The South African Constitutional Court and the unborn

Shaun de Freitas[1]

Abstract

The South African Constitutional Court has not yet been confronted with having to make a finding on the status of the unborn against the background of the South African Bill of Rights. Expecting that the Constitutional Court will sometime in the future be approached in this regard, this article presents some preparatory foundational insights on what the approach of the said Court should be. In this regard, the law-making function of the judiciary and the importance of an informative and rational approach towards the protection of the unborn in the judicial process are emphasised. A more nuanced approach by the judiciary towards the status of the unborn will provide more sensitivity towards matters which overlap with the practice of religion on the one hand and the protection of the unborn on the other. Examples in this regard are conscientious objections by medical practitioners against partaking in abortions due to their religious beliefs, and the dissemination of ethical or jurisprudential knowledge of the unborn to students in secular institutions of education who, in accordance with their religious beliefs, oppose the termination of the unborn. Religious institutions which oppose abortions will also be obligated by their own tenets to form part of such a judicial process, and this is allowed for by the Constitutional Court of South Africa.

Keywords Abortion, unborn, right to life, abortion and the judiciary, the right to life and the courts, the right to life and the South African Constitution.

1. Introduction

In South Africa, the recognition of the unborn[2] has yet to be addressed at the highest national level of judicial scrutiny – whilst the highest courts of many other states with strong human rights jurisprudence such as America, Canada and Germany have already had dealings with the issue. The South African *Choice on Termina-*

[1] Shaun de Freitas (*1970) is an Associate Professor of Law at the University of the Free State, South Africa. His legal speciality is religious rights and freedoms. Article received: 7 June 2012; Accepted: 29 December 2012. The article uses British English. Contact: Department of Constitutional Law and Philosophy of Law, Faculty of Law, PO Box 339, University of the Free State, Bloemfontein, 9300, South Africa. E-mail: defreitas@ufs.ac.za.

[2] In this article, "unborn" refers to the "entity" formed at fertilisation and continuing until birth, while "fertilisation" refers to the union of ovum and sperm.

tion of Pregnancy Act[3] basically allows for abortion on demand any time during approximately the first 20 weeks of pregnancy and in the words of John Smyth (2006:228), "most clinics, government and private, regard any abortion under 20 weeks as 'on demand' and most ignore the requirement that a doctor must assist the mother to make the decision." The High Court judgment (more than a decade ago) of *Christian Lawyers Association of Southern Africa v. Minister of Health and Others*[4] is the only "leading authority" for South African jurisprudence in this regard.[5] This judgment, says Tjakie Naudé (1999:547), failed to consider whether section 12(2)(a) of the South African Constitution[6] creates a constitutional right to have an abortion on demand up to the moment before birth, or only a "qualified" right to have an abortion on certain grounds and up to a certain stage of foetal development.[7]

In a democratic and constitutional dispensation aspiring to the furtherance of human rights application, South African jurisprudence on a fundamental matter such as the legal status of the unborn in the context of the South African Constitution, still has much to aspire towards. Bearing in mind that to date the South African Constitutional Court has not been approached in this regard, it is important that preparatory discussion on this issue be presented. Consequently, this article calls for having the Constitutional Court assist in gaining more clarity on the legal status of the unborn against the background of a more improved degree of legal recognition. In this regard, support is given to the role of the South African Constitutional Court in approaching the legal status of the unborn from a more nuanced and sensitive point of view, bearing in mind that the woman's right to have an abortion should be qualified against the background of the interests of the unborn as well.[8]

---

[3] 92 of 1996.

[4] 1998 (4) SA 1113. Hereafter referred to as the "*CLA*-judgment".

[5] For criticism on the said judgment, see Tjakie Naudé 1999:541-563 and S.A. de Freitas 2005:124 and 126-141.

[6] Which reads: "Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction". This represents the often referred to "pro-choice" view, which proclaims that the pregnant mother should have the freedom to make her own choices pertaining to matters related to her body.

[7] Henk Botha (2009:210) comments against the background of bearers of human dignity in South Africa, that *Christian Lawyers Association of SA v. Minister of Health*, "although it makes sense of the prominence afforded in the 1996 Constitution to reproductive freedom, it can be faulted for its formalism and its refusal to engage fundamental ethical issues raised by the legalisation of abortion".

