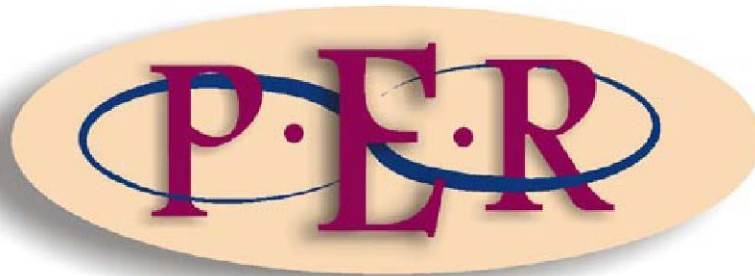


Authors: D Labuschagne and PA Carstens

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THE CONSTITUTIONAL INFLUENCE ON ORGAN TRANSPLANTS WITH SPECIFIC REFERENCE TO ORGAN PROCUREMENT*

D Labuschagne**

PA Carstens***

1 Introduction

The aim of this article is to determine the influence that the *Constitution* has on the law pertaining to organ transplants, with specific reference to organ procurement methods.¹ Whenever the demand for a particular resource is higher than the offer, there is a risk of a black market forming to compensate for the shortage.² This is indeed the case when it comes to transplantable human organs. The organ shortage is by no means a new problem. Academics have been looking for a solution to this global problem since 1980.³ In the light of this, the authors find it intriguing that this problem still exists around the world and more specifically, in South Africa. According to the Organ Donor Foundation,⁴ the number of solid organ transplants has declined yearly from 376 in 2009 to 319 in 2012.⁵ Furthermore, the number of South Africans awaiting an organ transplant increased from 3 500 in 2009⁶ to 4 300 in 2013.⁷ It has

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** Debbie Labuschagne. LLB (UP). Academic Associate in the Department of Mercantile Law, University of Pretoria. Email: Debbie.Labuschagne@up.ac.za.

*** Pieter A Carstens. PA BLC LLB LLD (UP). Professor in the Department of Public Law, University of Pretoria. Email: Pieter.Carstens@up.ac.za.

¹ The main organ procurement methods are opting-in; presumed consent; required request; required response, the sale of organs; and organ procurement from prisoners.

² For a discussion on market failure in the context of organ transplants, see Almeida *Market Failure*. See also *S v Netcare Kwa-Zulu (Proprietary) Limited, Agreement in Terms of s105A(1) of Act 51 of 1977, Netcare Kwa-Zulu (Proprietary) Limited and the State* (Commercial Crime Court, Regional Court of Kwa-Zulu-Natal) unreported case number 41/1804/2010 of 8 November 2010 and Allain 2011 *Med L Rev* 117-122.

³ Cooper *et al* 1982 *SA Medical Journal* 933-938; Ghods and Sava 2006 *CJASW* 1136-1145.

⁴ The Organ Donor Foundation of South Africa (hereinafter "the ODF") is a non-profit organisation that was established in 1988. Their main website can be found at <http://odf.org.za/>.

⁵ Organ Donor Foundation 2013 <http://odf.org.za/2013-06-11-09-17-45/statistics.html>.

⁶ Organ Donor Foundation 2009 <http://www.health24.com/Medical/Heart/Heart-transplants/Organ-transplant-statistics-20120721>.

⁷ Organ Donor Foundation 2013 <http://odf.org.za/2013-06-11-09-17-45/statistics.html>.

also been claimed that there are as many as 15 000 people in need of a kidney transplant only, or renal dialysis.⁸ There is, of course, no certain way to determine the actual number of South Africans in need of an organ transplant, since there is no national waiting list available. All that can be said with certainty is that there are not enough organs being procured to meet the demand. It is therefore submitted that the current organ procurement method, namely opting-in,⁹ as embodied in the *National Health Act*,¹⁰ is unsuccessful in procuring enough transplantable organs to satisfy the demand for them.

As a result of the shortage of organs, academics, both in South Africa,¹¹ and abroad,¹² are calling for a change in the method of procurement. The main organ procurement methods that are being considered are opting-in,¹³ presumed consent,¹⁴ required request,¹⁵ required response,¹⁶ the sale of organs,¹⁷ and organ procurement from prisoners.¹⁸

⁸ Molakeng date unknown <http://www.hst.org.za/news/15-000-wait-donated-organs>.

⁹ Opting-in requires the consent of the donor, or in some cases relatives, for a valid donation.

¹⁰ *National Health Act* 61 of 2003. The Act makes provision for both live and cadaveric donations upon the receipt of informed consent from the donor, or relatives, should the donor die without giving informed consent prior to death.

¹¹ See Slabbert *Handeldryf*, Fourie *Analysis on the Doctrine of Presumed Consent*; Slabbert 2008 *Koers* 75; Venter *Selection of Constitutional Perspectives*; and Labuschagne *Analysis of Organ Transplantation*.

¹² See Barnett and Kaserman 1993 *Issues in Law and Medicine* 117; Spital 1996 *Ann Intern Med* 66; Kwitowski 2005 *J Med & L* 141; Spellman 2006 *Syracuse L Rev* 353; Orentlicher 2008-2009 *Rutgers L Rev* 295; and Ryan 2009 *MSU J Med & L* 427.

¹³ Opting-in is based on obtaining informed consent from the donor and is widely used as a method of organ procurement, including in South Africa. It is also the only method of organ procurement ever applied in South Africa. See s 2 of the now repealed *Human Tissue Act* 65 of 1983, as well as ss 55-56 read together with ss 6-7 of the *National Health Act* 61 of 2003. For more on informed consent, see Van Oosten *Doctrine of Informed Consent* 1989.

¹⁴ This method of organ procurement accepts or makes the rebuttable presumption that all the citizens have given informed consent to be organ donors upon their death. The consent is thus merely presumed and not in any way real, informed consent. If one does not want to be an organ donor, one must make this objection publicly known prior to death, in accordance with the requirements set out by the legislature; see Fourie *Analysis on the Doctrine of Presumed Consent* 49.

¹⁵ Required request as a method of organ procurement places a duty on a certain group, usually employees of a specific state department, to request a person's donor status at certain specific events. The only duty therefore rests on the state employees to make an enquiry. There is no corresponding duty on the prospective donor to give a binding response.

¹⁶ Required response, unlike opting-in or required request, places an active duty on the prospective donor to declare his or her donor status.

¹⁷ The sale of organs entails the procurement of organs in exchange for monetary or other financial gain, and is typically structured as a futures contract. See Slabbert *Handeldryf* 150-151.

It is submitted that the best way to solve the current organ shortage in South Africa, is to review the different organ procurement methods in the light of their constitutional acceptability. According to section 2 of the *Constitution of the Republic of South Africa, 1996*,¹⁹ the *Constitution* is the supreme law in the Republic of South Africa, to the extent that any law or conduct inconsistent with the *Constitution* is invalid. It is therefore clear that no attempt to alter the existing law can be successful without giving due consideration to the rights and values entrenched in the *Constitution*.²⁰ To determine whether a certain constitutional right is being adhered to in the context of medical law, it is necessary to follow a multi-layered approach where one first looks at the *Constitution*, then at relevant legislation, the common law, case law and the relevant principles of medical ethics.²¹ It is thus essential to take into account all the different forms of law when dealing with any constitutionally entrenched right. The Bill of Rights lists all the rights entrenched in the *Constitution* and in addition, it deals with the application,²² limitation²³ and interpretation²⁴ thereof.

For the purposes of this article it is therefore necessary to identify the following: the specific rights involved with the research topic; the scope of these rights; the application of the Bill of Rights; and the interpretation thereof; if these rights are justifiably limited under the current legislation; and if these rights can be justifiably limited in terms of proposed amendments to the current legislation and any other aspects relevant thereto. In doing this it is important to keep in mind that the provisions in the *Constitution* have in many cases deliberately been formulated very

¹⁸ There are basically two methods of harvesting organs from prisoners. The first is to procure organs from deceased prisoners before the bodies are released to family members. The second method involves rewarding prisoners who are also organ donors, thus reducing a prison sentence in response to donation. See Ryan 2009 *MSU J Med & L* 433.

¹⁹ Hereinafter "the *Constitution*".

²⁰ Currie and De Waal *Bill of Rights Handbook* 7-8. Carstens and Pearmain *Foundational Principles* 10.

²¹ For a more detailed explanation of the multi-layered approach, see Carstens and Pearmain *Foundational Principles* 1-2. For more on bioethics, see Beauchamp and Childress *Principles* and Moodley *Medical Ethics*.

²² S 8 of the *Constitution*.

