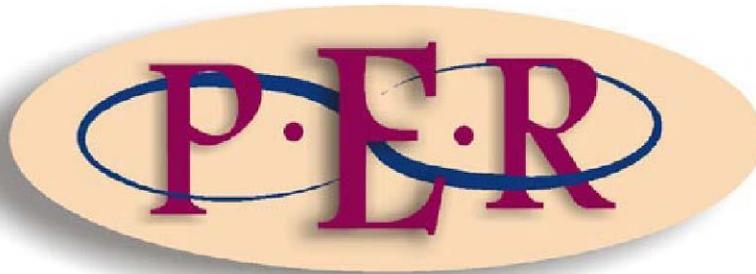


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ISSN 1727-3781



**2015 VOLUME 18 No 2**

<http://dx.doi.org/10.4314/pelj.v18i2.09>

## PROVISIONAL THOUGHTS ON LIMITATIONS TO THE RIGHT TO PROCREATE

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Freedom is the recognition of necessity<sup>1</sup>

Since 1950 the world population has multiplied more rapidly than ever before. In 1950 there were 2.5 billion people on earth and in 2005 there were 6.5 billion. This number could rise by 2015 to more than 9 billion.<sup>2</sup> In 1979 the human population was estimated to be approximately doubling in total every 36 years.<sup>3</sup> This led some authors to conclude that "[t]he human population is already above the optimum size".<sup>4</sup> This rapid growth results in severe ecological, psychological, political, economic and sociological ramifications<sup>5</sup> and it may well be concluded that warnings of authors as far back as 1798 have (collectively) been neglected or ignored. Malthus for instance warned that the population must always be kept down to the means of subsistence.<sup>6</sup> John Stuart Mill<sup>7</sup> allowed population control as one of the few exceptions to government non-interference. More recently, Hardin<sup>8</sup> approaches the issue from the notion of the commons – a shared, finite resource (for instance water, forest land and

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<sup>1</sup> Hegel as per Hardin 1968 *Science* 1248.

<sup>2</sup> Population Reference Bureau 2015 <http://goo.gl/nDJ4PF>.

<sup>3</sup> Bolner and Jacobsen 1979 *Loy L Rev* 236.

<sup>4</sup> Ehrlich, Ehrlich and Holdren *Ecoscience* 738.

<sup>5</sup> See eg UN *Population Debate*. One contribution reads as follows: "[T]he population problem is too often defined in narrow ... terms of too many people pressing on inadequate food supplies. This is but one dimension of the problem ... (O)thers include pollution and the disruption of the earth's ecosystem, depletion of mineral and water resources, energy shortages, erosion, deforestation, expanding deserts, unemployment, overcrowded cities ... [N]o country is spared the impact of population growth ... for we all live on a shrinking planet." Italics added.

<sup>6</sup> Malthus *An Essay on the Principle of Population* xii referred to by Bolner and Jacobsen 1979 *Loy L Rev* 236. Malthus explained that the human population expands exponentially while the increase of means takes place arithmetically. The imbalance created by this state of affairs is corrected by either a "positive check" (famine, disease, war) or theoretically by a "preventative check" (sexual abstinence). See Kates 2004 *Environmental Values* 51.

<sup>7</sup> Riley *Mill on Liberty* 97.

<sup>8</sup> Hardin 1968 *Science* 1248.

air) in which the cost of an individual's use is borne by all while benefits accrue mostly to himself.<sup>9</sup> He argues that freedom to procreate will bring ruin to all.

Because individuals will continue exploiting the commons indefinitely, human beings always perceive an increase in personal benefits from additional exploitation to be greater than personal costs.<sup>10</sup> Hardin concludes therefore that if means cannot be found to divide the ownership of the commons to hold the individual liable for the total cost of his actions, or if prohibitions cannot be imposed to inhibit exploitation, the commons will be destroyed. Applying this approach to the question of procreation he states that "[F]reedom to breed is intolerable ... [t]o couple the concept of freedom to breed with the belief that everyone has an equal right to the commons is to lock the world into a tragic course of action."<sup>11</sup>

Hardin's statement encapsulates the thesis for the current research – to what extent does the finite nature of the commons pose a limitation to the right to procreate? Can any choice and decision regarding the establishment and size of a family irrevocably rest with the family itself?<sup>12</sup> It is clear that the proverb that every (English-)man's

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<sup>9</sup> He explains his theory as follows:

[T]he tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

As a rational being, each herdsman seeks to maximise his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility *to me* of adding one more animal to my herd?" This utility has one negative and one positive component.

1. The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1  
 2. The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision making herdsman is only a fraction of -1.  
 Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another ... But this is the conclusion reached by each and every rational herdsman sharing a commons. *Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit- in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.* Italics added.

<sup>10</sup> Hardin 1968 *Science* 1247.

<sup>11</sup> Hardin 1968 *Science* 1246. See, also, Goodwin 2012 *Macalester Journal of Philosophy* 42.

<sup>12</sup> Thant *International Planned Parenthood News* 3 as quoted in Hardin 1968 *Science* 1247.

home is his castle may seriously be challenged by the protection and maintenance of the commons.

This contribution will consider the issue from a South African point of view which, in essence, entails a study of section 36 of the *Constitution*. This section principally regulates the limitation of constitutionally entrenched rights. However, for the sake of completeness a more general background regarding the limitation of the right to procreate against the background of ecological factors and socio-economic factors will be provided in paragraph 2.

## **2 Structuring of a social policy with regard to population control – a few introductory remarks**

It is trite that it is the duty of the State as protector of the common good to protect and maintain the commons.<sup>13</sup> The situation may be complicated, though, as the State's responsibility to implement measures is multi-dimensional and often affected by the strong moral, cultural and religious values of various communities. It is suggested, however, that it can safely be taken as a point of departure that dwindling resources *prima facie* pose a situation where continued growth of the population ultimately cannot go on uncontrolled – "[i]n the very long run, continued growth of the ... population would first become intolerable and then physically impossible".<sup>14</sup> This two-pronged starting point raises a plethora of questions: Is it within the authority of the State to adopt social policies which lead to a limitation of population growth; what exactly is it that the State must protect – is it the survival and bare existence of the human species as such or is it a form of life qualified by ethical good (the quality of life);<sup>15</sup> must the number of people be reduced or should other solutions be found to minimize the impact of the population on the commons; what means of "combating the threat" should be applied by the State; at what point has the size of the population made effective government impossible? These are but a few of the questions and issues that arise. It does not need any elaboration that these questions have definite

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<sup>13</sup> See eg Munalula 2012 *Theo Inq L* 312. See too Goodwin 2012 *Macalester Journal of Philosophy* 43.