[8] The following view by Tjakie Naudé (1999:551) is therefore supported: "A contextual approach should not allow a court interpreting the right to life to look at the right to bodily integrity, freedom, equality, human dignity and privacy of pregnant women only, whilst leaving the object of the right to life out of consideration." In this regard Naudé (1999:553) states: "Is the outcome intended by 12(2)(a) really that foetal life is not protected by the constitution, so that a woman has a constitutional right to have an abortion on demand up to the moment of birth? This would mean that legislation encouraging the

More specifically this article firstly postulates the importance of the "law-making function" of the judiciary in such contentious and complex issues, together with an emphasis on the responsibility of the judiciary to provide for an inclusive, impartial and informative decision-making process. In this regard, the reader is reminded of the important role that civil society, especially religious associations, may play in the judicial process. Secondly, the role of science and the recognition of the inherent value of the unborn in assisting the judiciary in such a matter is presented.

2. The unborn and the judiciary

Most liberal democracies, according to Michael Perry (2007:88), empower their judiciaries to enforce their constitutional law of human rights. This implies that the judiciary gains in its law-making authority, Perry (2007:90) stating that "[m]ost entrenched human rights are indeterminate in the context of many of the cases in which they are invoked. Consequently, in protecting entrenched human rights, courts are often in the position of 'making' law … ." This certainly applies to the Constitutional Court of South Africa. In *S v. Williams* the South African Constitutional Court stated:

> Courts do have a role to play in the promotion and development of a new culture "founded on the recognition of human rights", in particular, with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored.[9]

Ronald Dworkin (cited in Dellapenna 2006:1095) postulates that the quality of public debate is higher, more focused, and more extensive when the decision is to be rendered by a court rather than by a legislature. According to Du Plessis (2002:28-29), the Constitutional Court's judgments are "not cast aside as matters of dry law, settling technical disputes. Rather, they have the potential to stimulate debate and reflection, and to draw praise and criticism, becoming part of a rich and varied dialogue about ongoing moral and political issues within South Africa."[10] Peter

use of abortion as contraception even in the last trimester of pregnancy cannot be declared unconstitutional". Surely it cannot be that the South African Constitution allows for this type of practice.

[9] 1995 (7) BCLR 861 (CC): 866 E-G.

[10] Charles Ngwena (1998:57-58) also states that the *CLA*-judgment fell short of a comprehensive enumeration of rights to abortion under the Constitution and that: "The task is one that can only be authoritatively discharged when the court with ultimate jurisdiction in constitutional matters, the Con-

Russell (1995:146) states that it is especially in matters concerning pornography, prostitution, restrictions on Sunday shopping, the death penalty, cloning and abortion where judicialisation should best be understood, not as transferring decision-making authority from one branch of government to another, but rather as judicial processing of social controversy. The importance of the judiciary in such "socially controversial" issues is further explained against the background of the "balancing of interests" jurisprudence.[11] In this regard, Alexander Aleinikoff (1987:984) states that the judiciary improves the balancing process by giving weight to interests that the legislature tends to ignore or undervalue. This is more specifically explained in that the judiciary's application of the balancing exercise reinforces representation, hereby ensuring that the interests of unpopular or underrepresented groups are accommodated (and accommodated fairly).[12]

The Supreme Court of Appeal in *Stewart v. Botha*[13] stated that "… it should not be asked of the law to answer the question as to whether or not a 'particular child should have been born at all' as this 'goes so deeply to the heart of what it is to be human.'" In this regard, Sonia Human and Lize Mills (2010:88) comment that it should be the *duty of the courts to answer the most difficult questions.*[14] This implies also that the Constitutional Court will have to explain why the unborn

stitutional Court, is seized of the matter".

[11] By such "balancing" is meant the theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests (Aleinikoff 1987:945). Aleinikoff (1987:946) further explains that the "balancing metaphor" takes the form of where the Court talks about one interest outweighing another or where, according to the Court, one interest does not override another – each survives and is given its due.