²³ S 36 of the *Constitution*.

²⁴ S 39 of the *Constitution*.

broadly,²⁵ thus leaving the interpretation thereof to the courts and academics. The *Constitution* thus doesn't interpret itself and the interpretation of its provisions largely lies with the interpreter thereof.

This article thus proceeds to deal with the application, limitation and interpretation of the rights in the Bill of Rights. Thereafter, each of the applicable rights is discussed separately with reference to legislation where applicable, considering the scope, interpretation and possible limitation of the specific right. A discussion of the development of relevant case law and its consequences is also included.

2 The application of the Bill of Rights

Before one can look at the different individual rights in the Bill of Rights, one must have an understanding of when the Bill of Rights will be applicable. Section 8 of the *Constitution inter alia* states that the Bill of Rights is applicable to all law, and binding on the legislature, the executive, the judiciary and all organs of state.²⁶ Section 8 further states that the common law must be applied and developed to the extent that legislation does not give effect to a right in the Bill of Rights.²⁷

It is important to note that the modes of application of the Bill of Rights can be categorised into various groups. A right can be applied either directly or indirectly,²⁸ vertically between the state and an individual, or horizontally between individuals.^{29,30} The Bill of Rights is binding on the legislature, the executive, the

²⁵ For instance s 11 of the *Constitution*, which states succinctly that: "Everyone has the right to life".

²⁶ S 8(1) of the *Constitution*.

²⁷ S 8(3) of the *Constitution*.

²⁸ Currie and De Waal *Bill of Rights Handbook* 32. The Bill of Rights is applied directly when the right of a beneficiary has been infringed by someone with a duty not to infringe the right. For more on the direct application of the Bill of Rights, see Currie and De Waal *Bill of Rights Handbook* 35-64. When the Bill of Rights is applied indirectly, it is applied during the interpretation, development or application of the common law or legislation. For more on the indirect application of the Bill of Rights, see Currie and De Waal *Bill of Rights Handbook* 64-72. For more on the application of the Bill of Rights in general, see Chapter 31 of Woolman *et al Constitutional Law*.

²⁹ Currie and De Waal *Bill of Rights Handbook* 43-55.

judiciary, all organs of state,³¹ natural persons and juristic persons³² (to the extent required by the nature of the rights and the juristic person).³³ From this it is clear that the Bill of Rights enjoys wide application.

There are two facts stated above that are of particular importance for the purposes of this discussion. Firstly, the fact that the Bill of Rights binds the state deserves further discussion. "Section 8(1) binds all organs of state in all spheres of government to comply with the Bill of Rights."³⁴ Organs of state are expressly defined in section 213 and include the Department of Health and public hospitals.³⁵ In the context of socio-economic rights, these are the organs of state involved with and influenced by medical law, together with the legislature. This brings us to the second fact that deserves further discussion: the fact that the Bill of Rights is also binding on the legislature.³⁶ If any legislation does not comply with the Bill of Rights, it must be declared invalid, according to section 172(1) of the *Constitution*.³⁷ This has the consequence that legislation can be tested against the Bill of Rights, and if found inconsistent with the *Constitution* it will consequently be declared invalid.

When it comes to considering the validity of an organ procurement method, the Bill of Rights will therefore be applied horizontally between the state and individuals, to determine if the state has complied with its duties. This is of particular importance in

³⁰ In *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 861 the court explained the difference between the vertical and horizontal application of the Bill of Rights: "The term 'vertical application' is used to indicate that the rights conferred on persons by a bill of rights are intended only as a protection against the legislative and executive powers of the state in its various manifestations. The term 'horizontal application' on the other hand indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private law disputes."

³¹ S 8(1) of the *Constitution*. Cheadle is of the opinion that "all law" for the purposes of s 8(1) includes legislation, common law rules, and customary law. Cheadle, Davis and Haysom *South African Constitutional Law* 3-10, 3-15.

³² S 8(2) of the *Constitution*.

³³ S 8(4) of the *Constitution*. Cheadle states that the primary function of a constitution is to both empower and restrain the state in various aspects. Cheadle *et al South African Constitutional Law* 3-2.

³⁴ Cheadle *et al South African Constitutional Law* 3-15.

³⁵ S 213 of the *Constitution*.

³⁶ S 8(1) of the *Constitution*.

³⁷ S 172(1) of the *Constitution* states that: "When deciding a constitutional matter within its power, a court- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable..."

the light of section 27(2), which places a duty of progressive realisation of certain rights on the state, a duty which will be discussed below.³⁸ For the purposes of this article, as it deals primarily with the current legislation regarding methods of organ procurement, as well as the lack thereof, together with possible amendments that will have to be tested against the *Constitution* and enforced by the Department of Health and hospitals, the Bill of Rights will almost always be applicable.

3 The limitation clause³⁹

The limitation clause makes provision for the rights in the Bill of Rights to be limited. However, to be a valid limitation, a list of requirements must be met. Section 36 of the *Constitution* states that the rights in the Bill of Rights may be limited only by law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁴⁰

Prima facie, it is clear that the rights in the Bill of Rights may be limited and are thus not absolute.⁴¹ However, to be a valid limitation the abovementioned requirements have to be met. The fact that rights in the Bill of Rights may be limited in only terms of law of general application can be both positive and negative. On the positive side, this eliminates the possibility of discrimination and inequality. On the negative side, it raises the question: What happens when an individual wants to limit his or her constitutional rights? Does this constitute an unjustifiable limitation on the grounds that it is not in terms of law of general application, or are there now other rules in play?

The first requirement is that the limitation must be made in terms of law of general application. Although "law" itself hasn't been interpreted by the Constitutional Court,

³⁸ S 27(2) of the *Constitution* states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

³⁹ S 36 of the *Constitution*.

⁴⁰ S 36 of the *Constitution*.

⁴¹ S 36(1) of the *Constitution*.

it seems that "law of general application" includes all forms of legislation, the common law,⁴² and customary law.⁴³

As stated above, if the limitation is not a limitation in terms of law of general application, the limitation clause will not be applicable. The question is thus: can a right in the Bill of Rights be limited by means other than the limitation clause, and if so, what are these means and to what extent can these rights then be limited? In other words, can an individual limit his or her own constitutional rights validly by choice, even though such a limitation would not be under law of general application?

To find the answer to this question one must look for law that either permits the action in question or confirms the lack of a prohibition against the action. This would be in accordance with a basic legal principle: when legislation does not provide for certain situations, one must always return to the provisions of the common law. It is important to keep in mind that courts must apply or if necessary develop the common law to the extent that legislation does not give effect to the applicable right.⁴⁴

It is possible, however, to make the argument that using a common law defence such as *volenti non fit injuria* to justify the limitation of rights is in fact law of general application. Consequently this would in fact fall within the scope of the limitation clause. This is in line with the beginning of section 36(1), which states that: "The rights in the Bill of Rights may be limited *only* in terms of..."⁴⁵

It thus seems that the only valid limitation of rights in the Bill of Rights will be in terms of law of general application, which includes legislation, the common law and customary law.⁴⁶

⁴² Currie and De Waal *Bill of Rights Handbook* 169.

⁴³ *Du Plessis v De Klerk* 1996 3 SA 850 (CC). This view is shared by Cheadle *et al South African Constitutional Law* 30-9.

⁴⁴ S 8(3) of the *Constitution*.

⁴⁵ The writers' own emphasis.

⁴⁶ Currie and De Waal *Bill of Rights Handbook* 169.

Once it has been established that the limitation in question is in fact through law of general application, it must be shown that the limitation is both reasonable and justifiable in an open and democratic society that is based on the values of equality, human dignity and freedom, by taking into account the factors set out in section 36(1)(a)-(e). Currie and De Waal⁴⁷ states that "[t]he reasons for limiting a right need to be exceptionally strong". They contend that section 36 has the consequence not only of requiring an important purpose for the valid limitation of rights in the Bill of Rights, but also of requiring that the restriction must also be able to achieve its purpose, and that no other realistic solution exists that is able to achieve the same purpose without the limitation or by means of a lesser limitation.⁴⁸

The determination of whether the limitation of a right in the Bill of Rights is justifiable or not needs to occur in accordance with the provisions set out in section 36. This is a two-stage process. Firstly, it must be determined if a constitutionally entrenched right has indeed been limited. Secondly, it has to be determined if the infringement can be justified.⁴⁹ This is done by considering the factors listed in section 36(1)(a)-(e). The weighing of these factors must be viewed as a balancing act. They are not to be used as a check-list.⁵⁰ This balancing act requires an assessment that is based on proportionality.⁵¹ In balancing conflicts between rights, the court uses the right to dignity as a primary mechanism to resolve these conflicts.⁵² It is therefore not non-compliance with one of these factors that results in the limitation being deemed to be unreasonable in terms of section 36 of the *Constitution*, but rather the collective effect of all these factors taken together.

