

# Chapter 39

## Life

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### Life

11. Everyone has the right to life. <sup>1</sup>

## 39.1 Introduction

The right to life is the most basic, the most fundamental, the most primordial and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective. If there is no life, then there is nothing left of human dignity. Only when life exists can we be concerned with how to make it worth living and to prevent it from being undermined by various acts and omissions that endanger it. The protection of life is therefore an essential pre-requisite to the full enjoyment of all other human rights. <sup>2</sup>

The right to life is recognized in most legal and constitutional systems (to the extent that it is regarded as a norm of customary international law). It is often termed the 'most basic' human right, since its enjoyment is an essential prerequisite for the meaningful exercise of all other rights. Given the near universal acceptance of its importance, it is perhaps surprising that there is little consensus on the normative content of the right to life. International human rights instruments and foreign constitutions or human rights legislation tend to emphasize different aspects of, or limits to, its enjoyment. <sup>3</sup>

In South Africa, a similar lack of consensus among the constitutional drafters resulted in the deliberately broad and unqualified formulation of the right in the

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1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

2 F Menghistu 'The Satisfaction of Survival Requirements' in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 63.

Interim Constitution. <sup>4</sup> The open texture of the provision meant that controversies related to the normative content of the right, and its application to controversial social issues such as the death penalty and abortion, were deferred, and left largely, though not exclusively, to judicial resolution. <sup>5</sup> The Final Constitution retained this open-ended formulation.

Commentators appear to accept that this open-ended formulation, read with the directive in FC s 7(2) that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights', allows for a broad and permissive interpretation of the right to life in South Africa. <sup>6</sup> Constraints on its ambit are said to be permitted only in so far as FC s 36 allows. Of course, this general proposition sheds no light on the right's content, its outer limits, its enforceability and its impact on various forms of state and private action.

### 39.2 The object of protection: 'life'

At common law, legal personality (and thus 'life' in a legal sense) begins when birth is complete and ends when a doctor certifies that a person is dead. <sup>7</sup> However, while the common-law understanding of the end of life largely corresponds with the scientific/biological understanding of death, life in a biological sense may well begin significantly before the granting of legal personality. The value society places on biological life creates significant tension within a variety of legal doctrines: (1) our courts are unwilling to hold that no life is preferable over severely disabled life in relation to so-called 'wrongful life' actions; <sup>8</sup> (2) our legislation on termination

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3 T Desch 'The Concept and Dimensions of the Right to Life as Defined in International Standards and in International and Comparative Jurisprudence' (1985) 36 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* 77, 79-87 (Engages entrenchment of the right in various foreign constitutions). As to international law, compare for instance the following formulations in treaties that South Africa has ratified. Article 6(1) of the International Covenant on Civil and Political Rights (1966) ('ICCPR') reads: '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. Article 6 of the UN Convention on the Rights of the Child (1989) reads: '1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child'. Article 4 of the African Charter on Human and Peoples' Rights (1986) reads: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

4 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

5 See LM du Plessis 'Whither Capital Punishment and Abortion under South Africa's Transitional Constitution?' (1994) 7 SACJ 145, 146-48 and 161.

6 See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*') (Chaskalson P) at para 85 (Regarding the right to life in the Interim Constitution); Du Plessis (supra) at 151; I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 281.

7 See R Keightly 'The Beginning and End of Legal Personality: Birth and Death' in B van Heerden, A Cockrell, R Keightley, J Heaton, B Clarke, JD Sinclair & T Mosikatsana (eds) *Boberg's Law of Persons and the Family* (2nd Edition, 1999) 28-29, 50-54 (Discussing the common-law definition of birth and related complexities and the problems occasioned by the lack of a more precise legal definition of death.)

reflects unease with late-term abortions;<sup>9</sup> and (3) the cessation of life support for patients lacking cognitive or intellectual life remains hotly contested.<sup>10</sup>

However, life as a constitutional norm has as its aim more than the mere protection of biological or legal life against extinction. It appears to demand respect for and protection of something altogether more encompassing. In *S v Makwanyane*, O'Regan J wrote:

The right to life is, in one sense, antecedent to all 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

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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 recognized and treasured. The right to life is central to such a society.<sup>11</sup>

This understanding of life — which embraces the cognitive and intellectual experience of humanity — begins to illuminate the extension of FC s 11. It also begins to explain our society's hesitation with respect to the termination of biological life after conception but before birth (being more hesitant to allow for such termination later in pregnancy when the potential of cognitive human life in the sense understood here is at its greatest) and the termination of life (euthanasia) under conditions of terminal illness or debilitating pain (allowing for cessation of life support only where there is no or precious little potential of ongoing cognitive or intellectual existence).<sup>12</sup>

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8 See *Friedman v Glicksman* 1996 (1) SA 1134, 1142H-I (W) (Court expresses this unwillingness and indicates that actions for wrongful life are not recognized in South African law); M Blackbeard 'Die Aksie vir "Wrongful Life": "To Be or not to Be"?' (1991) 54 *THRHR* 57, 66-67 (Argues that this reluctance to recognize such an action is indicative of the value South African society places on 'life' in a biological sense.) The recognition of 'wrongful life' claims thus appears to be inimical to the values associated with the right to life. Otherwise, the debate surrounding these claims seems unaffected by the right to life. See J Fedler 'Life' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 2, 1998) 15-9-15-10.

9 See D Meyerson 'Abortion: The Constitutional Issues' (1999) 116 *SALJ* 50, 56-57.

10 See *Clarke v Hurst* 1992 (4) SA 630, 649G-H, 653A-C (D).

11 *Makwanyane* (supra) at para 326. See also Fedler (supra) at 3.

12 From this understanding of life, the Court affirms the connection between the rights of life and dignity. As O'Regan J has remarked:

The right to life, thus understood, incorporates the right to dignity. So the rights of human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

### 39.3 The Subjects of Protection: 'Everyone'

The right to life attaches to every human being. And the Constitutional Court has indicated that there are no exceptions. Criminals, for instance, do not forfeit their right to life through their actions.<sup>13</sup> But the interaction and tensions between biological, legal and constitutional notions of 'life' mean that the term 'everyone' is controversial when it comes to the interests of an unborn foetus (a biological, but not legal, entity) in being born alive. The threshold question to be decided in debates about the permissibility of abortion is whether such a foetus can claim the right to life. If not, the right to life (at least as an enforceable subjective right<sup>14</sup>) is a

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non-starter. If a foetus does, however, have a right to life, then the permissibility of abortion will pit the foetus' right against the autonomy and the bodily integrity rights of the woman who wishes to terminate her pregnancy.<sup>15</sup>

International human rights documents are largely ambivalent on the question of whether a foetus has a right to life, while foreign constitutional systems take a variety of positions on the issue.<sup>16</sup> Even at South African common law, where a foetus was not regarded as a person and did not therefore enjoy any subjective rights, divisions of the Supreme Court expressed some disagreement as to whether the *nasciturus*-fiction could be used in abortion cases to protect a foetus' interests in being born alive.<sup>17</sup> In *Christian League of Southern Africa v Rall*, the OPD held that the fiction does not provide protection against abortion and that any 'rights' of an unborn foetus die with it when it is aborted.<sup>18</sup> The CPD disagreed in *G v*