<sup>14</sup> Golding and Golding 1970 *Vand L Rev* 496.

<sup>15</sup> See in this respect Golding and Golding 1970 *Vand L Rev* 495.

ecological and socio-economic underpinnings – water and food shortages and damaging of the environment (*qua* examples of the depletion of the commons) may be a direct, and sometimes are, a direct consequence of overpopulation. The question remains, then, whether limitations may be placed on the right to procreate because of socio-economic conditions and ecological factors.

Kotzé considers sustainability as the point of departure to structure a social policy. Sustainability, according to him, is the balancing mechanism between the most basic (socio-economic) conditions of human existence on the one hand and ecological interests on the other<sup>16</sup> - more of the one implies less of the other unless a compromise is found which affords equal importance to ecological, social and economic interests. It is not clear what is meant by "most basic (socio-economic) conditions". If it is meant that survival is threatened only if ecological interests threaten literally such most basic socio-economic conditions, it is suggested that the definition of sustainability is too narrow. It is further not clear what survival means. Would it be survival as reflected in the availability of the most basic socio-economic conditions of human existence? It appears that there is not sufficient clarity in the identification of the threat or how to address it. For instance, overcrowding certainly is a threat, but does this necessarily mean that the number of people must be reduced? It is suggested that the exact nature of the threat as well as what it is that is threatened must be identified also to reflect on the question whether overpopulation and dwindling resources may serve as a limitation to the right to procreate. It will be argued in paragraph 5 *infra* that clarity must be had on these issues before section 36 of the *Constitution* can be invoked.

It is not altogether clear how to structure a social policy regarding population growth. This is largely due to the fact that there is no single body of received opinion that applies unconditionally. As the point of departure, though, it is accepted that the problem cannot simply be human survival or, put somewhat differently, the survival of the human species. It cannot be accepted unconditionally that the human species will not survive if the population were not limited; the species would survive even if

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<sup>16</sup> Kotzé 2010 *JHRE* 136.

humans procreated freely. Many would die off but the species would survive.<sup>17</sup> This leaves the question, then, what is it that needs to be protected?

Arguing as they do that mere survival cannot be the justification for a social policy, Golding and Golding depart from the point that it is a form of ethical life that must be protected - it is "our" obligation "to promote what is *good*".<sup>18</sup> To determine good in situations where a choice must be exercised, good is rarely a single good, but rather a cluster of goods. Every good has its own, legitimate appeal but all goods cannot be realised simultaneously and in the same degree. Different goods must therefore be ranked into relations of higher and lower when exercising a choice and even if it is not always clear where on a valuation scale a particular good finds itself, ranking nevertheless does take place. The authors provide<sup>19</sup> the following example as a scale for ranking: Going from lower to higher life or survival takes the lowest position. Material goods, recreational pursuit, friendship, knowledge, love and "radiant virtue" then follow. Debate may ensue about where a specific good must be located and the estimation may vary due to one's disposition.

Values do not only display a ranking in accordance with "valuational" height but also in accordance with "valuational" strength, in the sense that some may be stronger and some weaker. Friendship and love are higher on the valuation scale but a breach of friendship or an incapacity to love is not regarded as seriously as murder. Life (survival) is a stronger value and the deduction is made that the strength of a value is measured by the gravity of the violation against it – the good attendant upon the realization of a value is inversely proportional to the gravity of its violence.<sup>20</sup> The position is explained as follows by Hartmann:

The higher value is always the more conditioned, the more dependent and in this sense the weaker; its fulfilment is conceivable only in so far as it is raised upon the fulfilment of the lower values. But the more unconditioned, the more elementary, and in this sense the stronger value is always the lower; it is only a base for the

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<sup>17</sup> Golding and Golding 1970 *Vand L Rev* 497.

<sup>18</sup> Golding and Golding 1970 *Vand L Rev* 496.

<sup>19</sup> Golding and Golding 1970 *Vand L Rev* 498.

<sup>20</sup> Golding and Golding 1970 *Vand L Rev* 498. The authors refer here to the work of Hartmann *Ethics* from 444-463.

moral life, not a fulfilment of its meaning ... [T]he greatest moral desert attaches to the highest values.<sup>21</sup>

From this exposition Golding and Golding conclude that the very lowest values, particularly survival (life), have whatever value they have because they are conditions for the higher goods. The value of life is therefore derivative. This means that even though sight may never be lost of its importance, sheer survival should never be accepted unconditionally as the justification for a social policy. "[W]hat is at stake is not the survival of the species, but rather the survival, or realization, of a way of life."<sup>22</sup>

How are values to be ranked when exercising a choice with regard to social policy? There is no ready answer. The hierarchy of the scale of values does not necessarily provide a resolution of conflicts within clusters of goods. A higher value should not *ipso facto* be preferred over a lower; this may be impossible. On the other hand it may be unworthy to prefer a lower value over a higher. Irrespective of these difficulties the uneasy synthesis of values that comprise the way of life or good that is sought to be preserved must be accurately identified to insure that the means employed to promote the way of life does not in the final instance destroy it. It is not sufficient to argue that the species will not survive if a specific means is not adopted. If the solution to a given situation requires that morality be fundamentally extended, it is likely that the new synthesis of values promoted by the solution will not embody the good that society by implication acknowledges, specifically if it involves according survival a higher rather than a derivative status. In the final instance what is sought is "[t]o promote the *survival of a way of life that we consider good*."<sup>23</sup>

The detrimental effect of an over-populated earth is well documented and in this paragraph only a brief exposition of the state of the commons in South Africa will be provided. More specifically population growth and the exploitation of the environment for financial gain will be addressed. These are but two of the major contributors in a plethora of circumstances.<sup>24</sup> Issues not referred to include, *inter alia*, cultural and

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<sup>21</sup> Hartmann as referred to by Golding and Golding 1970 *Vand L Rev* 451-452.