⁴⁷ Currie and De Waal *Bill of Rights Handbook* 164.

⁴⁸ Currie and De Waal *Bill of Rights Handbook* 164. Also see Chapter 34 of Woolman *et al* *Constitutional Law* for more on the limitation clause.

⁴⁹ Currie and De Waal *Bill of Rights Handbook* 166.

⁵⁰ *S v Manamela* 2000 3 SA 1 (CC) 19.

⁵¹ Devenish *South African Constitution* 182.

⁵² Botha 2009 *Stell LR* 215.

The limitation of organ procurement methods to one method that has been proven to be ineffective also needs to be tested against the limitation clause.⁵³ The limitation of each of the specific rights will be addressed further in paragraphs 5.5.1-5.5.6, dealing with the applicable rights in the Bill of Rights on an individual basis.

4 The interpretation of the Bill of Rights

In order to ascertain the meaning of a provision in the *Constitution*, the provision needs to be interpreted according to the rules of interpretation.⁵⁴ Currie and De Waal⁵⁵ identify two stages of interpretation: firstly, determining the meaning or the scope of a right, and secondly, whether or not the challenged law or conduct is in conflict with the right. Section 39 of the *Constitution* regulates the interpretation of the Bill of Rights and states that a court, tribunal or forum must promote the Bill of Rights when interpreting any legislation or developing the law.

Although interpreting the *Constitution* will be in many ways the same as interpreting any other text, it is still a unique document in many ways, and there are additional factors that that need to be taken into account. These factors include the history leading to and resulting in the *Constitution's* being drafted, and the circumstances under which it was drafted. Furthermore, there are core values entrenched in the Bill of Rights, namely equality, human dignity, and freedom that need to be promoted whenever the Bill of Rights is interpreted. This is also known as the so-called purposive interpretation and can help to give more content to broadly formulated rights.⁵⁶ Further aid can also be found in previous judgments of the Constitutional Court, as well as in both international and foreign law.

⁵³ If opting in can't pass the test in ss 36 and 27 read together, there will be an active duty on the state to replace it with another organ procurement method.

⁵⁴ For general introductory rules on interpretation, see Botha *Statutory Interpretation* 2012. For more on constitutional interpretation, see Currie and De Waal *Bill of Rights Handbook* 145-162. See also De Ville *Constitutional and Statutory Interpretation*.

⁵⁵ Currie and De Waal *Bill of Rights Handbook* 145.

⁵⁶ Currie and De Waal *Bill of Rights Handbook* 148.

Care must be taken to adhere to the obligations created by section 39. They are, *inter alia*, that the three core values⁵⁷ *must* be promoted,⁵⁸ that international law *must* be considered when interpreting the Bill of Rights,⁵⁹ and that the spirit, purport and objects of the Bill of Rights *must* be promoted when dealing with legislation, the common law or customary law.⁶⁰ Ultimately, the interpretation of the provisions of the *Constitution* is the task of the judiciary, and more specifically the judges of the Constitutional Court, as the cases appear before them.

5 Specific rights

There are various constitutionally entrenched rights that are specifically important in the context of organ transplants and, more specifically, methods of organ procurement. The writers thus proceed to deal with each of these applicable rights separately, considering the scope, interpretation and possible limitation of each specific right. Relevant case law and the development thereof are also discussed, and the significance thereof is pointed out. Consequently the influence of the *Constitution* on organ procurement is discussed under each paragraph respectively.

5.1 Equality⁶¹

Section 9(1) of the *Constitution* states that "[e]veryone is equal before the law and has the right to equal protection and benefit from the law". This section is extremely important, especially in a South African context, as it states clearly that the state may not discriminate directly or indirectly against anyone *inter alia* on grounds of religion, belief or culture.⁶²

⁵⁷ Equality, human dignity and freedom.

⁵⁸ S 39(1)(a) of the *Constitution*.

⁵⁹ S 39(1)(b) of the *Constitution*.

⁶⁰ S 39(2) of the *Constitution*.

⁶¹ S 9 of the *Constitution*.

⁶² S 9(3) of the *Constitution*.

South Africa is known as a multi-cultural country with people from various religions, beliefs and cultures calling it home.⁶³ This can be very problematic for the legislature when enacting legislation that cannot discriminate on any of the grounds listed in section 9. Any legislation, including legislation regulating the methods of organ procurement, has to accommodate all the various religions and cultures, enabling members to practise their choice of religion freely, without unreasonably limiting the rights of others or placing a burden on them.⁶⁴ This is especially difficult with regards to organ procurement methods and organ transplantation in general, as there are several cultures, religions and beliefs that complicate the ethics around organ transplantation.⁶⁵

Furthermore, section 9(1) places everyone as equal before the law and gives everyone the right to equal protection and benefit from the law. Any legislation thus enacted by the legislature must allow for the equal benefit of the rights contained therein and make provision to achieve the realisation of these rights.⁶⁶ Even if legislation makes provision for organ donation without *prima facie* discriminating against a specific group, it might still not comply with section 9(1). This is indeed the case with the current organ procurement system, opting-in,⁶⁷ as it is unsuccessful in obtaining enough organs to meet the required demand.⁶⁸ Therefore, although there is currently legislation⁶⁹ making provision for organ donation, as it does not have the ability to provide enough organs to meet the demand, it cannot satisfy the requirements of equal protection and equal benefit as set out in section 9(1). It is

⁶³ The Preamble of the *Constitution* states that South Africans are "united in our diversity".

⁶⁴ To give effect to s 9, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 was enacted.

⁶⁵ Such as Jehova's Witnesses, who can't receive a blood transfusion, or some African tribes' beliefs. For more on different cultures and religions in South Africa, specifically in the context of organ transplantation, see Slabbert *Handeldryf*. See also Ebrahim and Haffejee *Shari'ah and Organ Transplants*; Goolam "Human Organ Transplantation"; Veatch *Transplantation Ethics* 1-27; and Slabbert, Mnyongani and Goolam 2011 *Koers* 261.

⁶⁶ The right to equality thus protects the ethical principle of justice, and specifically rights justice. For more on the ethical principle of justice, see Labuschagne *Analysis of Organ Transplantation* ch 4.3.4.

⁶⁷ Opting-in relies on obtaining the consent of the donor prior to donation and is therefore founded on the principle of autonomy.

⁶⁸ For more on the methods of organ procurement and the shortcomings of opting-in as an organ procurement method, see Labuschagne *Analysis of Organ Transplantation* ch 3.

⁶⁹ Namely, the *National Health Act* 61 of 2003.

submitted that the current organ allocation practice of distributing one out of every two organs to a state hospital and one to the private sector could be a clear violation of section 9(1). This is because only about 27.7% of the population that requires in-patient treatment receives it in the private sector.⁷⁰ Ackermann is of the opinion that there will be a violation of section 9(1) if the differentiation or *lacuna* (in this case) does not have a "rational connection to a legitimate government purpose".⁷¹

The importance of the interrelation between equality and human dignity must not be underestimated. "[H]uman dignity is the criterion of reference or the criterion of attribution essential to the understanding of equality."⁷² With this statement, Ackermann argues that equality, as a legal concept, can't fully make sense when being applied to human beings unless a criterion of reference or attribution is used to determine in respect of what human beings are equal.⁷³ He argues that human dignity or human worth must be the criterion of reference or attribution.⁷⁴ Therefore the right to equality must be viewed together with the right to human dignity.⁷⁵

5.2 Human dignity⁷⁶

Section 10 of the *Constitution* states that "everyone has inherent dignity and the right to have their dignity respected and protected".⁷⁷ The idea of inherent dignity or

⁷⁰ HSRC 2013
<http://www.hsrc.ac.za/uploads/pageContent/3895/06%20HEALTH%20CARE%20SERVICES.pdf>.

⁷¹ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) 1024-1025. Ackermann *Human Dignity* 182.

⁷² Ackermann *Human Dignity* 212-214.

⁷² S 10 of the *Constitution*.

⁷³ Ackermann *Human Dignity* 85.

⁷⁴ Ackermann *Human Dignity* 85.

⁷⁵ Botha 2009 *Stell LR* 212-214. In *Prinsloo v Van der Linde* the court held that any infringement on human dignity as a result of unequal treatment would be regarded as *prima facie* unfair discrimination in terms of s 9 (*Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) 1026). See also Devenish *South African Constitution* 62.