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*Makwanyane* (supra) at para 327. See also *Makwanyane* (supra) at paras 84, 111, 144, 218, 222, 311. See also Currie & De Waal (supra) at 281 ('Entrenchment of the right to life requires the state to take a leading role in re-establishing respect for human life and dignity in South Africa'); S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

- 13 See *Makwanyane* (supra) at paras 137 and 331. See also *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), 2001 (7) 685 (CC) ('*Mohamed*') at paras 47 and 52; Currie & De Waal (supra) at 282.
- 14 Some commentators argue that even if a foetus does not have a right to life, the values of life and dignity still inform the regulation of abortions in an open and democratic society. See M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 37; Meyerson (supra) at 56-58; T Naude 'The Value of Life: A Note on *Christian Lawyers Association of SA v Minister of Health*' (1999) 15 *SAJHR* 541, 551-59.
- 15 See Du Plessis (supra) at 158, 163. Commentators are divided as to whether, if a foetus indeed has a right to life, it could ever be outweighed by the autonomy interests of a pregnant woman. For instance, Meyerson argues that, in light of the value that our society places on the rights to life and dignity, a woman's rights in this respect would generally not outweigh the foetus' right to life. Meyerson (supra) at 53. PJ Visser regards the limitation of a foetus' right to life in this respect as uncontroversial. PJ Visser 'Enkele Gedagtes oor die Moontlike Invloed van die Reg op Lewe in die Deliktereg' (1997) 30 *De Jure* 135, 140. Michelle O'Sullivan recognizes that the state's general interest in human dignity underwrites the legal proscription of late-term abortion. However, she does not attribute personhood to the foetus and thus does not set up a direct conflict between women's reproductive rights and foetal rights.
- 16 See M Slabbert 'The Position of the Human Embryo and Foetus in International Law and its Relevance for the South African Context' (1999) 32 *CILSA* 336; Desch (supra) at 87-96.

*Superintendent, Grootte Schuur Hospital*.<sup>19</sup> It held that 'there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened.'<sup>20</sup>

The question of whether a foetus can rely on the constitutional protection of the right to life was thus bound to be controversial. Indeed, some traction might be gained by differences in wording between FC s 11 — which grants the right to life to 'everyone' — and the arguably more restrictive formulation of IC s 9 — which granted the right to 'every person'.<sup>21</sup> The question on the meaning of 'everyone' in this context came before the TPD in *Christian Lawyers Association of SA v Minister of Health*. The applicants challenged various provisions of the Choice on Termination of Pregnancy Act on the basis that they violated the

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constitutional right to life of unborn children.<sup>22</sup> McCreath J upheld an exception against the challenge, finding that, whatever the position may be at common law, the constitutional drafters did not intend for the concept 'everyone' to include unborn children.<sup>23</sup> Had this been the drafters' intention, McCreath J continued, the Final Constitution would either have contained an explicit provision to this effect, or unborn children would have been explicitly included in the definition of 'child' under FC s 28(3).<sup>24</sup> McCreath J also considered significant the drafters' refusal to limit the right to reproductive freedom in FC s 12(2)(a) to make allowance for the right to life of the foetus.<sup>25</sup> McCreath drew further support for his arguments from the absence of textual support for extending the protection of any other fundamental rights to unborn children. McCreath J concluded that '[t]o include the foetus in the meaning of

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17 According to this doctrine, a foetus that ultimately comes to term is regarded as having been born at conception in instances where the fiction works to the foetus' advantage. On the invocation of this legal fiction at common law, see Keightly (supra) at 31-41.

18 *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O), 827G, 830A-B.

19 *G v Superintendent, Grootte Schuur Hospital* 1993 (2) SA 255 (C).

20 Ibid at 259D-E (C).

21 But see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3(a) (Woolman discusses the beneficiaries of constitutional rights, in general, and the rights, if any, of a foetus, in particular. Woolman notes that the change in language was not meant to reflect a change in content but was intended by the drafters to serve the ends of linguistic naturalness and transparency.) See, however, Fedler (supra) at 15-6 (Argues that the shift from 'every person' to 'everyone' may be significant for the abortion debate.)

22 Act 92 of 1996.

23 *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T), 1117I-J, 1120H-1121H, 1123C, 1998 (11) BCLR 1434 (T) ('*Christian Lawyers Association I*').

24 Ibid at 1121G-H, 1122B-E.

25 Ibid at 1121I-J.

that term ['everyone'] in s 11 would ascribe to it a meaning different from that which it bears everywhere else in the Bill of Rights'.<sup>26</sup> In the end, none of the challenged provisions of the Choice on Termination of Pregnancy Act were deemed to infringe the right to life.<sup>27</sup> Given the sweeping nature of the *Christian Lawyers I* Court's judgment, a reader might be forgiven for assuming that pregnant women's rights to bodily integrity, equality, dignity, freedom of belief and access to reproductive health care services would trump foetal rights to life.<sup>28</sup>

However, the *Christian Lawyers I* Court's interpretation of the word 'everyone' in FC s 11 did not entirely settle the question as to whether the right to life or the right to dignity might, if properly construed, afford some protection to foetal life in South Africa. In *Christian Lawyers II*, Mojaelo J held that, while FC ss 12(2)(a) and (b) guarantee the right of every woman to determine the fate of her pregnancy, the state retains a legitimate dignity interest in the protection of life, generally, and of pre-natal life, in particular.<sup>29</sup> Although any regulation grounded in this dignity interest may not amount to a denial of a woman's right to reproductive autonomy, it appears that the rights to dignity and to life may well have a meaningful role to play in the regulation of abortion.<sup>30</sup>

## 39.4 End-of-life decision-making

Despite its fundamental nature, it would seem that there are circumstances in which subjects may exercise their rights to life and to autonomy in a manner that extinguishes the object of the right to life. Legal systems around the world typically tolerate suicide.<sup>31</sup> They also generally accept the legal principle that every person is free to refuse life-saving or life-prolonging medical treatment, even when such refusal would cause or accelerate their death.<sup>32</sup>

In the case of life-saving treatment, the right to life appears to prohibit the refusal of treatment on behalf of someone else who lacks the capacity to do so himself. In

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26 Ibid at 1122H-I.

27 For criticism of the *Christian Lawyers Association I* Court's reasoning, see Naude (supra) at 541-48; Woolman 'Application' (supra) at § 31.3(a).

28 See *Christian Lawyers Association I* (supra) at 1123E-G.

29 See *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509 (T), 526, 2004 (10) BLLR 1086, 1103 (T) ('*Christian Lawyers II*').

30 For more on how dignity interests play out in the context of reproductive rights and the 'life' of a foetus, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; O'Sullivan (supra) at § 37.8; Woolman 'Application' (supra) at § 31.3(a).

31 See Desch (supra) at 99. Committing or attempting suicide is not a crime in South Africa. See *S v Gordon* 1962 (4) SA 727 (N); *Ex parte Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A).