<sup>22</sup> Golding and Golding 1970 *Vand L Rev* 498.

<sup>23</sup> Golding and Golding 1970 *Vand L Rev* 499. Italics added.

<sup>24</sup> See <http://www.unfa.org/6billion/populationissues/development.htm> (hereafter "population issues"). According to this source 20% of the world's people living in the world's higher income

religious issues<sup>25</sup> and poor education. It goes without saying that these aspects can hardly be evaluated in isolation, as they are interrelated.

According to 2011 census statistics the population of South Africa was 51,770,560 people. This figure reflects a 767% growth from 1911. It is anticipated that in 2025 the population will be 56,255,907.<sup>26</sup> Females comprise approximately 51% of the population. 15,100,089 (29,2%) of the population falls in the 0-14 years category, 22934,113 (44,3%) in the 15-39 category, 10,970,366 (21.2%) in the 40-64 category and 2,793,992 (5,4%) in the 65 and over category. The male population growth is higher since more males than females were born between 1991 and 2001, and more female than male deaths of people aged 20-29 have been recorded since 2000.<sup>27</sup> The fertility rate of the South African population is declining. Whereas rates in regions such as Asia and Latin America have more than halved during the last 50 years, the rates in Sub-Saharan Africa remain high. The average total fertility rate in this region has

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countries are responsible for 86% of total private consumption compared with the poorest 20%, who account for only 1.3%. The richest 20% account for 53% of carbon dioxide emissions and the poorest 20% for 3%. A child born in the industrial world adds more to consumption and pollution levels in one lifetime than do 30-50 children born in developing countries. The authors warn that as living standards rise in developing countries the environmental consequences of population growth are amplified with ever-increasing numbers of people aspiring to "live better". Trends relating to the three "renewable" resources on which human life depends, namely water, air and land are becoming visible; eg 5-7 million hectares of agricultural lands are lost to accelerating land degradation and rapid urbanization every year; population growth in 2025 will lead to approximately 3 billion people in 48 countries being seriously affected by water shortages and rising sea levels because of CO2 emissions, which will seriously disrupt agricultural production. See too Kates 2004 *Environmental Values* 51.

<sup>25</sup> In this respect, reference may be made to the contribution of Munalula 2012 *Theo Inq L* 312. She argues that the best interests of the child should be considered as the primary consideration in the decision to procreate. At 306 she notes that Africa is a continent that favours large families. Large families are often "[t]he result of a lack of interest in, or access to, family planning and sustained use of contraceptives. ... The need to procreate emanates from a combination of factors including patriarchal norms, customary law and religious prescriptions, extended family values and, ironically, poverty itself ... Many African people see in reproduction an opportunity to prove their masculinity or femininity and assure their posterity". At 311 she proceeds to explain that reproduction may increase the suffering caused by overpopulation – in this sense exercising a legal right may be morally wrong. A child has a right to responsible parenting; to bring a child into the world when he or she will be cruelly deprived of all or most of the basic goods of human life is not an act of parental responsibility. At 316 she concludes that African culture tends to favour large families (regardless of the individual's means) thereby promoting broad-based rights and responsibilities in the care and maintenance of children *qua* vulnerable members of society. Individual duties and responsibilities are obscured in the process. See also Goodwin 2012 *Macalester Journal of Philosophy* 42; Orimoogunje *et al* 2011 *IFE Psychology* 58.

<sup>26</sup> South African Institute of Race Relations *South Africa Survey* 2012 2.

<sup>27</sup> South African Institute of Race Relations *South Africa Survey* 2012 10.

exceeded 5.1 between 2005 and 2010. In South Africa the rate has dropped from 2.92 in 2001 to 2.35 in 2011. This figure compares favourably with most African countries but appears to be higher than the international average. The birth rate has dropped from 26.1 in 2001 to 21 in 2011 and it is expected that it will drop further to 18 in 2025. An interesting piece of information emerges in the "Births minus Deaths" category in that in 1985 the difference between deaths as a proportion of births added up to 24,4% while in 2011 this figure was 56,6%. It was anticipated that in 2025 this figure will be higher than 71,7% as the number of births will decrease while the number of deaths will increase. In the period 2001-2011 the percentage of women who are HIV-positive has risen from 17,4% to 19,4%. The social security budget reflects a change in social security expenditure from 1994 to 2014 of 1250%. Its proportion of total government expenditure is 15,8% and its proportion to the GDP 4,8%.

Information pertaining to housing proves the existence of a clear and constantly increasing demand for formal housing. The provision in this category increased by 139,8% from 1996 to 2011 and in the informal housing category by 20,8%. With regard to the number of households, 86,1% of all households have access to free basic water. Free basic water comprises 6000 litres per household per month and is funded using local government revenue from appropriately structured water tariffs.<sup>28</sup>

When looking at the figures and statistics in the previous paragraph it must immediately be stressed that population growth, even though it is declining, is still higher than the average. It is commonly accepted that lack of skills and inability to enter the job market and secure good employment stems from a poor education background and results, *inter alia*, in higher population growth figures.<sup>29</sup> As such the population growth may be viewed as a symptom of poor education. However, its effects on the environment must still be evaluated. For the current purposes suffice it to evaluate the effect of the growth of the population on the water supply of the country.

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<sup>28</sup> South African Institute of Race Relations *South Africa Survey* 2012 637.

<sup>29</sup> See eg Munalula 2012 *Theo Inq L* 313; Orimoogunje *et al* 2011 *IFE Psychologia* 58; Van Bogaert 2005 *SAMJ* 32.

It speaks for itself that sustainable water provision is a critical component of the development of a society. In this respect South Africa faces severe challenges, since 65% the country is semi-arid. In this area the average rainfall is 450 mm/year, which is well below the world average of 860 mm/year. The country's water resources are scarce and limited in extent. In fact, the country is categorised as water-stressed, with an annual fresh water availability of less than 1700 m<sup>3</sup> *per capita* (the index for water stress). In fact, the current estimate is 1154 m<sup>3</sup> *per capita*/year and it is estimated that in 2025 the country will be among the countries in the world that will physically experience water scarcity with an annual fresh water availability of less than 1000 m<sup>3</sup> *per capita* (the index for water scarcity). A further complicating aspect relates to the unevenness of water resources across the country, which is compounded by a strong seasonality of rainfall. It is expected that in 2025 several water management areas will experience severe water deficits.