⁷⁶ S 10 of the *Constitution*.

⁷⁷ S 10 thus describes dignity in two ways: firstly, as inherent to all human beings, and secondly, as an enforceable right. "However much the *right to dignity* may suffer infringement in an imperfect world, the inherent dignity that everyone *has* cannot be destroyed." Ackermann *Human Dignity* 95.

intrinsic worth is the key to fully understand the concept of human dignity.⁷⁸ To Ackermann:

[t]he human worth (dignity) of each and every person is the capacity for and the right to respect as a human being... which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives.⁷⁹

Human dignity thus needs to be viewed in the context of daily human life, where dignity is achieved by individuals in their individualism. In their daily life, thoughts, choices and actions people are living out their human dignity.⁸⁰

When interpreting the Bill of Rights, one "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".⁸¹ Dignity is further enshrined in section 7(1)⁸² as well as being one of the founding values of the Republic of South Africa,⁸³ and thus enjoys ample protection under the *Constitution*. Dignity is referred to in eight different sections of the *Constitution*.⁸⁴ In these sections, it functions as a first order rule,⁸⁵ a second order rule⁸⁶ and a correlative right,⁸⁷ as well as a value.⁸⁸ The right to human dignity is thus one of the core values entrenched in the *Constitution*.⁸⁹

⁷⁸ Botha 2009 *Stell LR* 197.

⁷⁹ Ackermann *Human Dignity* 23-24.

⁸⁰ Dignity gives effect to the ethical principle of non-maleficence, meaning to refrain from causing harm (Dhai and McQuoid-Mason *Bioethics* 44). Dignity further protects the ethical principle of justice, and more specifically rights justice (Dhai and McQuoid-Mason *Bioethics* 46).

⁸¹ S 39(1)(a) of the *Constitution*.

⁸² S 7(1) reads: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

⁸³ S 1 of the *Constitution* reads: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

⁸⁴ Dignity is entrenched in ss 1, 7(1), 10, 36(1), 39(1), 165(4), 181(3) as well as s 196(3) of the *Constitution*.

⁸⁵ Woolman *et al Constitutional Law* 36-19-20.

⁸⁶ Woolman *Constitutional Law* 36-20-21.

⁸⁷ Woolman *Constitutional Law* 36-21-22.

⁸⁸ Woolman *Constitutional Law* 36-22-25; 36-19-25. See also Goolam 2001 *PER* 43.

⁸⁹ Devenish *South African Constitution* 61.

This is in line with the dictum of O'Regan in *Dawood*,⁹⁰ that constitutional adjudication and interpretation are informed by human dignity at a range of levels. She considers human dignity to be a value that possibly informs all other rights and also as significant in the limitations analysis. More than a mere value, human dignity is also a justiciable and enforceable right that must be respected and protected. Where the value of human dignity is offended, the primary constitutional breach may indeed be that of a specific right.⁹¹

Defining the term dignity is much harder than establishing its importance.⁹² Currie and De Waal⁹³ rightly state: "Though we can be certain of the pivotal importance of human dignity in the Constitution we can be less certain of the meaning of the concept."

Woolman attempts to arrive at five primary objectives of dignity.⁹⁴ An important facet of dignity is the right to self-actualisation.⁹⁵ Ackermann J believes that possessing dignity and freedom is necessary to achieving self-actualisation.⁹⁶ Another noteworthy point is the fact that the courts view dignity not only as an individual's characteristic but also as a communal characteristic.⁹⁷ This approach is clearly enunciated in *Port Elizabeth Municipality v Various Occupiers*.⁹⁸

⁹⁰ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

⁹¹ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 961-962.

⁹² Botha 2009 *Stell LR* 200-201.

⁹³ Currie and De Waal *Bill of Rights Handbook* 273.

⁹⁴ The five primary objectives of dignity, as identified by Woolman, are: 1) individual as an end-in-herself; 2) equal concern and equal respect; 3) self-actualisation; 4) self-governance and 5) collective responsibility for the material condition of agency. Woolman *Constitutional Law* 36-7, 36-10-12, 36-14.

⁹⁵ Woolman *Constitutional Law* 36-11. This facet of human dignity therefore allows the individual to act autonomously.

⁹⁶ *Ferreira v Levin* 1996 1 SA 984 (CC) 1013-1014. "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential... An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."

⁹⁷ Botha 2009 *Stell LR* 204-205.

⁹⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.⁹⁹

Dignity must thus be viewed as more than merely a set of duties owed to individuals by the state. It also has to be seen as a form of collective good, where dignity arises from the mutual recognition between individuals of the value of the other.¹⁰⁰

In *S v Williams* the Constitutional Court held that "[i]t is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value..."¹⁰¹

There is thus a duty on the state to ensure that the need to respect people's dignity is not ignored when important decisions are made by the State or any organ of State.¹⁰² The Constitutional Court held in *Grootboom*, in the context of the right to housing in terms of section 26 of the *Constitution*, that:

Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents *have a right to reasonable action by the state in all circumstances and with particular regard to human dignity*. In short, I emphasise that human beings are *required* to be treated as human beings.¹⁰³

⁹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) 227. See also *Khoza v Minister of Social Development* 2004 6 SA 505 (CC) 538, where the court notes that the personal well-being of the wealthier members in a community is dependent on the minimum well-being of the poor.

¹⁰⁰ Woolman *Constitutional Law* 36-15. Dignity can therefore be achieved by adhering to the principle of beneficence - in other words, by doing good. For more on beneficence, see Labuschagne *Analysis of Organ Transplantation* ch 4.4.3. This also illustrates the need for the tolerance required by dignity (Goolam 2001 *PER* 48-49).

¹⁰¹ *S v Williams* 1995 3 SA 632 (CC) 655.

¹⁰² Goolam 2001 *PER* 46. See also Devenish *South African Constitution* 63. Any reduction or limitation of individual liberty for the sake of the collective good must, however, be justified in terms of the limitation clause.

¹⁰³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 83. Own emphasis added.

This judgment is in line with the judgment in *S v Williams*. Woolman contends that the brief history of our new-found ability to recognize the inherent dignity¹⁰⁴ of our fellow South Africans is meant to suggest how the extension of this right progresses from mere duties of justice to duties of virtue that have as their aim the qualitative perfection of humanity.¹⁰⁵

This is an appealing thought in the sense that it establishes a movement back to one of the oldest forms of ethics in the Western world, namely virtue ethics.¹⁰⁶ The earliest writings on virtue ethics come from the well-known Greek Philosopher, Aristotle, and it was widely revived in the 20th century.¹⁰⁷ It requires one to consider the character and virtue that the doer acted with and thus looks at the subjective mind, intentions and attitude of the doer, rather than merely considering the act itself.

Dignity's relationship to the different substantive rights in the Bill of Rights will influence and shape our understanding thereof.¹⁰⁸ Even if the basic idea of what dignity entails stays the same, it will be examined by looking through a differently coloured lens. As O'Regan observes in *Dawood*:

Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary Constitutional breach occasioned may be of a more specific right such as the right to bodily integrity...¹⁰⁹

This indicates that both in general, and more specifically in the context of medical law, if the infringement could be addressed under another right, that is how it should be done, and dignity will then function only as a value that informs the right,

¹⁰⁴ The notion of inherent dignity is an important one, as it reaffirms that every human being has intrinsic worth. Liebenberg 2005 *SAJHR* 6-7.

¹⁰⁵ Woolman *Constitutional Law* 36-2.

¹⁰⁶ Moodley *Medical Ethics* 20.

¹⁰⁷ Moodley *Medical Ethics* 29.

¹⁰⁸ Woolman *Constitutional Law* 36-25.

¹⁰⁹ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 962. See also Botha 2009 *Stell LR* 198-199 for a discussion on the different applications of dignity as a right and dignity as a value.

rather than as a right on its own.¹¹⁰ If, for instance, an infringement of a persons' right to dignity is also an infringement under section 12(2)(b) or section 27 of the *Constitution*, the case should be brought on one of the latter sections, and not on section 10.¹¹¹ This, however, does not lead to dignity's being less important in the matter. Dignity remains a value that must be taken into consideration when dealing with the Bill of Rights.¹¹² The court in *Carmichele v Minister of Safety and Security*¹¹³ stated that the court's obligation to develop the common law is not discretionary, and that the courts have a "general obligation" to develop the common law where necessary.¹¹⁴ The court went so far as to say that courts might in certain circumstances be obliged to raise this matter on their own.¹¹⁵ Furthermore, the values in the Constitution must "guide the development of all areas of law".¹¹⁶ The most significant finding of the court was that there rests a positive duty on the state to protect the rights in sections 10, 11 and 12 of the *Constitution*.¹¹⁷ Merely refraining from infringing these rights would therefore not always be sufficient.¹¹⁸ The state must actively protect the rights to dignity, life, freedom, and the security of the person.

