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The Mammoth Task of Realising the Right to Life: A South African Perspective

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Life is not a problem to be solved but a reality to be experienced

Soren Kierkegaard

Life is not about finding yourself, it is about creating yourself

George Bernard Shaw

Abstract

Concentrating on South Africa, this chapter critically scrutinises the realisation of everyone's right to life as guaranteed in section 11 of the Constitution of the Republic of South Africa. Although the right to life is explored within the ambit of an international legal framework, realising the right to life in South Africa, with its history of demeaning the value of the life of the majority of its inhabitants in the past, forms the main pivot of discussion. It is argued that, despite the 1996 Constitution's promise to heal these past divisions and improve the quality of life of all citizens and free each person's potential, the State has been ambivalent about realising everyone's right to life. As part of post-apartheid transformation, the State has, on the one hand, made substantial progresses in creating a supporting and legal environment for the attainment of a better life for some of its inhabitants. On the other hand, reality still reflects poignantly flaws in freeing everyone's potential, thus highlighting the mammoth task that lies ahead.

Keywords: right to life, human dignity, quality, poverty, discrimination

1. Introduction

Life is regarded as being God-given to all human beings [1]. The right to life, by itself, is thus not conferred to humans by the law [2]. It is a moral right independent of the law, since humans possess it simply by virtue of their nature as being human [3, 4]. Based on their uniqueness, the Supreme Court of New York in *Park v Chessin*, 1977 60 AD 2d 80, 400 NYS 110, acknowledged the fact that each human being is born as a whole, functional human being. As such, various authors [5, 6] advocate that each person must be treated as a complete human individual with inherent worth despite being different from others.

The inherent nature of the right to life is specifically recognised by the International Covenant on Civil and Political Rights [7], Convention on the Rights of the Child [8], the African Charter on the Rights and Welfare of the Child [9] and the Arab Charter on Human Rights [10]. Albeit its intrinsic nature, various international [11], regional [12] and foreign [13] legal instruments recognise the necessity of legally protecting the right to life. This necessity is welcomed as it serves as proof of the value attributed to the sanctity of life by the law [14]. It is, alongside, proclaimed that legal systems should create a liberating framework, providing legal subjects with qualities of moral support and independence [15].

The prominence placed on human life is, accordingly, internationally recognised as a legal entitlement by, inter alia, the Universal Declaration of Human Rights guaranteeing the “right to life, liberty and security of person” in article 3, by the International Convention on Civil and Political Rights [16], through article 6, providing that “Every human being has the inherent right to life which shall be protected by law and that no one shall be arbitrarily deprived of his life”, as well as by the United Nations Convention on the Rights of the Child. The right to life is, concomitantly, guaranteed to all people by regional instruments such as the European Convention on Human Rights and Fundamental Freedoms [17], the American Convention on Human Rights [18], the African Charter on Human and Peoples Rights [19] plus the African Charter on the Rights and Welfare of the Child [20].

It is submitted that the acknowledgement of the human's inherent worth by the law justifies the empowerment of everyone through all means to live full lives [21]. The latter was underscored by the General Comments and Recommendations, delivered by the Human Rights Treaty Bodies [22], stating that the inherent right to life must be dealt with in a broader manner requiring from States to adopt positive measures to enhance human life. Various authors [23–25] agree with this broader interpretation as to include, amongst other, a personal (encompasses an individualised claim to a basic quality of life and meaningful existence, the principle of the “sanctity of life” should take precedence over other rights [26]) right to the basic necessities of life, such as housing, education and health care (socio-economic rights). A narrow interpretation, on the other hand, would restrict the right to life to being a non-derogable right that must be respected under all circumstances [27], thus merely entailing the right to be physically alive and to breath (physical-biological existence) [3, 4, 28].

In taking a broader approach to the interpretation of the right to life, the United Nations Convention on the Rights of the Child, through article 6, obliges all State Parties to recognise

that every child has the inherent right to life and to ensure, to the maximum extent possible, the survival and development of the child. The General Comments and Recommendations [22] on the right to life in the context of the International Covenant on Civil and Political Rights concomitantly state that for the protection of the right to life by law, mandate positive measures must be taken by States in order to safeguard this right.