The demand for water is set to become a major concern. Already in 2004 Otieno and Ochieng commented on the position as follows:

Water demand projections in South Africa indicate an annual growth rate of 1.5% between 1990 and 2005 with 3.5% predicted for urban and industrial use and 1% for irrigation. Despite the conventional demand sectors, a major but salient demand sector is the "productive uses" of water at household level and village based enterprises. *This sector is predicted to more than double the water supply volume to become more demand responsive and sustainable.* Water transfer from surplus to deficit areas is also increasing leading to reduced availability in the transfer area. With the increase in population coupled with increased human activities, the impact of organisations or individuals on the water quality in rivers, streams, groundwater and wetlands will make water unavailable through pollution. Deteriorating water quality is one of the major threats to South Africa's capability to provide sufficient water of appropriate quality to meet its needs and to ensure environmental sustainability. *These conditions will put pressure on the already stressed water systems leading to a reduction in water availability, a situation likely to result in increase in conflicts over water affectation.*<sup>30</sup>

#### **4 Brief consideration of the constitutional right to procreate and possible limitations to the right**

##### ***4.1 The right to privacy and dignity as fortification of the right to make decisions regarding reproduction***

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<sup>30</sup> Otieno and Ochieng "Water Management Tools" 121. Italics added.

Various provisions in the South African Bill of Rights enshrined in the *Constitution* contain prescripts which are relevant for the current discussion. They include section 12(2), which provides for the right to bodily and psychological integrity and which includes the *right to make decisions concerning reproduction* and the right to security in, and control over, one's body; section 24(b), which entails the right to have the environment protected for the benefit of present and future generations; and section 27(1)(b), which reads that everyone has the right to have access to sufficient food and water. The constitutional framework against which these provisions have to be understood, it is suggested, is to be found in the provisions in relation to privacy and dignity contained in sections 10 and 14 of the *Constitution*.<sup>31</sup> The rights to privacy and dignity serve as fortification of the right to make decisions about reproduction.<sup>32</sup>

Unlike almost all international instruments and some foreign constitutions,<sup>33</sup> the South African *Constitution*<sup>34</sup> does not contain a provision recognising the family as the basic unit of society. Neither is there any mention of the right freely to marry or to establish a family life.<sup>35</sup> The Constitutional Court explains that this omission must be understood in the context of South Africa being a multi-cultural jurisdiction:

The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. International experience accordingly suggests that a wide range of options on the subject would have been compatible with CP (constitutional principle) II. On the one hand, *the provisions of the NT (new text) would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family*. NT 7(1)

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<sup>31</sup> Currie and De Waal *Bill of Rights Handbook* 308, 522, 594.

<sup>32</sup> See *S v Makwanyane* 1995 3 SA 391 (CC) para 144; *In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) para 96; *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 28.

<sup>33</sup> See eg art 6(1) of the German *Grundgesetz*: "Ehe und Familie stehen unter dem besondern Schutze der staatlichen Ordnung".

<sup>34</sup> *Constitution of the Republic of South Africa, 1996*.

<sup>35</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) para 96. Ss 12(2)(a) and (b) of the *Constitution* provides for the right to bodily and psychological integrity, which includes the right to make decisions regarding reproduction and the right to security in and control over one's body.

enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected.<sup>36</sup>

It is clear that the court considers the constitutional safeguards, despite the absence of clauses expressly protecting the right to family life, sufficient to meet the obligations imposed by international human rights law to protect the rights of persons freely to marry and raise a family. In *Dawood, Shalabi and Thomas v Minister of Home Affairs* the court explains that marriage and family are matters of defining significance for many if not most people.<sup>37</sup> In particular the value of dignity in interpreting constitutional rights on the one hand and the right to dignity as enshrined in section 10 of the *Constitution* on the other are of particular relevance. In *Dawood* the Court held that the right to dignity is the primary right under these circumstances. Prohibiting a marriage relationship or the raising of a family would "[i]mpair(s) the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance".<sup>38</sup> The right is justiciable. As such it must be respected and protected, yet it may also be limited.<sup>39</sup>

#### **4.2 Scope of the rights to privacy and dignity**

The value of human dignity is safeguarded and promoted by the recognition of the right to dignity in the Bill of Rights. The central importance of this right was emphasised as follows by the Constitutional Court in *Makwanyane*:<sup>40</sup>

The right to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.

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<sup>36</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) paras 99-104. Italics added.

<sup>37</sup> *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) 28.

<sup>38</sup> Italics added.

<sup>39</sup> *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 35-37; *Booyesen v Minister of Home Affairs* 2001 4 SA 48S (CC). This much is clear from *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36. The applicants *in casu* argued that legislation interfering with the right to enter into marriage relationships infringed various constitutionally entrenched rights. The court held, however, that the primary right implicated under these circumstances is the right to dignity.

<sup>40</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 144.

The right to privacy enshrined in section 14 of the *Constitution* serves to protect and foster the right to dignity.<sup>41</sup> The section provides that everyone has the right to privacy and has on several occasions enjoyed the attention of the Constitutional Court. In *Bernstein v Bester*<sup>42</sup> the Court remarked as follows:

The concept of privacy is an amorphous and elusive one ... The scope of privacy has been closely related to the concept of identity and it has been stated that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity. ..." *The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.*

The exposition of the Court makes it clear that in the "[t]ruly personal realm" an expectation of privacy is more likely to be considered reasonable than such an expectation in the context of "[c]ommunal relations and activities".<sup>43</sup> In fact, the Court proceeds by approvingly referring to the German *Grundgesetz*. Unlike the position in South Africa the *Grundgesetz* does not entrench a general right to privacy, although isolated aspects of privacy (freedom of belief, protection of postal communications and inviolability of the home) are protected. The Court concludes that a very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions. Ultimately, however, there is a final sphere of human freedom that is untouchable and beyond interference from any public authority. In this most intimate core of privacy no limitation thereof is permitted. However, this intimate core is narrowly construed and "[i]s left behind when an individual enters into relationships with persons outside this closest intimate sphere;

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<sup>41</sup> *S v Jordan* 2002 6 SA 642 (CC) para 81. *In casu* the Court found that a prohibition on commercial sex does not encroach upon intimate or meaningful relationships.