As can be seen from the discussion under the right to life in terms of section 11,¹¹⁹ the rights to life and human dignity are intertwined and dependent on one another. Without life, there can't be dignity. However, without dignity, the quality of human life can be compromised.¹²⁰ O'Regan J held that dignity "is the foundation of many of the other rights that are specifically entrenched..."¹²¹ Chaskalson agrees in the

¹¹⁰ Woolman *Constitutional Law* 36-22.

¹¹¹ Botha 2009 *Stell LR* 198.

¹¹² For this reason, an analysis of dignity in the context of specific other rights in the Bill of Rights is pivotal to the discussion here.

¹¹³ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

¹¹⁴ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 322.

¹¹⁵ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 322.

¹¹⁶ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 227. See also Botha 2009 *Stell LR* 200.

¹¹⁷ Namely, the rights to life, dignity, freedom, and the security of the person. *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 324. See also Botha 2009 *Stell LR* 200.

¹¹⁸ Botha 2009 *Stell LR* 200.

¹¹⁹ *S v Makwanyane* 1995 3 SA 391 (CC) 506.

¹²⁰ *S v Makwanyane* 1995 3 SA 391 (CC) 506.

¹²¹ *S v Makwanyane* 1995 3 SA 391 (CC) 440-441.

same case by contending that the rights to life and dignity enjoy greater importance than any other human right, which importance must be made clear by the state in its conduct.¹²²

Carstens and Pearmain states that: "Health is an essential for life and for human dignity... The capacity for the enjoyment of the rights to life and human dignity is obviously significantly diminished by poor health."¹²³ This statement makes it clear that having good health, or at the very least access to health care, can promote the rights to life and human dignity. On the flip side, a lack of access to transplantable organs could result in denying individuals the right to dignity and compromising their right to life. In the context of organ transplantation, and more specifically organ procurement, human dignity is thus one of the most important rights to adhere to. It is important that the process of organ transplantation as a whole needs to be dignified. Every step taken in the process needs to respect the various role-player's right to dignity. This means that the method of organ procurement, the consent needed, the manner in which consent is obtained, the allocation procedures, the harvesting method, the care and treatment provided after the transplant has been completed, and any other action relevant to organ transplants need to be performed in a manner as that is as dignified as is possible. This is in line with one of the requirements for the valid limitation of any right in terms of section 36, namely that less restrictive means to achieve the purpose must at least have been considered in order for a constitutionally entrenched right to be limited justifiably.¹²⁴ It is on this very basis, namely that the state did not consider alternative organ procurement methods when enacting new legislation, namely the *National Health Act*, whilst it is well known that the supply of transplantable organs does not meet the demand, that the conclusion may be reached that opting-in denies patients their dignity.

¹²² *S v Makwanyane* 1995 3 SA 391 (CC) 451. "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything it does..."

¹²³ Carstens and Pearmain *Foundational Principles* 29.

¹²⁴ S 36(1)(e) of the *Constitution*.

Consequently, as less restrictive means were not considered, this will also not constitute a justifiable limitation in terms of section 36 of the *Constitution*.

From the discussion above the conclusion may be reached that the influence of the *Constitution* is of paramount importance in any discussion on the law relating to organ transplants. What is just as clear is that the different rights in the Bill of Rights may be in conflict with one another. The same is true for values such as human dignity, equality and freedom, to the extent that where these values inform specific rights, the content of one value may be very different in the context of different rights. One example of this would be that respecting one's dignity as a value might require that one is not refused life-saving treatment, if it exists, in the context of the right to life. Contrary to this, dignity might determine that the state should not save a few lives by granting everyone unqualified access to expensive medical procedures, which in turn could result in the collapse of the public health sector. Respecting people's dignity then becomes a balancing act between the conflicting rights and the application of the limitation clause to find the best solution to the problem at hand.¹²⁵ This is no easy or clear-cut task and trying to predict how the courts will handle such an issue would be pure speculation.

However, the various rights in the Bill of Rights do not only stand in conflict with another. On the contrary, they usually support and enhance one another. This is particularly true for dignity when it functions as a value, as it informs almost all the other rights in the Bill of Rights to some extent.¹²⁶ Venter asks two very important questions: "[C]an any human dignity exist in relation to renal dialysis? Can any human dignity be lost when a kidney donor receives a form of remuneration for the donation of his kidney?"¹²⁷

¹²⁵ *S v Manamela* 2000 3 SA 1 (CC) 19.

¹²⁶ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 961-962.

¹²⁷ Venter *Selection of Constitutional Perspectives* 38.

It has been argued that a patient receiving renal dialysis is not leading a dignified and humane life.¹²⁸ However, even if the treatment might not seem to be purely humane or dignified, receiving renal dialysis must certainly be more humane and dignified than not receiving treatment at all, especially when the purpose of the treatment is taken into account. On the other hand, the most dignified option would be to receive an organ for transplantation as soon as possible and thus to spend as little time as possible on dialysis. One proposed solution is to allow the sale of organs.¹²⁹ From the above discussion, it can be derived that there are arguments based on the right to human dignity either in favour of and against allowing the sale of organs.

5.3 Life¹³⁰

Section 11 of the *Constitution* grants "everyone" an unqualified right to life. This constitutionally entrenched right, although only six words in length, is perhaps the most important right of all. Without life, all other rights become almost instantly worthless, with very few exceptions to this general rule.¹³¹ The right to life is comprehensively discussed by the Constitutional Court in *Makwanyane*. O'Regan J stated:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. 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. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a

¹²⁸ Venter *Selection of Constitutional Perspectives* 38.

¹²⁹ For support of the sale of organs in a South African context, see Slabbert *Handeldryf*; Slabbert 2008 *Koers* 75; and Venter *Selection of Constitutional Perspectives*.

¹³⁰ S 11 of the *Constitution*.

¹³¹ For instance, the rights to dignity and privacy are respected and protected even after death in the form of doctor-patient confidentiality.

human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. This was recognised by the Hungarian constitutional court in the case in which it considered the constitutionality of the death penalty:

It is the -untouchability and equality contained in the right to human dignity that results in man's right to life being a specific right to human life (over and above animals' and artificial subjects' right to being); on the other hand, dignity as a fundamental right does not have meaning for the individual if he or she is dead. ... Human dignity is a naturally accompanying quality of human life.'... The importance of dignity as a founding value of the new Constitution cannot be overemphasised. *Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.*¹³²

The right to life, then, as enshrined in the *Constitution*, involves much more than merely the right to existence. According to Justice O'Regan, life must be *dignified* life. It is thus not life as the absence of death (as when a person is in a persistent vegetative state) that the *Constitution* cherishes, but the right to live as a human being, being part of a community, being able to share in the experience of humanity, that is the goal. Interaction with the world around us is thus the key to having a dignified life, and the right to being treated with respect and concern is included in the right to human dignity.¹³³

The argument can be made that because persons in a persistent vegetative state can have no meaningful interaction with their surroundings, both their dignity and their quality of life are significantly reduced. As O'Regan J¹³⁴ rightly states: "... without dignity, human life is substantially diminished". If your dignity is automatically reduced when you are in a persistent vegetative state, how does one ensure that the right to dignity for these people is still respected? It is submitted that this can be achieved by treating them with respect and concern, specifically with respect for bodily integrity, patient autonomy,¹³⁵ and what the person would have wanted, had they been able to convey the message to others. It comes down

¹³² *S v Makwanyane* 1995 3 SA 391 (CC) 506-507, writers' own emphasis.

¹³³ S 10 of the *Constitution*.

¹³⁴ *S v Makwanyane* 1995 3 SA 391 (CC) 506.

¹³⁵ As enshrined in s 12(2)(b) of the *Constitution*.

to allowing a person in a persistent vegetative state the little freedom that is left in her life, such as donating her organs.

Woolman contends that section 11 read with section 7(2) not only provides a safeguard against killing or the diminution of life, but also imposes positive obligations on the state to protect life.¹³⁶ These positive obligations include *inter alia* the duty of the state to enact legislation to preserve life where possible. Changing the current organ procurement system to a more effective one would consequently both promote and protect the right to life. Refusing to change the current organ procurement method results in directly denying individuals a chance of life.