32 See Desch (supra) at 99; Fedler (supra) at 8. See also *Castell v De Greeff* 1994 (4) SA 408 (C), 420J-421D.

*Hay v B*, the WLD authorized a blood transfusion to an infant despite the refusal of the treatment by the infant's parents. The *Hay* Court overruled the parents' refusal of consent, in its capacity as upper guardian of all minors, because the infant would die if the transfusion were not performed. The *Hay* Court was not prepared to 'negate the essential content' of the child's 'inviolable' right to 'live as a human being, be part of a broader community and share in the experience of humanity' merely because administering the transfusion was against the wishes and the sincere beliefs of his parents.<sup>33</sup>

Refusing life-prolonging treatment on behalf of another adult is a more vexed question. Whereas there is no legal duty artificially to keep someone alive who is clinically dead, it is less certain whether life-prolonging treatment may be discontinued where a patient lacks the capacity for cognitive or intellectual life but remains clinically alive.<sup>34</sup> In *Clarke v Hurst*, which pre-dated the Interim Constitution and thus did not explicitly involve the right to life, the Durban Supreme Court authorized the discontinuance of artificial life support on a patient who, despite his biological life-functions being described as 'stable', completely lacked cognitive or intellectual awareness due to severe brain-stem injury from which there was no chance of recovery.<sup>35</sup> The patient's wife had applied for an order to be appointed his curatrix personae and sought, in that capacity, to authorize the acceleration of her husband's death through the cessation of his gastric feeding and hydration treatment regimes. The *Clarke* Court held that the wrongfulness or otherwise of such an authorization depended on whether, according to the legal convictions of the community, the discontinuation of the treatment would be reasonable in light of the quality of life remaining to the patient and of his physical and mental status.<sup>36</sup> Given the patient's complete lack of cognitive or intellectual

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life and the irreversibility of his condition, the order was granted.<sup>37</sup> The 'qualitative conception of life' accepted in *Clarke* corresponds with the broader understanding of the object of the right to life advanced by O'Regan J in *S v Makwanyane*.<sup>38</sup> Read together, the cases suggest that extinguishing the object of the right to life of another through the refusal of life-prolonging treatment may be permissible in circumstances where the object of that other person's right has irreversibly been reduced to nothing more than biological existence.

*Clarke* is also authority for the proposition that South African law tolerates refusal of life-sustaining treatment by means of a so-called 'living will'.<sup>39</sup> A living will is a document in terms of which an able-bodied person commits to writing her refusal of life-sustaining medical treatment to apply in future circumstances where it is

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33 *Hay v B* 2003 (3) SA 492 (W), 486B-E.

34 See *S v Williams* 1986 (4) SA 1188 (A); Currie & De Waal (supra) at 289.

35 *Clarke v Hurst* 1992 (4) SA 630 (D), 649G-H, 653A-C ('Clarke').

36 Ibid at 653A-C.

37 *Clarke* (supra) at 649A-H.

38 See Fedler (supra) at 15-8.

impossible to obtain her express consent to such treatment and where there is little or no hope that she would recover from a severely debilitating injury or condition.<sup>40</sup>

*Clarke* does not, however, answer the more controversial question of whether a person may request the termination of his life in circumstances where he remains cognitively and intellectually alive, but where his quality of life has so deteriorated that he considers life no longer to be worth living. Requesting active euthanasia is more controversial than refusal of life-sustaining treatment by means of a living will, since what is extinguished in cases of active euthanasia is not merely biological life, but also cognitive and intellectual life.<sup>41</sup> Even more controversial still are situations of active euthanasia where a patient does not himself expressly request the acceleration of death. The question of the permissibility of active euthanasia is often depicted as conflict between the right to life and various rights that secure individual autonomy.<sup>42</sup> However, given, first, the close connection between the rights to life and to dignity and, second, the fact that death is an inextricable part of life, one can argue that the right to life includes a right to die with dignity and that the right to die with dignity supports requests for active euthanasia.<sup>43</sup>

Whereas instances of active euthanasia in South Africa have historically resulted in criminal prosecution, courts have typically treated persons found guilty

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of murder under such circumstances with 'conspicuous leniency' in sentencing.<sup>44</sup> In its Report on *Euthanasia and the Artificial Preservation of Life*, the South African Law Commission (SALC) declined to take a final position on the question of active euthanasia.<sup>45</sup> Instead, it suggested three alternative models of regulating the practice to the legislature. The first is to leave the current legal position intact (and hence to allow courts to decide on whether a conviction is warranted and, if it so finds, to craft appropriate sentences for 'mercy killers'.) Under the second model, medical practitioners would be allowed to give effect to the explicit request of a

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39 Ibid. See also Currie & De Waal (supra) at 289. The patient in *Clarke* was a member of the South African Voluntary Euthanasia Society and had signed a living will in terms of which he was not to receive life-sustaining medical treatment in circumstances where there were no reasonable prospects of his recovery from extreme physical or mental disability. See *Clarke* (supra) at 633E-634A.

40 On the interpretation of the right to life in the context of living wills or powers of attorney generally, see C Wellman 'The Inalienable Right to Life and the Durable Power of Attorney' (1995) 14 *Law & Philosophy* 245.

41 On euthanasia as a waiver of the right to life, see Desch (supra) at 97-100.

42 See Fedler (supra) at 15-8; Currie & De Waal (supra) at 288.

43 See L M du Plessis & J R de Ville 'Personal Rights: Life, Freedom and Security of the Person, Privacy, and Freedom of Movement' in D van Wyk, B de Villiers, J Dugard & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 212, 232.

44 Compare, for instance, the sentences passed in *S v Hartmann* 1975 (3) SA 532 (C); *S v De Bellocq* 1975 (3) SA 538 (T); *S v Smorenburg* 1992 (2) SACR 389 (C).

45 South African Law Commission Report *Euthanasia and the Artificial Preservation of Life* Project 86 (November 1998) ('SALC *Euthanasia Report*').



terminally ill but mentally competent patient for the acceleration of her death, provided that they adhere to strict procedural guidelines. Under the third model, a multi-disciplinary panel or committee would be constituted to decide on requests for active euthanasia.<sup>46</sup> Under all three models, instances of active euthanasia in the absence of an express request by the patient would remain open for prosecution. None of these models has, as yet, been adopted by the legislature.

Should the right to life be interpreted as encompassing a right to die with dignity, a legislative scheme along the lines proposed by the SALC would probably not amount to an infringement of the right to life. But, even if such legislation were held to infringe a (more narrowly interpreted) right to life, commentators have suggested that such infringement would constitute a reasonable and justifiable limitation thereof, given the value that society attaches to the right to dignity, in particular, and to autonomy, in general.<sup>47</sup>

## 39.5 The obligation to respect the right to life

### (a) The core of the right to life: A prohibition on killing

At its core, the right to life protects human life from extinction. To kill or to condone the killing of a person thus amounts to an infringement of the right to life. And yet, there are 'exceptionally compelling' circumstances in which open and democratic societies regard such an infringement as justifiable.<sup>48</sup>

The most widely debated example of such killing is the death penalty, which, perhaps surprisingly, is not altogether impermissible at international law. Article 6 of the International Covenant on Civil and Political Rights contains an express

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limitation on the right to life that allows for the death penalty to be imposed 'for the most serious crimes', subject to adherence to rigorous procedural safeguards.<sup>49</sup> In commenting on this provision, however, the UN Human Rights Committee (UNHRC)

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46 See SALC *Euthanasia Report* (supra) at 228-232. The SALC's proposal allows for instances of 'passive euthanasia' such as that authorised in *Clarke*.