<sup>42</sup> *Bernstein v Bester* 1996 2 SA 751 (CC) paras 65-67. Italics added.

<sup>43</sup> Currie and De Waal *Bill of Rights Handbook* 318.

the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation".<sup>44</sup>

It may provisionally be concluded that *prima facie* the inner sanctum would cover the decision to reproduce so that the individual would remain the final arbiter of his/her decisions in this respect. However, the question may well be raised whether circumstances such as over-population and the depletion of resources do not reflect a social dimension to the right to make decisions concerning reproduction which may indeed render it possible to limit the exercising of the right. In other words, does the welfare of society/do the interests of the State remove the location of the right down the continuum, rendering it legally possible to be limited? In *S v Jordan*<sup>45</sup> the Constitutional Court elaborated to some extent on this matter. Whereas the issue before the Court in *Bernstein* related to an examination of the respondents in terms of the *Companies Act*,<sup>46</sup> the facts in *Jordan* dealt with provisions of the *Sexual Offences Act*<sup>47</sup> which made it an offence to have unlawful carnal intercourse or commit an act of indecency for reward. The issue raised by these facts is of course where to locate acts of prostitution on the continuum of privacy interests, as it is a combination of the intimacy of an act of a sexual nature and of an impersonal cash transaction.

*In casu* the Court found that in its very essence prostitution is indiscriminate and loveless. Consequently it is not the form of intimate sexual expression that is penalised by criminal law but rather that the sex is indiscriminate and for reward. The sex worker "[i]s not nurturing relationships or taking life affirming decisions about birth, marriage or family; she is making money".<sup>48</sup> It is therefore clear that the act of prostitution

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<sup>44</sup> *Bernstein v Bester* 1996 2 SA 751 (CC) para 77. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) the Court explains that privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. It concludes that the level of justification for a limitation of the right must be evaluated on an *ad hoc* basis in the light of all relevant circumstances of each case. "[R]elevant circumstances would include whether the subject of the limitation is a natural or a juristic person as well as the nature and effect of the invasion of privacy" (para 18).

<sup>45</sup> *S v Jordan* 2002 6 SA 642 (CC).

<sup>46</sup> *Companies Act* 61 of 1973.

<sup>47</sup> *Sexual Offences Act* 23 of 1957.

<sup>48</sup> *S v Jordan* 2002 6 SA 642 (CC) para 83.

places her far away from the inner sanctum of projected privacy rights.<sup>49</sup> However, even though it is less difficult for the State to establish that the limitation is justifiable, the suppression of commercial sex cannot be justified merely on the basis of enforcing a particular view of morality. Reasons advanced by the State to justify such suppression therefore include that prostitution in itself is degrading to women; that it is conducive to violent abuse of prostitutes by both customers and pimps; that it is associated with, and encourages international trafficking in women; that it leads to child prostitution; that it carries an intensified risk of the spread of sexually transmitted diseases; that it goes hand in hand with high degrees of drug abuse; that it has close connections with other crimes; and that it is a frequent and persistent cause of public nuisance.<sup>50</sup> The Court consequently points out that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women.<sup>51</sup>

#### **4.3 The right to make decisions about reproduction enshrined in section 12(2)(a) of the Constitution**

Section 12(2) stipulates that everyone has the right to bodily and psychological integrity, which includes the right, *inter alia*, to make decisions concerning reproduction. The inclusion of this right serves as a recognition that the power to make decisions about reproduction is a crucial aspect of control over one's body.<sup>52</sup> It is suggested that the interpretation of this right to a substantial extent stems from the right to privacy and in fact appears to be bearing out on it. It comes as no surprise, therefore, that there is little case law on the particular provision. In *Christian Lawyers Association v Minister of Health*<sup>53</sup> the court had the opportunity, though, to deal with the matter in an application to strike down some provisions of the *Choice on Termination of Pregnancy Act 92* of 1996. It approached the matter from the perspective of the right of a woman to determine the fate of her own pregnancy.<sup>54</sup>

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<sup>49</sup> *S v Jordan* 2002 6 SA 642 (CC) para 83.

<sup>50</sup> *S v Jordan* 2002 6 SA 642 (CC) para 86.

<sup>51</sup> *S v Jordan* 2002 6 SA 642 (CC) para 93.

<sup>52</sup> Currie and De Waal *Bill of Rights Handbook* 308.

<sup>53</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD).

<sup>54</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD) 521G.

The court argues that section 12(2)(a) affords everyone in explicit language the right to bodily integrity, which includes the right to make decisions concerning reproduction. This provision clearly includes the right to choose whether or not to terminate a pregnancy. This constitutional right is reinforced by various other rights enshrined in the Bill of Rights, including the inherent right to dignity, to have one's dignity respected and protected, the right to privacy and the right to have access to reproductive health care.<sup>55</sup> A strong basis for the right to the termination of pregnancy is provided by the cumulative effect of the specific provision in section 12(2)(a) as reinforced by other constitutional rights.<sup>56</sup>

From this perspective it is clear that the State may not unduly interfere with a woman's right to terminate her pregnancy. However, as with all other constitutional rights, the Court concludes that the right to the termination of pregnancy is not absolute.

The state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman's right to choose in that regard. However, because the right itself is derived from the Constitution the regulation thereof by the state may amount to the denial of that right. Similarly any limitation of the right constitutes a limitation of a woman's fundamental right and is therefore valid only to the extent that such limitation is justifiable<sup>57</sup> in an open and democratic society based on human dignity, equality and freedom.<sup>58</sup>

The question arises what the true nature of the right to decisions concerning reproduction entails – what exactly is it that is constitutionally protected? Phrased somewhat differently, what falls in the "[t]ruly personal realm" or "inner sanctum" (*Bernstein*)? It is suggested that a proper reading of section 12(2) makes it abundantly clear that it is not the act of sexual intercourse. The exposition in *Jordan* conveys that sex may indeed have a social dimension when, for instance, it is for commercial purposes. Other factors may also be indicative of such a social dimension and it is argued that commercial purposes do not form a *numerus clausus* of limitations. What does fall in the inner sanctum, it is submitted, is the decision concerning reproduction.