The right to life *prima facie* involves preserving life whenever and wherever possible. It is one of the most important rights in the Bill of Rights, as life is a pre-requisite for the enjoyment of all the other rights in the Bill of Rights. Although dying is a part of life, and seen as the completion of life rather than the opposite thereof,¹³⁷ it is human nature to extend and hold on to life as long as possible. Where there are life-saving treatments available, it is against human nature to let a person die due to a lack of resources. Yet this is the reality in which we currently live.¹³⁸

5.4 Freedom and security of the person¹³⁹

Section 12(1) of the *Constitution* states that: "[e]veryone has the right to freedom and security of the person..." and continues to state in section 12(2)(b) that "[e]veryone has the right to bodily and psychological integrity, which includes the right... (b) to security in and control over their body". Of specific importance for the current discussion is section 12(2)(b). Having security in and control over one's body is a fundamental principle of medical law, with far-reaching consequences.

¹³⁶ Woolman *Constitutional Law* 39-14.

¹³⁷ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 784.

¹³⁸ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 782. Sachs J contended that "the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care".

¹³⁹ S 12 of the *Constitution*.

Section 12(2)(b) clearly gives everyone a constitutionally entrenched right to bodily integrity. In the context of medical law, section 12(2)(b) supports and promotes the principle of patient autonomy.¹⁴⁰ This is done in two ways: by granting a right to a) security in, and b) control over one's body. Currie and De Waal¹⁴¹ gives the following concise explanation to point out the difference between a) and b):

"Security in" and "control over" one's body are not synonyms. The former denotes the protection of bodily integrity against intrusions by the state and others. The latter denotes the protection of what could be called bodily autonomy against interference. The former is a component of the right to be left alone in the sense of being unmolested by others. The latter is a component of the right to be left alone in the sense of being allowed to live the life one chooses.

In practice patient autonomy is achieved by obtaining informed consent from the patient before any action is taken.¹⁴² Informed consent is thus in many ways inseparable from patient autonomy, and thus also from the right to the freedom and security of the person, which are in no way new concepts in South African law.¹⁴³ Both patient autonomy and informed consent have developed considerably during the last century, as can clearly be seen in the relevant case law. A short discussion of the case law follows, to show the progressive support for these two principles.

As early as 1923, in the case of *Stoffberg v Elliot*,¹⁴⁴ the court looked at the right to security of the person and patient autonomy. The facts of this case are as follows: Mr Stoffberg was a patient of Dr Elliott and scheduled to undergo treatment for cancer of his penis. During the operation it was discovered that the cancer was much more advanced than expected and Dr Elliott consequently amputated the penis. This constituted a clear deviation from the consent given by Mr Stoffberg prior to being anaesthetised. Watermeyer J stated that "every person has certain absolute

¹⁴⁰ In addition to autonomy's being protected in s 12(2)(b), autonomy is further protected in the *Constitution* by s 11, which embodies the right to life, and by s 14, which deals with the right to privacy. Dhai and McQuoid-Mason *Bioethics* 39.

¹⁴¹ Currie and De Waal *Bill of Rights Handbook* 308-309.

¹⁴² This is required by ss 6 and 7 of the *National Health Act* 61 of 2003 as well.

¹⁴³ See *Stoffberg v Elliot* 1923 CPD 148.

¹⁴⁴ *Stoffberg v Elliot* 1923 CPD 148.

rights... and one of those rights is the right of absolute security of the person."¹⁴⁵ He went further and added:

... a man, by entering a hospital, does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary... By going into hospital, he does not waive or give up his right of absolute security of the person...¹⁴⁶

It is important to note that constitutional rights are not absolute and can be limited by the limitations clause.¹⁴⁷ Sadly, the Constitutional Court has not had the chance to interpret section 12(2)(b) directly as of yet.¹⁴⁸ Much of what is written about this section thus remains pure speculation or an educated guess at best. Determining for instance whether it is an unjustified limitation not to allow one to sell a bodily organ is thus no easy task.

Clearly, not allowing a person to sell an organ is a limitation of section 12(2)(b), as it limits one's "control over" one's body. The Constitutional Court has stated through O'Regan J and Sachs J in a dissenting judgment that the human body is not something to be commoditised and that the *Constitution* demands respect for the human body.¹⁴⁹ The reason for this, however, seems to be that "[t]he very character of [prostitution] devalues the respect that the Constitution regards as inherent in the human body".¹⁵⁰

It seems that the real problem they have is thus not the commoditisation of the human body, but rather treating it without the required respect.

Section 12(2)(b) specifically states that everyone has the right "to security in and control over their body." The question that now arises is when, in the context of

¹⁴⁵ *Stoffberg v Elliott* 1923 CPD 148.

¹⁴⁶ *Stoffberg v Elliott* 1923 CPD 149.

¹⁴⁷ S 36 of the *Constitution*. For a comprehensive discussion of the right of absolute security of the person in the context of the *Stoffberg*- case, see Carstens and Pearmain *Foundational Principles* 879-883.

¹⁴⁸ Woolman *Constitutional Law* 40-89.

¹⁴⁹ *S v Jordan* 2002 6 SA 642 (CC) 671.

¹⁵⁰ *S v Jordan* 2002 6 SA 671 (CC).

organ transplants, is an organ still part of the body? Certainly up until it is removed, it still forms part of your body. Is the fact that a removed organ was once a part of your body enough to keep regarding it as part of you? And when it is transplanted into another human being, at what point does it become part of that person's body? Is the organ alienated from your body once you give permission to donate, when the organ is removed, or after it has been transplanted? Basically, the question comes down to how long after removal from the body should one have control over one's body parts. The answer would also be important to determining the last point at which permission to donate could be revoked. This question has been addressed neither by the legislature nor by the courts. However, it is bound to surface within the foreseeable future.

Something that is noteworthy is a particular defence, *volenti non fit iniuria*, stating that no harm can be done to someone that consents thereto.¹⁵¹ This ties in closely to the doctrine of informed consent. Informed consent in South African law dates back to the case of *Castell v De Greef*,¹⁵² where the requirements of informed consent were introduced and imported into South African law.¹⁵³ *Castell v De Greef* is commonly regarded as the *locus classicus* in this regard.¹⁵⁴

In this case the plaintiff underwent an unsuccessful subcutaneous mastectomy that resulted *inter alia* in necrosis and deformation of the areolae of the plaintiff. The court rejected the reasonable-doctor approach and replaced it with the doctrine of informed consent, thereby moving away from medical paternalism and toward patient autonomy.¹⁵⁵ This is clearly in support of the rights to self-determination and freedom and security of the person as voiced in section 12 of the *Constitution*.

¹⁵¹ For a more detailed discussion on *volenti non fit iniuria* in this context, see Labuschagne *Analysis of Organ Transplantation* ch 2.

¹⁵² *Castell v De Greef* 1994 4 SA 408 (C).

¹⁵³ Carstens and Pearmain *Foundational Principles* 891-892.

¹⁵⁴ Carstens and Pearmain *Foundational Principles* 891.

¹⁵⁵ Carstens and Pearmain *Foundational Principles* 892.

The rights to freedom and the security of the person are inextricably woven together with patient autonomy and informed consent, and together they form the basis of medical law. It is therefore simply logical that patient autonomy and informed consent should play a vital role in organ procurement law, and that any organ procurement should be compliant to the above. Based on the right to freedom and security of the person, any proposed organ procurement method will therefore need to adhere to patient autonomy by utilising informed consent, in order to adhere to the *Constitution*. "Because to take away a man's freedom of choice, even his freedom to make the wrong choice, is to manipulate him as though he were a puppet and not a person."¹⁵⁶ Consequently, organ procurement by means of presumed consent or procurement from prisoners is entirely irreconcilable with section 12(2)(b) of the *Constitution*. Organ procurement methods such as opting-in or required response, and possibly also the sale of organs, however, supports and promotes the right to freedom and security of the person.

5.5 Privacy¹⁵⁷

The right to privacy enables an individual to live free from interference from others and is of specific importance in medical and health care law.¹⁵⁸ Section 14 of the *Constitution* states that "[e]veryone has the right to privacy". The right to privacy contained in section 14 does not include an exhaustive list of all the instances where privacy will be protected, but it does give four instances in subsections (a)-(d) that are definitely included in the right to privacy. Privacy has been interpreted numerous times by the Constitutional Court, and from its various judgments it is clear that privacy must be respected and upheld wherever possible.

¹⁵⁶ L'Engle date unknown <http://www.goodreads.com/quotes/tag/human-rights>.

¹⁵⁷ S 14 of the *Constitution*.

¹⁵⁸ Devenish goes as far as to state that privacy is a "basic human need". Devenish *South African Constitution* 79.