47 See Fedler (supra) at 8-9; Currie & De Waal (supra) at 289.

48 Accordingly, it is often said that the core of the right to life consists only of a guarantee against 'arbitrary' or 'unjust' killing. See Desch (supra) at 102-106; Du Plessis & De Ville (supra) at 222; Meghistu (supra) at 64; H Rudolph 'The 1993 Constitution — Some Thoughts on its Effect on Certain Aspects of Our System of Criminal Procedure' (1994) 111 *SALJ* 497, 500; Currie & De Waal (supra) at 282-283.

49 Article 6(2)-(6) states: '2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'. For discussion of similar restrictions on the right to life in other international instruments, see Desch (supra) at 108-111.

has indicated that the death penalty should only be tolerated in highly exceptional circumstances, and that its abolition is 'desirable' and is 'considered as progress in the enjoyment of the right to life'.<sup>50</sup>

The Constitutional Court declared the death penalty unconstitutional in *S v Makwanyane*. Chaskalson P viewed the penalty primarily as an unjustifiable violation of the guarantee against cruel and inhuman punishment (in terms of IC s 11(2)), but stated that his reading of IC s 11(2) was informed by the right to life in IC s 9.<sup>51</sup> He also held that the state had to demonstrate respect for the rights to life and dignity in everything it does, including the manner in which it punishes criminals. The fact that the death penalty failed to demonstrate such respect contributed to the Court's finding it unconstitutional.<sup>52</sup>

Most of the other opinions in *Makwanyane* regard the death penalty as a violation of the right to life. This right, a number of justices held, at the very least entitled citizens not to be deliberately and systematically put to death by the state in a manner that disregarded their human dignity.<sup>53</sup> Several justices also noted that the death penalty did not merely limit, but totally extinguished, the right to life (and, hence, the enjoyment of all other constitutional rights).<sup>54</sup>

Another form of state-sanctioned killing enjoying limited recognition in international law is killing during warfare and armed conflict. Whereas international law typically regards such killing as permissible, provided it takes place in accordance with the rules of humanitarian law,<sup>55</sup> the UNHRC has emphasized that war

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and related violence pose major threats to the right to life and that states accordingly have a duty to prevent warfare at all costs.<sup>56</sup> In *Makwanyane*, Chaskalson P recognized that it may be permissible to limit the right to life in warfare and armed conflict (provided that the state adheres to relevant international standards.)<sup>57</sup> Furthermore, Kentridge AJ remarked, in a separate judgment, that the right to life must not be understood to prohibit the state from defending itself

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50 UN Human Rights Committee General Comment 6 'The Right to Life' (Article 6 of the Convention) (16th Session, 1982) ('GC 6') at para 6. See also GC 6 (supra) at para 7.

51 *Makwanyane* (supra) at para 80. See also *Makwanyane* (supra) at para 95.

52 *Ibid* at para 144.

53 *Ibid* at paras 166 (Ackermann J), 174-76 (Didcott J), 193 (Kentridge AJ), 208 (Kriegler J), 217, 234 (Langa J), 269, 282 (Mahomed DP), 313, 317 (Mokgoro J), 333-34 (O'Regan J), 353-54 (Sachs J).

54 See, for instance, *Makwanyane* (supra) at paras 270 (Mahomed DP) and 350-51, 353 (Sachs J). The Court has since reiterated its stance on the death penalty in *Mohamed. Mohamed* (supra) at para 39. See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*') at paras 98 (Chaskalson CJ) and 206 (Ngcobo J).

55 See Desch (supra) at 114-115.

56 UNHRC General Comment 6 (supra) at para 2.

against insurrection.<sup>58</sup> One would, however, expect that such killing would only be justifiable in circumstances where no other options were reasonably available to the state.

A further particularly controversial example of killing in furthering state interests is the use of lethal force in arrest, which certain international human rights instruments regard as amounting, in narrowly defined circumstances, to a justifiable limitation of the right to life.<sup>59</sup> In South Africa, such killing has for years been authorized by s 49 of the Criminal Procedure Act.<sup>60</sup> The Act provided for the use of such force as is reasonably necessary in the circumstances to effect an arrest, and determined that killing a person suspected of having committed an offence listed in Schedule 1 of the Act (which included a list of crimes ranging from serious violent crimes to significantly more mundane offences) would amount to justifiable homicide where there were no other means of affecting the arrest. Several commentators speculated that s 49(2), in conferring such wide indemnity on police officers and others who kill in the course of an arrest, probably amounted to an unjustifiable violation of the right to life.<sup>61</sup>

In *Makwanyane*, Chaskalson P deliberately refrained from pronouncing on the constitutionality of s 49(2), but stated that '[g]reater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person's right to life'.<sup>62</sup> Subsequently, the Northern Cape High Court held in *Raloso v Wilson* that while s 49(2) was probably unconstitutional, it ought to refrain from making a declaration to that effect because the legislature had indicated that it was revising the subsection at issue.<sup>63</sup> In *Govender v Minister of Safety and Security*, the Supreme Court of Appeal held, in relation to s 49(1) of the Criminal Procedure Act, that the state's duty to protect the rights

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(including the right to life) of citizens extended to fleeing subjects and that the legitimacy of the use of force in arrest would depend on the outcome of a proportionality inquiry. In such an inquiry, the interests served by such force would be weighed against the interests infringed thereby. The *Govender* Court further

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57 *Makwanyane* (supra) at para 139.

58 *Ibid* at para 193.

59 See GC 6 (supra) at para 3; art 2(2) of the European Convention of Human Rights; Desch (supra) at 111-14.

60 Act 51 of 1977.

61 See, for example, Du Plessis & De Ville (supra) at 215; Rudolph (supra) at 501-02; Visser (supra) at 144. For a useful comparison of the interests served and affected by killing in the course of arrest and the death penalty, which illustrates the likely unconstitutionality of such a broad indemnity for killing in the course of arrest, see D Bruce 'Killing and the Constitution — Arrest and the Use of Lethal Force' (2003) 19 *SAJHR* 430, 439-42.

62 *Makwanyane* (supra) at para 140.