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<sup>55</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD) 527A.

<sup>56</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD) 527B.

<sup>57</sup> In *S v Makwanyane* 1995 3 SA 391 (CC) the Constitutional Court indicated the general approach towards the interpretation of s 36 of the *Constitution*. See the text to para 3.1 above.

<sup>58</sup> *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD) 527D-F. See para 4.41 for a discussion of s 36(2) of the *Constitution*.

It is suggested that as such it has to be considered similarly, for instance, to the right to religious freedom.

*Prima facie* the right to make decisions concerning reproduction is couched in similar terms as the constitutional right to religious freedom – "[E]veryone has the right to freedom of conscience, religion, thought, belief and opinion."<sup>59</sup> In *Prince v President, Cape Law Society*<sup>60</sup> the Constitutional Court explained the nature of the right to religious freedom as follows:

[t]he right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination.<sup>61</sup>

Freedom of religion therefore has a distinct individual and collective dimension.<sup>62</sup> It is considered that only the entertaining of religious beliefs would fall in the inner sanctum or truly personal realm. Announcing such beliefs publicly and manifesting such beliefs openly on the other hand are activities which place the right to freedom of religion in the public domain. Limitations on the right to freedom of religion are provided for in section 31(2) of the *Constitution* in that the rights to practise one's religion and to form, join and maintain associations may not be exercised in a manner inconsistent with any provision of the Bill of Rights. It is therefore clear that it is the collective dimension of the right to freedom of religion that is constitutionally limited. The entertaining of religious beliefs would fall in the truly personal realm, in terms of which an expectation of privacy is more likely to be considered reasonable than such an expectation in the context of "[c]ommunal relations and activities".<sup>63</sup>

#### *A brief exposition of section 24(b)*

It is submitted that sections 24(b) and 27(1)(b) must be read together and also together with section 12(2)(a) in terms of the so-called principle of interdependency

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<sup>59</sup> S 15(1) of the *Constitution*.

<sup>60</sup> *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) para 38.

<sup>61</sup> See also *S v Lawrence* 1997 4 SA 1176 (CC) para 92. Furthermore, even though it is very important for the subject, no attention will be paid to the debate regarding abortion.

<sup>62</sup> See eg *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD) para 19.

<sup>63</sup> See the text accompanying n 40 above.

of rights. By their very nature sections 24(b) and 27(1)(b) do not only contain constitutionally protected rights but indeed also by implication provide for the possibility of justifiable limitations of the right to decide about reproduction. Section 24(b) provides that everyone has the right to have the environment protected, "[f]or the benefit of present and future generations, through reasonable legislative and other measures that ... (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."<sup>64</sup> Section 27(1)(b) reads that everyone has the right to have access to sufficient food and water and must be read in conjunction with section 24(b).<sup>65</sup>

From the wording of the section it is clear that by including environmental rights as justiciable, constitutionally protected rights the State requires that environmental considerations be accorded appropriate recognition in the administrative process.<sup>66</sup> By necessary implication this means that all government action and legislation must comply with the constitutional right to a healthy environment.<sup>67</sup> Currie and De Waal further suggest that in view of the fact that negative environmental impacts are often not restricted to individuals but also profoundly affect groups of people, individuals may exercise this right collectively.<sup>68</sup> The authors point out that *qua* constitutional right section 24(b) must also be read with section 8, which in essence means that it is not only the State that is bound by individual constitutional rights, but that individuals may now also assert their constitutional rights directly against others - the so-called direct horizontal application of the *Constitution*.<sup>69</sup>

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<sup>64</sup> Italics added.

<sup>65</sup> One may refer in this respect to the so-called principle of the interdependency of rights, which requires that fundamental rights must be interpreted in such a way that they reinforce and complement one another. When interpreting s 24(b) of the *Constitution* regard should therefore be had to other fundamental rights such as the rights to equality, life, dignity etc. See too Goodwin 2012 *Macalester Journal of Philosophy* 47 for an explanation of the protection of the ecological rights of future generations.

<sup>66</sup> *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) para 20.

<sup>67</sup> Currie and De Waal *Bill of Rights Handbook* 522.

<sup>68</sup> Currie and De Waal *Bill of Rights Handbook* 522.

<sup>69</sup> At Currie and De Waal *Bill of Rights Handbook* 524 the authors express the opinion that s 24(b) of the *Constitution* is unlikely to have direct horizontal application, as the subsection requires the State to take legislative and other steps to protect the environment. It imposes obligations only on the State and not on individuals.

The *National Environmental Management Act* 107 of 1998 provides a comprehensive definition of the environment. In terms of this definition the "environment" is the surroundings within which people exist, which are made up of:

- the land, water and atmosphere of the earth;
- micro-organisms, plant and animal life;
- any part or combination of the first mentioned two aspects and the interrelationships among and between them; and
- the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human life and well-being.

This anthropocentric approach to the environment reflects a clear recognition of the impact the environment has on human beings. The term environment should consequently not be limited to the non-human natural environment but must be defined broadly so as to include both the relationship between human beings *inter se* and people and the environment. Currie and De Waal suggest that such a wider definition of environment would incorporate both the socio-economic and the cultural dimensions of these interrelationships.<sup>70</sup> In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*<sup>71</sup> the Court elaborated comprehensively on the nature of the right. As its point of departure it takes the well-known dictum in *King v Dykes*<sup>72</sup> where it was explained that the idea that prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased was giving way to a more responsible approach that an owner may not use his land in a way prejudicial to his neighbours or the community and *that he holds the land in trust for future generations*. One of the recurring legal elements of ecological sustainable development is therefore the need to preserve natural systems for the benefit of future generations.<sup>73</sup> This approach bears on section 1(1) of the *National Environmental Management Act* 107 of 1998, which defines sustainable development

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<sup>70</sup> Currie and De Waal *Bill of Rights Handbook* 525.

<sup>71</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) 151.