Langa DP¹⁵⁹ states that "privacy is a right which becomes more intense the closer it moves to the personal sphere of the life of human beings, and less intense as it moves away from that core". From this quote it is clear that when dealing with any privacy issue related to healthcare, health and the life of a person, privacy must be given very high priority.¹⁶⁰ It is submitted that this also holds true for the methods of organ procurement. When legislation does not provide individuals with adequate access to transplantable organs, the right to privacy of choice is denied by the legislature.

O'Regan J and Sachs J summarise the *Bernstein*¹⁶¹ judgment as follows in *Jordan*:

In *Bernstein*, Ackermann J held that the right to privacy in the interim Constitution must be understood as recognising a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated, if at all... *There can be no doubt that autonomy to make decisions in relation to intensely significant aspects of one's personal life are encompassed by the term.*¹⁶²

This ties in with the previous quote from *Hyundai Motor Distributors*, in the sense that the closer to the personal sphere, the more important privacy becomes, and thus the harder it becomes to limit the right. Limiting privacy in the public sphere *versus* limiting privacy in the private sphere was considered extensively in *S v Jordan*:

Commercial sex involves the most intimate of activity taking place in the most impersonal and public of realms, the market place; it is simultaneously all about sex and all about money... A prohibition on commercial sex, therefore, will not ordinarily encroach upon intimate or meaningful human relationships. Yet it will intrude upon the intensely personal sphere of sexual intercourse, albeit intercourse for reward.¹⁶³

¹⁵⁹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) 557.

¹⁶⁰ Another cause of the importance of the right to privacy is the overlap between the rights to privacy and dignity. Devenish *South African Constitution* 80.

¹⁶¹ *Bernstein v Bester* 1996 2 SA 751 (CC).

¹⁶² *S v Jordan* 2002 6 SA 642 (CC) 48-49. Own emphasis added.

¹⁶³ *S v Jordan* 2002 6 SA 642 (CC) 53.

Here it can be seen that there can be conflicting issues when it comes to limiting privacy. It is submitted that the same will hold true for the argument relating to the sale human kidneys. The sale of human kidneys can be seen as a purely commercial transaction: goods are supplied in exchange for money. On the other hand, however, the goods in this scenario are pieces of a person's body, an organ that only one person has autonomy over. As Currie and De Waal¹⁶⁴ state: "This is a difficult opposition to mediate: the intimacy of the transaction would suggest that it is at the core of privacy while its mercantile aspects would put it in the public domain."

In the context of organ transplants, there are a number of conflicting legislative instruments pertaining to privacy. There is the *Promotion of Access to Information Act 2* of 2000 that grants the right to access to information and has the goal to "actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights".¹⁶⁵

However, there are also sections 14-17 of the *National Health Act 61* of 2003, which deal with confidentiality, access to and the protection of health records. From this it can be seen that although the State values the individuals' privacy, the right to privacy must be limited in certain instances in order to allow individuals to exercise their rights and for the health care industry to be able to function properly. It is submitted that by staying with opting-in as the method of organ procurement the state denies individuals privacy in making a very personal choice; indeed, it denies individuals a possible end-of-life decision.

¹⁶⁴ Currie and De Waal *Bill of Rights Handbook* 321.

¹⁶⁵ *Promotion of Access to Information Act 2* of 2000, Preamble. Hereinafter referred to as "PAIA".

5.6 Health care¹⁶⁶

Section 27 specifies the various rights pertaining to health care and embodies so-called socio-economic rights.¹⁶⁷ There are, however, also other socio-economic rights entrenched in the Bill of Rights, such as section 26 of the *Constitution*, which relates to housing. As these rights themselves have inherent similarities, for the purpose of this discussion reference will also be made to judgments on other socio-economic rights where applicable under the current heading.

Section 27(1) of the *Constitution* states that "[e]veryone has the right to have access to... health care services" and section 27(2) required the state to "...take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

Section 27 is important as it gives effect to the ethical principle of beneficence.¹⁶⁸ In *Soobramoney* the Constitutional Court had to interpret section 27 of the *Constitution*. The facts of the case are briefly as follows: The Appellant in this case was a diabetic suffering from ischaemic heart disease and cerebro-vascular disease, as well as irreversible chronic renal failure. Due to the fact that the applicant was not free of significant vascular or cardiac disease, he was not eligible for a kidney transplant, and according to the Addington hospital policies and guidelines, therefore also not eligible for regular renal dialysis.¹⁶⁹

¹⁶⁶ S 27 of the *Constitution*.

¹⁶⁷ Socio-economic rights are also known as second generation rights, that are based on the principle of social justice. Devenish *South African Constitution* 146.

¹⁶⁸ Beneficence means to do good. For more on beneficence, see Labuschagne *Analysis of Organ Transplantation* ch 4.4.3.

¹⁶⁹ The duty of the State regarding organ transplantation and the availability of resources for organ transplants was not discussed further in this case, as the Appellant was not eligible for a transplant due to medical reasons.

The court pointed out that the obligations imposed on the state by section 27 are "...dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources".¹⁷⁰

The court also stated that:

Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa. However, the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources 'to achieve the progressive realisation of each of these rights'.¹⁷¹

This clearly shows that in certain cases the court will value the wellbeing of a collective group higher than that of an individual, due to the limitation of section 27(1) by section 27(2).¹⁷² Carstens and Pearmain¹⁷³ correctly point out that "[t]he individualistic approach must have limits if society is to function successfully as a whole". In *Grootboom* the Court found that rather than granting a right to demand immediate relief, there exists a duty on the State to develop a comprehensive plan to meet the obligations imposed on it by the *Constitution*.¹⁷⁴ According to Yacoob J, establishing whether a socio-economic right has been complied with requires one to establish whether the state has taken reasonable steps.¹⁷⁵ Woolman believes that reasonable measures demand that the State both establish and implement a coherent, well-co-ordinated and inclusive programme with the aim of progressively realising the content of the right.¹⁷⁶

¹⁷⁰ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 771.

¹⁷¹ S 27(2) of the *Constitution*. *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 779.

¹⁷² Moellendorf 1998 *SAJHR* 330.

¹⁷³ Carstens and Pearmain *Foundational Principles* 47.

¹⁷⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 67, 86.

¹⁷⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 66.

¹⁷⁶ Woolman *Constitutional Law* 56A-7.

What is noteworthy is that the decision in the *Soobramoney*-case might have been very different if decided after the proposed National Health Insurance had come into effect.¹⁷⁷ This is because a large part of the judgment was based on the provisions in section 27(2), which states that the state must take reasonable legislative and other measures, within its available resources.¹⁷⁸ Once National Health Insurance is in place, there might be a legal duty on the state to provide for social security in the form of access to dialysis or to make alternative treatment, such as organ transplants, available to all of those in need thereof.¹⁷⁹

A fact well worth mentioning is that the Constitutional Court does not follow a uniform approach when it comes to different socio-economic rights. Throughout its judgments a development in the thought process can be observed. In its various judgments the Court has considered the dignity interests of those parties seeking relief in terms of sections 26 or 27 in a progressively more serious manner.¹⁸⁰ In *Soobramoney* Sachs J stated: "In all the open and democratic societies based on dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care".¹⁸¹ According to Sachs, it is thus perfectly justifiable to limit access to resources that merely have the ability to lengthen the recipients' life.¹⁸² He goes even further by suggesting that not only is it justified, but also fundamental to an open and democratic society.¹⁸³

Contrary to the judgment in *Soobramoney*, the Court in *Grootboom* stressed the requirement that state action must in all circumstances be reasonable action with

¹⁷⁷ For more on Department of Health date unknown <http://www.health.gov.za/nhi.php>.

¹⁷⁸ This requirement is in line with the principle of justice, specifically distributive justice, as a social approach is preferred above an individualistic approach. Dhali and McQuoid-Mason *Bioethics* 145.

¹⁷⁹ National Health Insurance is still in its first, preparatory phase and it will still be several years before it is fully functional.

¹⁸⁰ Woolman *Constitutional Law* 36-59.

¹⁸¹ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 782.

¹⁸² Although it is agreed that the rationing of resources is essential, it nonetheless remains a "tragedy for justice", especially in the case of rationing medical resources. Moellendorf 1998 *SAJHR* 332.