63 *Raloso v Wilson* 1998 (4) SA 369 (NC), 377E-G, 378G-H.

indicated that the protection of property would, in all likelihood, not outweigh the rights of fleeing suspects to life and physical integrity.<sup>64</sup>

The Constitutional Court finally held that s 49(2) was unconstitutional in *Ex Parte Minister of Safety and Security: In re S v Walters*.<sup>65</sup> In a unanimous judgment, the Court reiterated its stance in *Makwanyane* on the value of the right to life and reaffirmed the state's duty to promote respect for the right in everything that it does.<sup>66</sup> Kriegler J stated that the rights to life, dignity and bodily integrity were 'individually essential and collectively foundational to the value system prescribed by the Constitution'<sup>67</sup> and regarded it as obvious that s 49(2) significantly limited these rights.<sup>68</sup> The *Walters* Court held that s 49(2) was unconstitutional because the interests it protected did not provide the 'weighty consideration' that would be necessary to justify the taking of a life.<sup>69</sup> The *Walters* Court stated that the question of how much force was permissible in an attempt to affect an arrest, had to be answered in light of 'the value our Constitution places on human life'.<sup>70</sup> It reiterated that the use of force in arrest would only be justified if deemed reasonably necessary in the circumstances, taking into account the seriousness of the offence allegedly committed by the suspect and the threat of violence posed by the suspect to the arresting officer or others.<sup>71</sup>

Subsequent to *Walters*, s 49(2) was amended to allow for the use of deadly force in circumstances where such force is immediately necessary to protect the arrestor or a third party, where delaying the arrest holds substantial risk of death or bodily harm to members of the public, and where the suspected offence is a serious one of a violent nature. To the extent that it provides for the use of force beyond the parameters laid down in *Walters*, the new s 49(2) reintroduces uncertainty over the constitutionality of statutory limitations placed upon the right to life in these circumstances.<sup>72</sup>

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64 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA) ('*Govender*') at paras 8, 13, 19-22.

65 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('*Walters*').

66 *Ibid* at paras 5-6.

67 *Ibid* at para 28.

68 *Ibid* at paras 29-30.

69 *Ibid* at paras 40-41, 44. On the weighing of interests in this context, see Bruce (*supra*) at 446-49.

70 *Walters* (*supra*) at para 53.

71 *Ibid* at para 54.

72 The terms and effects of the amendment are critically discussed by Bruce. See Bruce (*supra*) at 436-37, 449-451. Bruce prefers the more precise *Walters* formulation of circumstances in which lethal force is permissible.

The horizontal application of the prohibition against killing is effected primarily through the criminalization of murder and culpable homicide. A pertinent limitation on the right to life in this context, recognized in the great majority of legal

systems, including South African common law, is the permissibility of killing in self-defence or in defence of another person.<sup>73</sup> In both *Makwanyane* and *Walters*, the Constitutional Court indicated that such killing in principle remains tolerable in a society committed to respect for the right to life. In *Makwanyane*, Chaskalson P stated that it was consistent with the general limitations clause, and indeed required by the right to life, to give preference to the lives of 'innocent' civilians over the lives of 'aggressors' in circumstances of private defence.<sup>74</sup> Unlike the death penalty, he continued, such private defence 'takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less-severe alternative is readily available to the potential victim'.<sup>75</sup> In *Walters*, Kriegler J was at pains to point out that the unconstitutionality of s 49(2) of the Criminal Procedure Act in no way diminished the ability of police officers, or civilians, to defend life or physical safety by any means necessary.<sup>76</sup>

However, both judgments accept that our basic law severely constrains the entitlement to kill in private defence. As Chaskalson P stated in *Makwanyane*: 'There are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to.'<sup>77</sup> The permissibility of a limitation on the right to life through killing in private defence, as with killing in the cause of arrest, is determined through weighing the interests protected by the killing against those infringed.<sup>78</sup> While such a proportionality exercise is consistent with the common-law approach to determining the permissibility of killing in private defence, the value that the constitutional order places on the right to life likely means that the common law boundaries of permissibility have significantly contracted.

Whereas the common law allows for killing in defence of life, physical integrity and even, in extreme cases, property, Chaskalson P's judgment in *Makwanyane* appears to regard life as the only interest that may justify extinguishing the right to life of another.<sup>79</sup> In *Ntamo v Minister of Safety and Security*, the Transkei High Court

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73 On the common law definition of 'private defense' and the circumstances in which it is allowed, and the authority for these defenses, see Bruce (supra) at 233.

74 *Makwanyane* (supra) at para 138.

75 Ibid. See also *Makwanyane* (supra) at paras 193 (Kentridge AJ), 270 (Mahomed DP), and 355-56 (Sachs J).

76 *Walters* (supra) at paras 33, 51, 54.

77 *Makwanyane* (supra) at para 138.

78 Ibid. See also *Walters* (supra) at para 33; Bruce (supra) at 233.

79 See *Ex Parte die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A).

stated that the boni mores in private defence cases are impacted by 'the sanctity of life, a fundamental right enshrined in s 11 of the Constitution' and endorsed the views of Chaskalson P in *Makwanyane*.<sup>80</sup> In *S v Dougherty*, the WLD similarly held that the impact of the right to life on an inquiry into the permissibility of private defence was to raise the common-law standard. It rejected, as a result, the

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appellant's reliance on private defence since the appellant could not show that lethal force was necessary to protect his own life.<sup>81</sup> In *Walters*, however, Kriegler J appeared to accept that killing in defence of physical safety would, at least in circumstances where such safety is seriously threatened, amount to a justifiable limitation of the right to life.<sup>82</sup> This latter view seems more realistic, and appears to be consistent with the values of a society that values bodily and psychological integrity as well as life. What seems clear, however, is that killing in defence of property is not constitutionally permissible,<sup>83</sup> and that killing in defence of physical safety would only be so in circumstances where such safety is genuinely and seriously threatened.

The right to life may, ultimately, compel a shift with respect to both criminal and civil liability for the negligent causation of death. As for civil liability, the Supreme Court of Appeal remarked, obiter, in *Johannesburg Country Club v Stott* that it may be against public policy contractually to exclude such liability because of the high value placed by the Final Constitution on the sanctity of life.<sup>84</sup> This 'high value' may, in addition, influence the calculation of damages in delictual cases concerning the negative causation of death in dependants' actions.

### **(b) Beyond the core**

The Final Constitution's broad conception of 'life' ensures that FC s 11 protects South Africans against injuries that result in a significant diminution of their cognitive and intellectual capacity. The right to life therefore features in the calculation of delictual damages to compensate for the wrongful causation of loss of amenities of life and/or reduced life expectancy.<sup>85</sup>

In the realm of criminal law, a broad conception of the right to life raises the question of whether the right is unjustifiably limited by a sentence of life imprisonment. In an unreported judgment of the Namibian High Court in *S v Tijo*, it was held that, because life imprisonment significantly diminishes the experience of human life for a convicted person's entire lifespan, such a sentence was akin to 'a sentence of death' and accordingly amounted to an unconstitutional infringement of

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80 *Ntamo v Minister of Safety and Security* 2001 (1) SA 830 (Tk) at para 35.

81 *S v Dougherty* 2003 (2) SACR 36 (W) at paras 38-39. For criticism of this aspect of the judgment, see CR Snyman 'Private Defence in Criminal Law — an Unwarranted Raising of the Test of Reasonableness' (2004) 67 *THRHR* 325, 330-31.

82 See *Walters* (supra) at para 51.

83 See *Govender* (supra) at para 22. See also Visser (supra) at 143.

84 *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12.