<sup>72</sup> *King v Dykes* 1971 3 SA 540 (RA) 545G-H.

<sup>73</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) 143.

as the integration of social and environmental factors into planning, implementation and decision-making so as to ensure that development serves "[p]resent and future generations".

The nature of the State's duty in terms of section 24(b) is a positive one. This goal must be achieved by legislation and administrative measures which include *inter alia* the securing of ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

#### **4.4 *Limitation of constitutionally entrenched rights – general background***

It is trite that constitutional rights may be limited; no right applies without limits. Section 8(1) of the Bill of Rights provides that the Bill applies to all law and that it binds the legislature, the executive, the judiciary and all organs of State. This provision is self-explanatory, and suffice it to note that "law" in this section has to be broadly interpreted so as to include statutory law, common law and also customary law. Section 36(2) provides that the limitation of a constitutionally entrenched right must comply with the prescriptions of section 36(1) or with the dictates of any other provision of the *Constitution*. In terms of section 36(1) the limitation of a constitutionally protected right must adhere to the following requirements:

- the limitation must be sanctioned by law of general application;
- must be reasonable; and
- must be justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also the availability of less restrictive means to achieve the purpose.

Section 36 in essence provides for a two-stage approach to the question of the limitation of a constitutional right: Has such a right been infringed by law or the conduct of another person and, depending on a positive answer, can the infringement be justified as a permissible limitation of the right? It needs no further illumination that a statutory provision to the effect that procreation be limited would constitute an infringement of this right. The reasonableness of such a limitation must then be

established. In this respect it is important to note that a court will not determine in the abstract whether the limitation is justifiable in an open and democratic society. On the contrary, evidence about the impact, for instance sociological evidence or statistical data about the impact of such a legislative restriction on society, must be presented.<sup>74</sup> Where justification rests on policy or factual considerations, such must be put before the court. Failure to do so may lead to a deduction that the limitation is not justifiable.<sup>75</sup>

Certain definite requirements pertaining to the limitation of constitutional rights have developed:

- Law of general application includes legislation, delegated legislation and the South African common law. To qualify as "law" under this rubric, a rule of these sources must be accessible, precise and of general application.
- The requirement of reasonableness and justifiability has given rise to a substantial body of jurisprudence. In essence the requirement of reasonableness is aimed at ensuring that a law should not invade a right any further than it needs in order to achieve its purpose. The requirement conveys that it must be shown that the particular law serves a constitutionally acceptable purpose and that there is sufficient proportionality between the infringement of the fundamental right in question and the benefit it is designed to achieve.

The requirement of reasonableness was held to mean that a law or action limiting a right must have a reasonable goal and also that the means for achieving that goal must be reasonable.<sup>76</sup> In *S v Makwanyane*<sup>77</sup> the Constitutional Court explained the position as follows:

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<sup>74</sup> See eg *S v Meaker* 1998 8 BCLR 1038 (W), where the court held at 1047A-G that it is not necessarily required that vast amounts of sources to substantiate an argument be put before a court. A "common sense analysis" of the purpose and need for legislation and of the "social and economic" milieu giving rise to the legislations would be sufficient.

<sup>75</sup> *Phillips v Director of Public Prosecutions* 2003 3 SA 345 (CC) para [20].

<sup>76</sup> See eg *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC).

<sup>77</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 104. In *S v Bhulwana* 1996 1 SA 388 (CC) the court explains the position graphically as follows: "In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be." (para 18).

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. ... The fact that different rights have different implications for democracy and, in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

This cautious approach was echoed later in a number of decisions. In *S v Manamela*<sup>78</sup> the Court explained that it has to engage in a balancing exercise and arrive at a global judgment on proportionality. It is not to adhere mechanically to a sequential checklist. As a general rule, however, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree, to be assessed in the concrete and legislative and social setting of the measure, paying due regard to the means which are realistically available in the country but without losing sight of the ultimate values to be protected.<sup>79</sup>

The nature of the right is of particular relevance. Most of the constitutionally entrenched rights are textually unqualified. The provision in section 11 that everyone has the right to life is, for example, not textually qualified and the only limitations placed on it are those imposed by section 36. However, the scope of some of the rights contained in the Bill is qualified by language that specifically demarcates their application. Section 12(2) of the Bill indeed serves as an example in point – the right to freedom of religion is limited by the provisions of section 31 in the sense that it may not be exercised in a manner inconsistent with any provision of the Bill of Rights. In similar fashion section 17 provides for the right to assemble, demonstrate, picket

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<sup>78</sup> *S v Manamela* 2000 3 SA 1 (CC).

<sup>79</sup> See, also, *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) paras [29]-[35].

and petition but stipulates that such assembly must take place peacefully and unarmed.<sup>80</sup>

It would appear that practical measures to effect population control will in view of the provisions of the Constitution be extremely difficult to implement. In this respect reference may be made to the so-called *jihua shengyu* or one-child-per-couple policy of the People's Republic of China. The idea of birth control was introduced as early as in the 1950s, when it became clear that the rapid population growth posed a potential threat to the economic development and food surplus in China.<sup>81</sup> Initially the approach was to "propagandize and popularize" birth control in densely populated areas, and this decision was followed by a propaganda campaign promoting late marriage and having two children only. However, the implementation of birth control policy was gradually transferred from a voluntary-based birth planning programme to a state-based control of population growth. Two steps were taken to promote population control. The first was the so-called "later, longer, fewer" campaign, which focused on extending contraceptive and abortion services into rural areas, longer intervals between births, and smaller families. The one-child policy took effect in 1979 when the Chinese Communist Party Central Committee and the State Council's Resolution Concerning the Strengthening of Birth Control and Strictly Controlling Population Growth announced that:

The State advocates that one couple has only one child. Except for special cases, with approval for second birth, government officials, workers and urban residents can only have one child for each couple. In rural areas, the State also advocates that each couple has only one child. However, with approval, those who have real difficulties can have their second child, several years after the birth of the first.<sup>82</sup>

People were encouraged to have only one child through financial and material incentives such as paid pregnancy, leave for up to three years, a 5-10% salary increase and preferential access to housing, schools and health services. Couples having a

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<sup>80</sup> See Currie and De Waal *Bill of Rights Handbook* 186. Other sections referred to include ss 16 of the *Constitution* (that the right to freedom of expression does not extend to advocacy of hatred that is based on ethnicity etc) and 31 (which provides that the rights of cultural, religious and linguistic communities may not be exercised in a manner inconsistent with any other right contained in the Bill).