[12] Aleinikoff (1987:1001) adds that: "Balancing may appear inevitable, not because we can't think in non-balancing ways, but because it seems unreasonable not to take all the relevant interests into account in deciding an important question." See what John Hart Ely (1973:933-934) states regarding the importance of the judiciary regarding the interests of the foetus: "In his famous *Carolene Products* footnote, Justice Stone suggested that the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of "discrete and insular minorities" unable to form effective political alliances … Compared with men, very few women sit in our legislatures … But *no* fetuses sit in our legislatures. Of course they have their champions, but so have women. The two interests have clashed repeatedly in the political arena, and have continued to do so…"

[13] 2008 6 SA 310 (SCA).

[14] (Author's emphasis). Also see Naudé 1999:551; Fuller1978:366-367; and Aulis1986:198. Similarly, the South African High Court in *S v. Mshumpa* (2008 1 SACR 126 [E]), although the court (per Froneman) found the State's argument to be "passionate, eloquent and temptingly persuasive", it refrained from engaging in any substantial evaluation of its merits. According to Rani Pillay (2010:234-235), the said court chose instead to adopt a largely pragmatic approach and focused on what it regarded as "important impediments" to developing the common law regarding the extending of personhood status to the unborn against the background of establishing feticide as a possible crime in South Africa.

is not human or worthy of protection. Similarly, Tjakie Naudé (1999:554), in her criticism of the *CLA*-judgment, states that the Court cannot skip a thorough consideration of the value of life. To do so, says Naudé, would be to choose a radical free model of interpretation, without the judge being able to argue convincingly how the desired outcome was reached. To ignore efforts at clarifying the legal status of the unborn due to the "complexity" and "disparate" views surrounding the legal status of the unborn (or due to fears of reflecting insensitivity towards the pregnant woman), is simply a weak argument. With special reference to the legal status of the unborn, the judiciary has on more than one occasion proclaimed its exclusion on matters so complex. The irony is that by avoiding the issue, a decision is in fact made which influences perspectives on the unborn.[15] Referring to Judge McCreath's view in the *CLA*-judgment, Denise Meyerson (1999:54) comments that Judge McCreath's suggestion that the plaintiffs might have raised a different cause of action from the one they did is not in the least convincing. The judge, according to Meyerson (1999:54), suggested that the plaintiffs, instead of framing their cause of action in "absolute terms", might have argued that the rights of the woman and that of the unborn compete and that the "Choice Act" does not provide the right balance between the unborn's right to life and the woman's right to liberty. This statement, says Meyerson (1999:54), makes no sense. Either section 11 confers a right to life on the unborn or it does not.

Here it is important to emphasize the role of civil society, especially those religious institutions that have an interest in the protection of the unborn, in taking the matter to the Constitutional Court or in becoming involved in the Court proceedings in other ways, for example as *amicus curiae*. Access to the Constitutional Court is provided for in the Constitutional Court Rules, which permit a person with an interest in a matter before the Constitutional Court and who is not a party in the matter to be admitted as an *amicus curiae* (De Waal et al 2001:119). An *amicus curiae* assists the court by providing information or argument (usually by means of written submissions but also via oral submissions) concerning questions relating to law or fact. The *amicus* can have an interest in the case at hand (or can be a source of expertise on the matter relevant to the case being addressed), and can enter the proceedings either voluntarily or be requested by the court to urge a particular position. This allows organised civil society (for example the churches) to intervene in a case and present arguments before the court (Jagwanth 2003:15). According to Jagwanth (2003:16), public interest litigation and intervention in courts by or-

[15] Rani Pillay (2010:234) refers to the *CLA*-judgment as having relinquished a valuable opportunity to engage with the interpretation and development of whether an unborn child is a legal persona under the common law and adds that the same opportunity again presented itself in *S v. Mshumpa* (2008 1 SACR 126 (E).

ganised civil society has resulted in tremendous victories for disadvantaged groups in other parts of the world.

From the above, the argument is therefore made that the judiciary in general, and the highest domestic human rights courts specifically, have, in a democratic and rule of law dispensation, a constructive and developmental role to play regarding complex yet foundational human rights questions such as that related to the legal status of the unborn. Civil society, especially religious associations, also have a role to play in this. To assist in this regard, the role of science and the idea of the unborn as, at best, something human, and at worst, something so closely resembling humanity that it should be awarded some or other protection, are argued for in the next section.