85 See Visser (supra) at 137-38, 141-42.

the right to life in the Namibian Constitution.<sup>86</sup> This view was subsequently rejected by the Namibian Supreme Court in *S v Tcoelib*. While seemingly accepting that life imprisonment significantly restricts enjoyment of life, the Court

regarded it as significant that such a sentence, unlike the death penalty, did not involve the extinction of the right to life. Rather, Mahomed CJ viewed a sentence of life imprisonment as justifiably infringing the right to liberty of an imprisoned person.<sup>87</sup> Similarly, at least two judges in *Makwanyane* distinguished the death penalty from long-term imprisonment. They did so on the grounds that the latter did not involve the complete extinction of the rights to life and to dignity associated with the former.<sup>88</sup>

While certainly not comparable to the death penalty, a sentence of life-imprisonment does appear to be at odds with the broad understanding of the right to life endorsed elsewhere in *Makwanyane*. Life imprisonment is not solely concerned with the limitation of liberty interests. Because it involves a significant diminution of the right to 'human life' and 'to share in the experience of humanity', life imprisonment would constitute a justifiable limitation of the right to life only when imposed as punishment for the most heinous of offences.<sup>89</sup>

## 39.6 The obligation to protect the right to life

When read with FC s 7(2), it is clear that the right to life, in addition to providing a safeguard against killing or significant diminution of quality of life, imposes positive obligations on the state. Among these obligations is the duty to protect the right to life against unlawful outside threats. At a minimum, the state is required to punish the unlawful deprivation or diminution of life through the effective implementation of criminal law. However, the duty imposed by FC s 11 read with FC s 7(2) extends beyond punishment and encompasses an obligation to protect citizens from unlawful threats to their life and physical integrity.<sup>90</sup>

In *Carmichele v Minister of Safety and Security*, the Constitutional Court found that the common law of delict was in need of development in order to comport with the constitutional entrenchment of rights to life, to dignity and to freedom and

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86 *S v Nehemia Tijo* High Court of Namibia 4/9/91 (unreported), quoted and discussed in *S v Tcoelib* 1996 (1) SACR 390, 396A-H (NmS).

87 *Tcoelib* (supra) at 396H-397C.

88 See *Makwanyane* (supra) at paras 142 (Chaskalson P), and 196 (Kentridge AJ).

89 On relationship between rights to life and right to dignity and the Court's jurisprudence on life imprisonment, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; D van zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49. See also *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

90 See GC 6 (supra) at para 3; *Makwanyane* (supra) at para 193 (Kentridge AJ); BG Ramcharan 'The Concepts and Dimensions of the Right to Life' in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 1, 7; Currie & De Waal (supra) at 285-86.

security of the person.<sup>91</sup> The Court further endorsed a dictum by the European Court of Human Rights, according to which the right to life 'may also imply in certain well-defined circumstances a positive obligation on the authorities to take

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preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'<sup>92</sup> While it did not speak directly to the existence of a positive obligation in terms of the right to life, the *Carmichele* Court signalled that the right imposed more than a negative duty of non-interference.

In *Rail Commuters Action Group v Transnet t/a Metrorail*, the Cape High Court recognized that the state actors in question 'have a legal duty to protect the lives and property of members of the public who commute by rail',<sup>93</sup> a finding informed by a purposive interpretation of the rights to life and to freedom from violence.<sup>94</sup> In upholding an appeal against the partial overturning of this judgment by the Supreme Court of Appeal, the Constitutional Court reiterated that the rights to life, to dignity and to freedom and security of the person sometimes imposed positive obligations on the State.<sup>95</sup> The *Rail Commuters Action Group* Court confirmed the respondents' duty to take reasonable measures to provide for the security of rail commuters, but found it unnecessary to locate such an obligation in the relevant constitutional rights. Instead, it found the duty implicit in the provisions of the Legal Succession to the South African Transport Services Act<sup>96</sup> read in light of FC ss 10, 11 and 12.<sup>97</sup>

Whereas the existence of an obligation to protect the lives of citizens, inherent in the right to life, thus appears to be beyond question, the extent of this obligation remains uncertain. In giving effect to the Constitutional Court's implied directive to develop the common law in *Carmichele*, the Supreme Court of Appeal stated that an obligation to protect the lives of citizens is not absolute and that liability for non-compliance with such an obligation would result only in circumstances where security officers were aware, or should reasonably have been aware, of a 'real and immediate risk to life' and where they failed to take such action within their powers as might reasonably 'have been expected to avoid that risk'.<sup>98</sup> The Supreme Court of Appeal has also suggested, in passing, that such an obligation does not operate horizontally, notwithstanding the constitutional entrenchment of the right to life.<sup>99</sup>

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91 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (1) BCLR 995 (CC) ('*Carmichele*') at para 44.

92 *Osman v United Kingdom* 29 EHRR 245 (ECHR) at para 115, quoted and endorsed in *Carmichele* (supra) at para 45.

93 *Rail Commuters Action Group v Transnet t/a Metrorail* 2003 (3) BCLR 288, 352C-D (C).

94 *Ibid* at 335H-I.

95 *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) ('*Rail Commuters*') at paras 66 and 70

96 Act 9 of 1989

97 *Rail Commuters* (supra) at paras 72, 84, 111(3).



An interesting and related question is whether the obligation to protect the right to life extends to the protection of foetal life, even if it is accepted that a foetus cannot be a subjective beneficiary of the right to life. Given the high regard

that the Final Constitution has for the values of life and human dignity, the state may have an obligation to protect foetal life in a manner that might justify limitations on women's reproductive rights.<sup>100</sup> This interest might require a court to look harder at the justifications for late-term abortions endorsed by the Choice on Termination of Pregnancy Act.<sup>101</sup>

### 39.7 The obligation to promote the right to life

In *Makwanyane*, Chaskalson P concluded that the state had to demonstrate respect for the right to life in 'everything that it does'.<sup>102</sup> That an obligation to promote respect for the right to life in this manner was more than a mere rhetorical flourish became apparent in *Mohamed v President of the RSA*. In *Mohamed*, the Constitutional Court held that immigration authorities 'failed to give any value to Mohamed's right to life' when allowing for his extradition to the United States in order to stand trial for an offence that could result in the imposition of the death penalty.<sup>103</sup> Given that the death penalty is inimical to the right to life in the Final Constitution, the state was held to have breached a constitutional obligation by allowing for the deportation or extradition of a person without first securing the assurance that he would not be sentenced to death.<sup>104</sup>

Whereas the *Mohamed* order included a directive to bring the judgment to the attention of the trial court in the United States, the majority of the Constitutional Court subsequently held in *Kaunda v President of the RSA* that the obligation to promote respect for the right to life did not extend to ensuring that the provisions of the Final Constitution are adhered to by foreign governments. As has been noted

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98 *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA), 2004 (2) BCLR 133 (SCA) at para 33, quoting from *Osman* (supra) at para 116. See also *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

99 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 33.

100 I have in mind late-pregnancy abortions and deliberate foetal 'harvesting' for commercial, research or other reasons. See Meyerson (supra) at 56-58 (Argues that such an obligation may be derived from the constitutional value of human dignity.) But see Naude (supra) at 551-559 (Views the obligation as flowing from the value of life underlying FC s 11.)

101 See Meyerson (supra) at 56-58 (Meyerson regards the current provisions of the Choice on Termination of Pregnancy Act as striking an adequate balance between women's autonomy and equality rights on the one hand and the State's obligation to protect foetal life on the other.)