<sup>81</sup> Settles and Sheng "The One-child Policy" 1.

<sup>82</sup> Settles and Sheng "The One-child Policy" 2.

second child were excluded from these benefits and suffered financial penalties such as financial levies on each additional child and sanctions which ranged from social pressure to curtailed career prospects in government jobs. Urban couples were persuaded more easily, but rural families were difficult to convince. Peasants with limited savings and without government pensions effectively still needed their children to support them in old age. Traditionally a married daughter would move into her husband's family home and lineage. A son was therefore essential to meet the demands of labour on farms and related businesses. Social control in the rural areas was weakened by the collapse of the old commune system due to the post-Mao economic reform. Local authorities were therefore forced to rely on fines to discourage higher order births and they embarked upon stringent birth control campaigns. Many women were consequently bullied into abortion and sterilisation. Since 1985 a softening of policy and a relaxing of the requirements to permit a second child have occurred. By 2001 a second birth was permitted if the first child in rural areas was a girl, if the couple were only children, or if the only child was disabled.

The one-child policy was successful in achieving the goals it was meant to achieve. It slowed down the population growth from 11.6% in 1979 to 5.9% in 2005. It reduced the population by an estimated 250-300 million people and the fertility rate fell from 2.8 in 1979 to 1.8 in 2001. In urban areas such as Beijing more than 95% of children are only children. In 2002 China adopted its first *Population and Family Planning Law* in which birth control is set out as fundamental State policy. The attachment of subsistence income, the use of physical force and the confiscation of property to pursue population goals are now formally banned. Fines for out-of-plan births are replaced by a "social compensation fee" which ranges from 10% of one's annual income in poor rural areas to three to seven times one's income in some urban areas.<sup>83</sup>

The one-child policy has had severe unintended impacts on the social and economic situation in China. These include *inter alia* an unbalanced gender ratio as well as an unbalanced urban-rural ratio of newborns. It is the unbalanced gender ratio especially

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<sup>83</sup> Settles and Sheng "The One-child Policy" 5. See, also, Nakra 2012 *World Future Review* 134. The author notes that China's National Population and Family Planning Commission announced in 2006 that the policy had helped to prevent 400 million births since its inception.

that has been severely criticized, since it was inevitably bound to lead to discrimination against female new-borns, who are aborted, abandoned, or unregistered, and are most likely to have disadvantaged status in matters of health care and education.<sup>84</sup>

It needs no further explanation that similar measures would have serious consequences in South Africa. The measures adopted by the Chinese would clearly infringe many if not all the rights entrenched in the Bill of Rights.

## 5 Conclusion

The limitation of the constitutional right to make decisions concerning reproduction is bound to be controversial. It is therefore important that a clear mind must address the question of why such limitation is required. Mere survival cannot serve as the justification for a social policy to this effect – rather, it is ethical life or whatever may be described as being good that must be protected. The exposition of the situation in China in paragraph 3.4 shows that such an ethical life must be accurately identified to insure that the means to be employed will not ultimately destroy it. It would appear, though, that the state of the commons in South Africa is poor. The 767% growth in population in the period 1911-2011 and the scarcity and serious deterioration of the quality of water bear on the worrisome situation. In fact, these factors serve as indicators that social policy in respect of population growth should be pro-active and that it may indeed be justified to limit constitutionally entrenched rights in this respect.<sup>85</sup>

The inner sanctum of the individual is shielded "[f]rom erosion by conflicting rights of the community".<sup>86</sup> However, in similar vein as the right to religious freedom, it would appear that the right enshrined in section 12(2) of the *Constitution* relates to decisions regarding reproduction – that constitutes the inner-sanctum that may not be eroded. The outward manifestation of the right (procreation), however, reflects an aspect of

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<sup>84</sup> See Settles and Sheng "The One-child Policy" 6 for a comprehensive discussion of the negative consequences of the one-child policy.

<sup>85</sup> *S v Meaker* 1998 8 BCLR 1038 (W) 1047; *Phillips v Director of Public Prosecutions* 2003 3 SA 345 (CC) para [20].

<sup>86</sup> *Bernstein v Bester* 1996 2 SA 751 (CC) para 66.

the right that may be subject to limitation. This much is clear from the discussion in *S v Jordan*.<sup>87</sup>

Section 36 in the final instance requires that any limitation must be justifiable in an open and democratic society and must reflect, *inter alia*, a *less restrictive means* to achieve the required purpose.<sup>88</sup> The multiple negative consequences pertaining to the Chinese one-child policy bear testimony to the wisdom of this provision. It is suggested that positive measures, for instance the provision of proper education and social provision rather than negative measures (the withholding of benefits or taxation) should be considered. The continued existence of the state may depend on the implementation of such measures.<sup>89</sup>

Ultimately, the wealth of a nation in the modern world does not come from the ground, or the forests, or even its other natural resources. Instead it resides in the health and well-being of its people. It is time ... to rethink ... human development strategy. The very first step in building a viable humane society would be to develop a viable universal national pension plan, along with social and health-care programs (sic!) to protect people from cradle to grave.<sup>90</sup>

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<sup>87</sup> See the text accompanying n 42 above.

<sup>88</sup> See *S v Makwanyane* 1995 3 SA 391 (CC) para [104] as well as the exposition of the position in China in the previous paragraph.

<sup>89</sup> In this respect it is suggested that the application of the so-called theory of public subjective rights may be considered. See eg Robinson 2013 *PELJ* 148-205.

<sup>90</sup> Nakra 2012 *World Future Review* 139. Italics added.

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## LIST OF ABBREVIATIONS

JHRE	Journal of Human Rights and the Environment
Loyola LR	Loy L Rev
PELJ	Potchefstroom Electronic Law Journal
SAMJ	South African Medical Journal
Theo Inq L	Theoretical Inquiries in Law
UN	United Nations
Vand L Rev	Vanderbilt Law Review