3. Towards establishing the value of the unborn

Questions as to the legal status of the unborn surely necessitate some enquiry as to what it means *to be human.* If an important end of the law is the human being, and if it is critical for our understanding of human rights law to see how it can protect the individual, then it is also important *to address* the legal status of the unborn. This gains in importance when one bears in mind that the debate on the nature of the unborn has not quietened down, and has, in fact, intensified. In addition, advances in medical science and technology have had a profound impact on the areas of human reproduction, pregnancy and foetology, which in turn, has transformed the understanding of the unborn to that of an individual with a separate genetic identity from that of its mother (Pillay 2010:237).

In *Roe v. Wade*[16], the American Supreme Court was presented with briefs describing foetal development and containing photographs of the unborn. Nevertheless, all the Justices remained silent on the issue as to the *actual characteristics* of the unborn. The nearest they came to discussion on this was their consideration of the "viability factor", which is in essence a *relational* characteristic (rather than a characteristic primarily of the *nature* of the foetus). Similarly Judge McCreath in the *CLA*-judgment argued that medical evidence was irrelevant.[17] Regarding the *CLA*-judgment,

[16] 410 U.S. 113 (1973). S.J. Frankowski (1987:23-24) comments that the ***Roe***-decision was revolutionary for many reasons, one of them being that for all practical purposes, abortion on demand suddenly became a matter of constitutional right.

[17] In this regard, Judge McCreath in the *CLA*-judgment (1118 B-D) stated: "The plaintiffs' cause of action, founded, as it is, solely on s 11 of the Constitution, is therefore dependent for its validity on the question whether 'everyone' or 'every person' applies to the foetus 'from the moment of the child's conception'. The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth." Naudé (1999:553) criticises Judge McCreath's reliance on the Canadian case of *Tremblay v. Daigle* so as to support the view that medical evidence is irrelevant. In fact, Naudé states that the said Canadian

Tjakie Naudé (1999:553) questions whether section 12(2)(a) of the South African Constitution was intended to allow for abortions even in the period of pregnancy immediately preceding birth. Could this well be the case? If this was the intention, says Naudé, then it can be argued that the state may pay women to have abortions in order to ensure a ready supply of cadaver foetal brain tissue to be used in the treatment of disease.[18] Having brought this to our attention, Naudé (1999:553) comes to the conclusion that section 12(2)(a) does not create a constitutional right to have an abortion on demand up to just before birth, *and once a court accepts this view, medical evidence would be relevant for establishing the stages of foetal development involved.*[19]

Rani Pillay (2010:238) comments that whatever the reasons for judges' reluctance to take into consideration advances in medical science and technology in interpreting and applying the law, it is clear that their approach to the beginning of human personhood is incompatible with the imperative that law be impartial, relevant and dynamic. The judiciary must make a point of choosing its language carefully so as to be sensitive towards the issue in general. In this regard, the European Court of Human Rights in the recent case of *Vo v. France*[20] stated (as per majority judgment): "they [human embryos] are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation" (Joseph 2009:211). Jozef Dorscheidt (2010:444) observes that in 2006 the District Court of Amsterdam concluded that in an advanced pregnancy of twenty-seven weeks, the unborn child had to be regarded as "another person" under the *Compulsory Admissions in Psychiatric Hospitals Act*. In this regard, it was acknowledged that the unborn child was capable of experiencing danger within the meaning of the law, which was believed to justify the authorisation of a compulsory measure in this case – an acknowledgment that according to Dorscheidt was "quite a break-through". It will be difficult to exclude a scientific analysis of foetal development, hereby assisting what Justice Cameron refers to as "that quality of open-minded readings to persuasion without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication. Impartiality requires, in short, a mind, open to persuasion

judgment did not categorically exclude the relevance of science.

[18] Here Naudé is referring to a situation sketched by Denise Meyerson.

[19] Naudé (1999:553) adds that: "As a court must consider s 12(2)(a) for its interpretation of s 11, it should therefore be prepared to admit medical evidence when it considers s 11, although such evidence would not necessarily be decisive."

[20] App. No. 53924/00, Eur. Ct. H.R., 8 July 2004.

by the evidence and the submissions of counsel …"[21] This undoubtedly implies the relevance of science in the determination of the legal status of the unborn.