102 *Makwanyane* (supra) at para 144.

103 *Mohamed* (supra) at para 48.

104 *Ibid* at paras 47-48, 52, 58, 73.

elsewhere, the two decisions are difficult to square with one another.<sup>105</sup> While the government ordinarily required assurance from foreign states that the death penalty would not be imposed on South African citizens, the majority in *Kaunda* was not prepared to direct the state to insist on such assurance in relation to crimes committed by South African nationals in countries where the death penalty was allowed in accordance with international law.<sup>106</sup> O'Regan J dissented

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on the grounds that the obligation to promote respect for the rights in the Bill of Rights also bound the South African government when conducting diplomatic affairs or otherwise acting extra-territorially. On her reading of *Mohamed*, the government was ordinarily under an obligation to ensure that South African citizens would not be sentenced to death elsewhere in the world.<sup>107</sup> Similarly, Sachs J reasoned that the government was obliged to do what was reasonably within its power to ensure that South Africans are not subjected to the death penalty elsewhere.<sup>108</sup> While O'Regan J's judgment gives better effect to the obligation to promote the right to life, a joint reading of *Mohamed* and *Kaunda* suggests that, at a minimum, state actions which do not themselves violate the right to life but which render the right vulnerable to infringement by others (in South Africa or elsewhere) fall foul of the obligation to promote respect for the right insofar as such actions fall within the territorial reach of the Final Constitution.

### 39.8 The obligation to fulfil the right to life

The existence of an obligation to fulfil the right to life was first acknowledged in South African constitutional jurisprudence by Sachs J in *S v Makwanyane*. Sachs J wrote that an 'objective approach in relation to the enjoyment of the right to life' entailed that 'the State is under a duty to create conditions to enable all persons to enjoy the right'.<sup>109</sup> This objective approach entails more than protecting the existence of citizens' lives from unlawful infringement by their peers. Enjoyment of the right to 'human life' and to 'share in the experience of humanity' depends not only on biological existence and cognitive and intellectual ability, but also on material means and access to social goods. As Joanne Fedler observes:

Both materially and philosophically, life depends upon resources essential for the preservation and quality of existence. Inherent in a broader notion of life is a value judgment about what constitutes an acceptable quality of life. So whilst life may be a

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105 S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.5 (On the extraterritorial effect of the Final Constitution.)

106 *Kaunda* (supra) at paras 32, 37, 44-45, 56, 70, 98-102, 144. The matter was accordingly distinguished from *Mohamed* on the basis that Mohamed was present in South Africa, and could thus avail himself of the protection of the Final Constitution. Ibid at paras 49-50, 56. It would appear that Chaskalson CJ did contemplate the operation of a duty to promote respect for rights as forming a part of customary international law in such circumstances.

107 *Kaunda* (supra) at paras 229, 231, 249, 253.

108 Ibid at para 275.

109 *Makwanyane* (supra) at para 353.

value in and of itself, without water, food, livelihood, friendship, and recreation it may not be worth living.<sup>110</sup>

The obligation to fulfil the right to life, therefore, involves satisfaction of the socio-economic dimensions of the right<sup>111</sup> and thus intersects with various positive obligations that the state must heed in terms of FC ss 26, 27, 28 and 35.

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Two 'categories' of socio-economic interests may be regarded as relevant to the enjoyment of the right to life. The first, which may be termed 'survival requirements', are 'the type of elementary, basic, and essential inputs necessary to keep [biological] life going'<sup>112</sup> and include access to basic nutrition, water, shelter and (arguably) basic health care services. Beyond these minimum requirements, the satisfaction of several 'secondary' socio-economic rights aimed at ensuring an adequate standard of living — housing, more advanced health care services and education — affirm the Final Constitution's commitment to human dignity and life.<sup>113</sup> However, even if 'life' is confined to biological existence, it may be argued that the obligation to fulfil the right to life at least requires the satisfaction of survival requirements:

If deprivation of the lives of millions of people through lack of access to survival requirements is not a right to life issue, we can only say that the whole concept and notion of the right to life in its restricted and narrow sense does not apply to more than a billion people around the globe.<sup>114</sup>

Although the obligation to fulfil the right to life in South Africa appears to require the realization of most socio-economic rights, the Final Constitution's general commitment to the progressive realization of socio-economic rights suggests that the courts are unlikely to recognize a free-standing right to life that would secure the claimant some immediate set of entitlements.<sup>115</sup> But this does not mean that such positive obligations — in terms of the right to life — should be viewed as perpetually unenforceable. Indian Courts, for instance, have found that the right to life embraces a wide range of survival and quality of life concerns and have enforced several socio-economic claims (contained in the Indian Constitution as non-enforceable

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110 Fedler (supra) at 15-2.

111 That the right to life encompasses such socio-economic dimensions has also been affirmed in international law, with the UNHRC remarking that '[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.' GC 6 (supra) at para 5. In international human rights law scholarship, the right to life is accordingly regarded as a prime example of the interdependence and indivisibility of civil and political rights and socio-economic rights. See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769, 781, 875, 878; Menghistu (supra) at 78.

112 Menghistu (supra) at 67.

113 Ibid.

114 Ibid at 65. See also Menghistu (supra) at 63, 67-69, 79-80; Ramcharan (supra) at 6-10; Du Plessis & De Ville (supra) at 215; M Pieterse 'A Different Shade of Red: Socio-economic Dimensions of the Right to Life in South Africa' (1999) 15 *SAJHR* 372, 373 (Pieterse 'A Different Shade of Red').

Directive Principles of State Policy) against the state in terms of the right to life.<sup>116</sup> While it is certainly significant that, unlike its Indian counterpart,, the South African Constitution provides for the judicial enforcement

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of several socio-economic rights in their own right and, while there is accordingly a strong argument that enforcement of such rights should not be confused with enforcement of the right to life, the Indian experience shows that enforcing the obligation to fulfil the right to life is not impossible. In South Africa, it may be argued that the obligation to fulfil the right to life at least entails that the state, in its effort progressively to realize socio-economic rights, should award immediate priority to the satisfaction of survival requirements.

In *Soobramoney v Minister of Health, KwaZulu-Natal*, the Constitutional Court acknowledged that access to socio-economic amenities was essential to enjoyment of the right to life. In detailing the many socio-economic demands that the Constitution places on the state, Chaskalson P stated that satisfaction of needs for access to medical care, food, water, housing and employment formed part of the right to 'human life'.<sup>117</sup> In a separate concurring judgment, Sachs J added that: '[a] healthy life depends upon social interdependence: the quality of air, water, and sanitation which the State maintains for the public good; the quality of one's caring relationships as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends, and the community.'<sup>118</sup> Madala J observed, in another concurring judgment, that '[t]he State undoubtedly

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115 It may therefore be expected that the general limitations clause will more readily be invoked in relation to the obligation to fulfil the right to life than in relation to the obligations to respect and to protect the right. See Du Plessis & De Ville (supra) at 224; Pieterse 'A Different Shade of Red' (supra) at 378, 384.