¹⁸³ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC) 782.

particular regard to human dignity.¹⁸⁴ In *Treatment Action Campaign*¹⁸⁵ further development of the Court's view on the importance of human dignity can be observed, as the argument of inadequate resources *in casu* was rejected by the Court. This was justified by stating that the needs of the affected people outweighed the financial implications on the State. The Court stated that refusing life-saving treatment *in casu* could in no way be consistent with respecting the right to human dignity. Here, the need to respect the dignity of those concerned thus outweighed the lack of adequate resources. Furthermore, it was found that the state had failed to adopt reasonable measures to enable the progressive realisation of the rights embodied in section 27.¹⁸⁶

What is noteworthy is that in *Soobramoney* life-lengthening treatment was denied on the grounds of inadequate resources, whereas in *Treatment Action Campaign* potential life-saving treatment was granted in spite of inadequate resources. From this it is clear that the effect of the treatment in question had an influence on the outcome of the court's decision. A clear distinction can thus be made between these two cases. In *Treatment Action Campaign* relief was granted as the relief directly protected the right to life, as entrenched in section 11, of a group of people. Granting the requested relief in *Soobramoney* would not have had the same effect, as it could not have saved a life, but merely prolonged it. This is significant, as the Court granted relief where the need was greater. The state is under an obligation to "provide care according to need rather than the ability to pay."¹⁸⁷ The *Treatment Action Campaign*-judgment is also in accordance with the judgment in *Grootboom*, as "... a right to reasonable action by the state in all circumstances and with particular regard to human dignity"¹⁸⁸ had been complied with. Socio-economic rights were seen as more than a mere key to bare survival, and comprised of "the development and exercise of the people's associational, intellectual and emotional

¹⁸⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 83.

¹⁸⁵ *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC).

¹⁸⁶ *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) 750; see also Brand and Heyns *Socio-economic Rights* 139.

¹⁸⁷ Brand and Heyns *Socio-economic Rights* 132.

¹⁸⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 83.

capabilities".¹⁸⁹ It thus seems as if the courts are gradually giving more importance to both socio-economic rights and human dignity, both as a right as found in section 10 and as a value informing other fundamental human rights.¹⁹⁰

In considering socio-economic rights, the "reasonableness" standard is of great importance. Yacoob J¹⁹¹ states that "[r]easonableness must also be understood in the context of the Bill of Rights as a whole." Some of the elements of a reasonable plan listed by the court in *Grootboom* include:

- sufficient flexibility to be able to cope with emergency, short-, medium- and long-term needs;
- allocating appropriate financial and human resources to execute the plan; and
- adequate legislation, policies and programmes to achieve the plan. This is inclusive of the implementation of the proper allocation of tasks and monitoring programmes.¹⁹²

In *Glenister v President of the RSA: Helen Suzman Foundation as Amicus Curiae*¹⁹³ the Court found that section 7(2) of the *Constitution* requires the state to take steps that are both reasonable and effective in order to fulfil constitutional rights.¹⁹⁴ The court goes further to state that this duty rests, *inter alia*, on the Executive and Parliament when initiating and enacting legislation.¹⁹⁵ There is thus a duty on the Executive and Parliament to actively ensure that legislation is enacted in order to

¹⁸⁹ Liebenberg 2005 *SAJHR* 8.

¹⁹⁰ As stated in ss 1, 7(1) and s 39(1)(a) of the *Constitution*.

¹⁹¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 69.

¹⁹² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 68-69. For a more detailed discussion on *Grootboom*, see Hassim, Heywood and Berger *Health and Democracy* 37-39. These elements of a reasonable plan as part of the reasonableness requirement have to be considered in the light of human dignity. Liebenberg 2005 *SAJHR* 3.

¹⁹³ *Glenister v President of the RSA: Helen Suzman Foundation as Amicus Curiae* 2011 3 SA 347 (CC).

¹⁹⁴ A court may require a "comprehensive explanation from the state on the measures elected to fulfil the socio-economic rights". Devenish *South African Constitution* 149. The state can therefore be held accountable by the courts and may be obliged to defend and explain its choices.

¹⁹⁵ *Glenister v President of the RSA: Helen Suzman Foundation as Amicus Curiae* 2011 3 SA 347 (CC) paras 189-190.

make possible the fulfilment of constitutionally entrenched rights. In addition to this duty in terms of section 7(2), the court in *Carmichele* found that there is a duty on the state in terms of section 39(2) to develop the common law to protect the right to dignity, life, and freedom and security of the person.¹⁹⁶

With regard to the right of access to health care in terms of section 27, the Court held in *Treatment Action Campaign* that there is a duty on the state to establish the "progressive realisation of each of [the socio-economic rights entrenched in the Constitution]".¹⁹⁷ Taking into account that this case was decided in 1997, it raises the question: What has been done since to realise the rights contained in section 27?

It is true that a new act with regard to health care has been promulgated since, namely the *National Health Act*,¹⁹⁸ that came into effect on the 1st of March 2012.¹⁹⁹ However, the question remains whether or not the Act has achieved the standard of a reasonable legislative measure as required by section 27(2). It is the authors' submission that the *National Health Act* does not meet the standard of a reasonable legislative measure with regards to organ transplantation law, as required by section 27(2). Venter raises the possibility that there might be a duty on the state to find alternative options if a specific resource has been limited for a number of years.²⁰⁰ *In casu*, it is submitted that the state has a duty to find alternative measures to alleviate the constant organ shortage, by replacing the current organ procurement system of opting-in with a more suitable method of organ procurement.²⁰¹ The Court in *Port Elizabeth* rightly held that that our entire society is demeaned when government action denies citizens' basic needs.²⁰²

¹⁹⁶ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 322.

¹⁹⁷ *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) 754.

¹⁹⁸ *National Health Act* 61 of 2003.

¹⁹⁹ Commencement of certain sections of the National Health Act (Act No 61 of 2003) Proc 11 in GG 35081 on 27 February 2012.

²⁰⁰ Venter *Selection of Constitutional Perspectives* 58.

²⁰¹ For more information on the different organ procurement methods, see Labuschagne *Analysis of Organ Transplantation* ch 3.

²⁰² *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) 227.

6 Conclusion

This article has investigated the constitutional influences on organ transplantation law, with specific reference to organ procurement methods. One of the main factors that has to be kept in mind when considering legal development is that the law can take a long time to change, it is conservative, and often a few years behind society's perspectives on morality and the law.

However, there is a duty whenever new law is enacted or when existing law is amended, interpreted or limited to do so in a manner that protects and promotes the values underlying an open and democratic society based on human dignity, equality and freedom.

Each of the rights applicable to this study in the Bill of Rights was examined specifically in the light of the research topic. The scope and application of the limitation clause were also examined to determine whether and to what extent an individual can limit his or her own rights. What is clear from the study is that many of the rights in the Bill of Rights are intertwined and cannot be read in isolation. They inform one another and must thus be looked at together to form an overall picture.

When considering any right in the Bill of Rights a comprehensive and complex study is required. There are many issues that deserve proper consideration: the application of the right, the meaning or content of the right, the interpretation of the right, other existing law, whether it be in the form of legislation, common law, case law or ethics; the limitation of the right; in the case of dignity, equality or freedom whether it operates as a right or a fundamental value; and so forth. Establishing what the court might find in a specific case is no easy task.

Section 7(2) is applicable to all of the above rights and places a positive duty on the state to respect, protect, promote and fulfil these rights. In the context of organ transplants, this means that the state has a duty to allow people to exercise their

respective rights and to prevent third parties from interfering with someone's rights, as well as to establish a proper legislative framework to enable the progressive realisation of these rights. In the context of medical law, section 12(2)(b) and section 27(1) and 27(2), together with the value assigned by the *Constitution* to human dignity generally, should have the biggest influence on the choice of a suitable method of organ procurement. The determination of whether a method of organ procurement would be constitutionally acceptable or not would include an investigation into what constitutes "reasonable legislative and other measures, within [the State's] available resources, to achieve the progressive realisation" of chiefly the right to life.²⁰³ As was shown in the judgements in *Soobramoney* and *Treatment Action Campaign*, the Constitutional Court is inclined to grant lifesaving relief, even if there aren't available resources, rather than to grant mere life-prolonging relief.

It is submitted that the State has failed to provide a proper legislative framework to relieve the critical shortage of human organs available for transplantation, and has thus failed to uphold the applicable constitutional rights and values as discussed above.

²⁰³ S 27(2) of the *Constitution*.

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LIST OF ABBREVIATIONS

Ann Intern Med	Annals of Internal Medicine
CJASN	Clinical Journal of the American Society of Nephrology
HSRC	Human Sciences Research Council
J Med & L	Journal of Medicine and Law
Med L Rev	Medical Law Review
MSU J Med & L	Michigan State University Journal of Medicine and Law
ODF	Organ Donor Foundation of South Africa
PAIA	Promotion of Access to Information Act 2 of 2000
PER	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
Rutgers L Rev	Rutgers Law Review
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
Syracuse L Rev	Syracuse Law Review