David Bilchitz (2009:52) states that a related and central principle of the new constitutional order in South Africa is that the interests of the most vulnerable in our society must be protected. Taking the meaning of the "most vulnerable in our society" a step further in his analysis of the '"legal personhood and dignity of non-human animals", Bilchitz (2009:52) asks: "Why is it that we should value all and only human beings and only confer on them rights to decent treatment?" Bilchitz is implying here the need for considering the interests of animals. However, the question that Bilchitz presents can also be applied to the *human* foetus.

Bilchitz adds that, although section 8(4) of the South African Constitution provides that a juristic person is entitled to the rights in the Bill of Rights (to the extent required by the nature of the rights and the nature of the juristic person), there is no similar provision in relation to natural persons. In this regard, Bilchitz (2009:67) states:

> It would be absurd, however, to suggest that the Bill of Rights was only designed to protect the interests of juristic persons and there are other clear textual pointers against such an interpretation. Perhaps it was too obvious to include in the application clause but the rights of natural persons must, by necessary implication, be protected by the Bill of Rights. The extension of the category of natural persons thus becomes crucial in determining who is entitled to the protection of the Bill of Rights.

May such an extension of the category of natural persons not include the unborn? If it is proposed for animals then why not for the unborn? In commenting on Martha Nussbaum's notion of dignity and capabilities, which is attractive in that it inculcates respect for each form of life that exists and requires us to treat each being according to the standards appropriate for its flourishing (Bilchitz 2009:64), Bilchitz (2009:65) states: "It attempts to move away from arbitrary exclusions (something that has characterised South Africa's past) to embrace all beings capable of flourishing. It also seeks to respect the variable goods of different beings, reflecting the distinctiveness and individuality of each." Bearing Bilchitz's observations in mind, is there any reason why the protection of the unborn may not be seriously considered? Even if the unborn is not perceived as human, "it" should at least enjoy some sensitivity from the law. Coleman (1984:17) argues that if dogs and post offices, which

[21] *SA Commercial Catering and Allied Workers Union v. Irvin and Johnson Ltd (Seafood Division Fish Processing)* 2000 8 BCLR 886 CC 893 (this is a judgment of the South African Constitutional Court).

are not persons and do not bear constitutional rights, enjoy protection, all the more reason for the protection of the interests of the unborn.

The ever-growing relevance of science to the abortion debate, and the understanding that the unborn represents an entity that has intrinsic value worthy of protection, should assist in supporting the South African Constitutional Court in coming to a finding that recognises the protection of the unborn to some or other degree.

4. Conclusion

Whether the whole or a part of the *Choice on the Termination of Pregnancy Act* be presented to the Constitutional Court for a decision that it violates the right to life (or that the unborn requires some or other protection more than current South African legislation permits), it will be expected of the Court to refrain from making findings from which it is portrayed that "it is not the responsibility of the Court to make findings on matters so complex and contentious." What is hinted at here is an approach with the character of, for example, the German judiciary, where it found that "the state had a primary duty to protect human life, even before birth. This duty, which begins at conception, related to every individual life and included a duty also to protect the unborn child against the mother" (Chaskalson et al 1996:16-5). This did not exclude protection of the pregnant woman's rights, in that it was decided that where a woman insisted on having an abortion after she had been subjected to counselling designed to persuade her to carry the unborn to term, and the abortion was performed within a legislatively defined period, such an abortion need not be a criminal offence. Nevertheless, the illegal abortion could never be justified constitutionally because of the duty of the state to protect unborn life. The majority drew no distinction between pre- and post-natal life (Chaskalson et al 1996:16-5–16-6). The Court decided that the unborn is a bearer of constitutional rights from conception (Chaskalson et al 1996:16-6).[22]

The South African Constitutional Court needs to transcend the findings of "classical" judgments qualifying so-called unlimited access to abortions. In this regard, Tjakie Naudé (1999:549), commenting on the *CLA*-judgment, states:

> The US Supreme Court decision in *Roe v. Wade* involved a challenge by a woman against prohibitive legislation regarding abortion and that it is not therefore of much assistance to the question regarding whether there is any ground on which

[22] For more on this see Kommers, Donald P. 1977. Abortion and Constitution: United States and West Germany. *The American Journal of Comparative Law* 25(2): 255-285. This is basically the stance the German Court maintained in both of its major decisions pertaining to abortion jurisprudence handed down in 1975 and 1993 (in 1975, it was the West German Federal Constitutional Court and after Germany's reunification it was Germany's Federal Constitutional Court).