116 See, for example, the following judgments of the Indian Supreme Court: *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 (Right to life includes protection of health); *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 (Right to life includes right to livelihood); *MC Metha v Union of India* AIR 1987 SC 965 (Right to life includes protection against harmful environmental factors); *Parmanand Katara v Union of India* AIR 1989 SC 2039 (State must take all possible measures to preserve life; right to life violated where emergency medical treatment is refused); *P Rathinam v Union of India* AIR 1994 SC 1844 (Right to life entails more than 'mere animal existence'); *Consumer Education and Research Centre v Union of India* AIR 1995 SC 636 (Right to health forms integral part of the right to life); *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922 (Right to life includes right to livelihood); *UP Avas Evam Vikas Parishad v Friends Co-op Housing Society* AIR 1996 SC114 (Right to life includes right to shelter); *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426 (Right to life violated by non-provision of emergency medical care); *State of Punjab v Mohinder Singh Chawla* AIR 1997 SC 1225 (Right to life includes access to health care services); *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297 (Right to life requires the social and economic empowerment of tribal peoples); *State of Himachal Pradesh v Raja Mahendra Pal* AIR 1999 SC 1786 (Right to life includes right to livelihood); *Akhtari B v State of Madhya Pradesh* AIR 2001 SC 1528 (Right to life includes right to parental care); *Murli S Deora v Union of India* AIR 2002 SC 40 (Right to life includes right not to be victim of air pollution and requires ban of smoking in public places); *Secretary, Minor Irrigation and Rural Engineering Services UP v Sahngoo Ram Arya and Another* AIR 2002 SC 2225 (Right to life includes right not to be hounded and constantly harassed by police); *MC Metha v Union of India* AIR 2004 SCW 4033 (B)(Right to life includes rights to enjoyment of pollution-free water and air); *Kapila Hingorani v State of Bihar* AIR 2005 SC 980 (Right to life includes right of workers to earn a salary).

117 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*') at para 31.

has a strong interest in protecting and preserving the life and health of its citizens and to that end must do all in its power to protect and preserve life.' <sup>119</sup>

However, the *Soobramoney* Court did not ground a positive obligation to provide such goods in the right to life. The appellant, who required renal dialysis in order to remain alive, argued that a decision not to provide him with such treatment at state expense infringed his right to life, read with his right not to be refused emergency medical treatment. <sup>120</sup> He relied, for this part of his argument, on the judgment of the Indian Supreme Court in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*. <sup>121</sup> In dismissing the claim, the Court regarded it as significant

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that, unlike its Indian counterpart, the Final Constitution contained a right not to be refused emergency medical treatment in FC s 27(3), which would logically apply to situations similar to that in *Samity* (where the claimant was in urgent need of immediate care). <sup>122</sup> The *Soobramoney* Court thus thought it unnecessary to engage the more general right to life in this matter. Further, since Mr Soobramoney's condition did not constitute a medical emergency, FC s 27(3) was held to be inapplicable. <sup>123</sup> Instead, the *Soobramoney* Court proceeded to evaluate the claim in light of the right to have access to adequate health care services in FC s 27(1) and (2) and found that the non-provision of dialysis to Mr Soobramoney, in terms of a rationally conceived and bona fide resource rationing policy, was not in breach of the state's FC s 27 obligations. <sup>124</sup>

While clearly ruling out the application of the right to life in circumstances covered by FC s 27(3), *Soobramoney* does not directly address whether the right to life may be used in conjunction with FC s 27(1) in circumstances where death may result from a refusal of medical treatment in non-emergency situations. <sup>125</sup> So while it seems clear from Sachs J's observation that 'the right to life may [not] . . . be extended to encompass the right indefinitely to evade death', <sup>126</sup> it is not clear

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118 Ibid at para 54.

119 Ibid at para 39.

120 Ibid at para 14.

121 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

122 *Soobramoney* (supra) at paras 15-18.

123 Ibid at paras 20-21.

124 Ibid at paras 29, 36-37.

125 I have criticized the manner in which the judgment sidesteps this question and thereby reads down the ambit of the right to life elsewhere. See Pieterse 'A Different Shade of Red' (supra) at 382; M Pieterse 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004) 26 *Human Rights Quarterly* 882, 900. See C Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206, 236-237.

whether the judgment similarly precludes claims for life-saving treatment in terms of the right to life.

The Constitutional Court seemed to acknowledge that the effect of the obligation to fulfil the right to life may mandate special consideration for claims for life-saving treatment in *Minister of Health v Treatment Action Campaign (No 2)*.<sup>127</sup> In *TAC*, the Court remarked that 'regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of Nevirapine to mother and child at the time of birth'.<sup>128</sup> However, it nowhere explicitly depicted the restrictive policy as potentially falling foul of the obligation to fulfil the right to life. To date, the only explicit acknowledgement that the right to life has a role to play in securing access to life-saving medical treatment is the WLD's finding in *Hay v B* that a child's inviolable right to life justified an order that he receive life-saving medical treatment against the wishes of his parents.<sup>129</sup>

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Apart from decisions concerning access to health care services, an acknowledgement of the socio-economic dimensions of the right to life motivated an obiter remark in the CPD that a prohibition on begging on privately owned public retail premises would be unlikely to withstand constitutional scrutiny. In *Victoria & Alfred Waterfront v Police Commissioner, Western Cape*, Desai J expressed 'grave reservations' on the constitutionality of such a prohibition. He continued:

The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights, we are required to value those rights above all others. Furthermore, the right to life encompasses more than "mere animal existence". It includes the right to livelihood.<sup>130</sup>

Finally, the Constitutional Court acknowledged that the 'intertwined' rights to life and to dignity were implicated in a matter concerning the denial of social security benefits.<sup>131</sup> In *Khosa*, the Court declared legislative provisions that limited social security benefits to South African citizens unconstitutional, since these provisions infringed the rights of non-citizens to equality and to have access to social security. In accepting social security as necessary for enjoyment of the right to life, Mokgoro J held that '[w]hen the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with

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126 *Soobramoney* (supra) at para 57. See also D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-economic Rights Claims' (1998) 14 *SAJHR* 327, 327-328.

127 See Pieterse 'A Different Shade of Red' (supra) at 385; Scott & Alston (supra) at 255.

128 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*') at para 72. See also *TAC* (supra) at para 131.

129 See *Hay v B* (supra) at 486B-E.

130 *Victoria & Alfred Waterfront v Police Commissioner, Western Cape* 2004 (4) SA 444, 446D-G (C).

131 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 41.

the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness.'<sup>132</sup>

It therefore seems that, while South African courts are prepared to acknowledge that the right to life encompasses access to such socio-economic amenities as are necessary for human survival and flourishing, they are unwilling to simultaneously acknowledge that this understanding of the right entails obligations beyond those imposed upon the State in terms of Chapter 2's enumerated socio-economic rights. At the moment, it, the right to life plays an indirect role in decisions concerning urgent access to vital socio-economic goods and services. While one may lament the inability to deploy the right to life in a manner that might enable one to secure access to those goods necessary for surviving and flourishing, it is encouraging that the socio-economic dimensions of the obligation to fulfil the right to life are not denied.

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132 *Ibid* at paras 44 and 81.