> permissive abortion legislation may be challenged on the basis that foetal life must be protected. The Court did not examine the subsequent controversy surrounding Roe, being content that that controversy did not affect the finding that the foetus is not a person.

Naudé (1999:556) adds that, if the judiciary is not allowed to review legislation such as the *Choice on Termination of Pregnancy Act*, the state could freely allow the termination on demand of a form of biological life with a clear connection to born human life (and which looks very much like born human life at some stage) without the judiciary being able to declare such legislation unconstitutional. The high regard for human life which the Constitution displays, says Naudé, would then be endangered so that the right to life itself would be threatened. Taking into account South Africa's transformation into a nation *aspiring towards the advancement of human rights and freedoms*,[23] there should be informative, impartial and constructive discourse on the legal status of the unborn, and in this regard, the Constitutional Court needs to play its expected role, together with those sectors of civil society, such as religious associations.

References

Aleinikoff, Alexander T. 1987. Constitutional law in the age of balancing. *The Yale Law Journal* 96(5):943-1005.

Bilchitz, David. 2009. Moving beyond arbitrariness: The legal personhood and dignity of non-human animals. *South African Journal for Human Rights* 25(1):38-72.

Botha, Henk. 2009. Human dignity in comparative perspective. *Stellenbosch Law Review* 20(2):171-220.

Chaskalson, M., Kentridge, J., Klaaren, J., Marcus, G., Spitz, D., Woolman, S. 1996. *Constitutional law of South Africa*. Kenwyn: Juta.

Coleman III, J.J. 1984. *Roe v. Wade*: A retrospective look at a judicial oxymoron. *Saint Louis University Law Journal* 29(7):7-44.

De Waal, J., Currie, I., Erasmus, G. (eds). 2001. *The Bill of Rights handbook*. 4th edition, Lansdowne: Juta.

Dellapenna, Joseph W. 2006. *Dispelling **the** myths of abortion history*. Durham, North Carolina: Carolina Academic Press.

Dorscheidt, Jozef H.H.M. 2010. Developments in legal and medical practice regarding the unborn child and the need to expand prenatal legal protection. *European Journal **of** Health Law* 17(5):433-454.

Du Plessis, M. 2002. Between apology and Utopia – the Constitutional Court and public opinion. *South African Journal of Human Rights* 18(1):1-40.

[23] Section 1 (a) of the South African Constitution, 1996.

Ely, John Hart. 1973. The wages of crying wolf: A comment on *Roe v. Wade. Yale Law Journal* 82:920-949.

Frankowski, S.J. 1987. United States of America, in S.J. Frankowski and G.F. Cole (eds). *Abortion and protection of the human fetus. Legal problems in a cross-cultural perspective.* Dordrecht/Boston/Lancaster: Martinus Nijhoff, 17-74.

Human, Sonia and Mills, Lize. 2010. The immeasurable wrongfulness of being: The denial of the claim for wrongful life. *Stellenbosch Law Review 2*1(1):67-89.

Jagwanth, S. 2003. *Management of social transformations*. Discussion Paper 65, Democracy, Civil Society and the South African Constitution: Some Challenges. Paris: UNESCO.

Joseph, Rita. 2009. *Human rights and the unborn child.* Leiden: Martinus Nijhoff.

Meyerson, D. 1999. Abortion: the constitutional issues. *South African Law Journal* 116(1):50-59.

Naudé, Tjakie. 1999. The value of life. A note on *Christian Lawyers Association of SA v. Minister of Health. South African Journal of Human Rights*15(4):541-563.

Ngwena, Charles. 1998. The history and transformation of abortion law in South Africa. *Acta Academica* 30(3):32-68.

Perry, Michael J. 2007. *Toward a theory of human rights. Religion, law, courts.* Cambridge: Cambridge University Press.

Pillay, Rani. 2010. The beginning of human personhood: Is South African law outdated? *Stellenbosch Law Review* 2(2010):230-238.

Russell, Peter H. 1995. Canadian constraints on judicialization from without, in C. Neal Tate and Torbjörn Vallinder (eds.). *The global expansion of judicial power*. New York and London: New York University Press, 137-150.

Smyth, John. 2006. Moving towards improvement in SA abortion legislation. *Journal for Christian Scholarship* 42 (Special Issue 2):223-239.