Both positive and negative obligations are, however, placed on State Parties. While negative duties include the State refraining from doing anything that could endanger the lives of human beings, the positive responsibilities include the duty that all possible/reasonable measures should be taken to realise life opportunities and ensure that all live a life worth living, taking economic, social and cultural conditions into account [29]. The Manual on Human Rights Reporting [30], equally, referred to both negative and positive State measures. This Manual identified the negative measures requiring from States “to refrain from any action that may intentionally take life away” and the positive measures, as those “designed to protect life”, including “increasing life expectancy, diminishing infant and child mortality, combating diseases and rehabilitating health as well as providing adequate nutritious foods and clean drinking water”. These encapsulate the creation of an environment that shows respect to human dignity by States in order to, to the maximum extent of their available resources, promote human survival and ensure optimal development which, in turn, demand the complete and holistic (physical, intellectual, emotional, spiritual, moral, psychological and social) development of at least every child [31, 32]. These positive measures, flowing forth from the right to life, entail the prerequisites for the optimal safeguarding and perpetuation of human life [33].

Since the main aim of this chapter is to provide a South African perspective on the practical realisation of the right to life, section 11 of the Constitution of the Republic of South Africa guaranteeing everyone the right to life is depicted by the way of a literature review as well as a legislative and case law analysis. Regard is taken of this country's historical experiences [34, 35] and future normative orientated Constitution promising the healing of past inequalities, the improving of the quality of life of all citizens and freeing the potential of each person in its preamble. The hope, this Constitution instilled in South Africans, is researched against the reality experienced by the majority of South Africans still anticipating a better, dignified life free from, especially, poverty.

Life is a dream for the wise, a game for the fool and a comedy for the rich, a tragedy for the poor

Sholom Aleichem

2. The right to life within a legislative framework

It was suggested that a broad definition of the right to life should be adopted in order to include much more than mere human existence. It is rather a right to the full enjoyment of human existence, without which, life would be meaningless [36]. This is underscored by the

Preamble of the Constitution of the RSA guaranteeing all a life that is worth living. The latter entails the living of a dignified life requiring that all humans be empowered to enjoy the benefits of humanity on an equal basis [21], since life is substantially diminished without dignity. An analysis of South African case law indicates that the Constitutional Court and High Court have, on several occasions [37], highlighted the importance of human dignity as a constitutional value when interpreting the right to life. As a justiciable and enforceable right, human dignity must, on the other hand, at all times, be respected and protected [38], thus obliging legal systems not to regard humans as mere objects that may be treated and punished as the State sees fit, but rather as autonomous subjects worthy of legal protection, physical and psychological growth and developed to being active participants in society [39, 40].

The kind of citizen being envisaged is one who will be instilled with values and act in the well-being of society based on respect for democracy, life, human dignity, equality and social justice. In accordance, the National Education Policy Act, 27 of 1996 [41], demands a school curriculum that aims at developing the full potential of each learner. It aims at creating life-long learners who are confident and independent, literate, numerate and multiskilled, compassionate, with a respect for the environment and the ability to participate in society as a critical and active citizen.

It is moreover emphasised that the integrity [42] including physical integrity, honour, reputation [43] and privacy [44–46] of humans needs to be protected in order to allow them to live with dignity and to create and develop sound relationships with all other human beings. The protection of the right to life coupled with the right to physical integrity was, for example, argued to be individually crucial and mutually foundational to the value system underscored by the Constitution in *Ex parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 28, as well as in *Bernstein v Bester N.N.O.* 1996 (2) SA 751 (CC) at para 67–68.

From another perspective, the courts in *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) and in *Stewart v Botha* 2008 (6) SA 310 (SCA) paras 23 and 27 were confronted with wrongful life claims posing difficult moral, ethical and social challenges. In these cases as well as in the case of *Friedman v Glicksman* 1996 (1) SA 1134 (W), it had to be considered whether the plaintiffs have suffered loss by giving birth to a child with disabilities and thus incapable of having a full and dignified life to live due to the doctors' not informing them of the unborn child's disabilities in which case they would have aborted the foetus. The enormous task for courts herein lies in the balancing of conflicting rights such as the right to life of the unborn child, the freedom of the parents' self-determination and the economic burden such a child may place on them. Such a balancing act cannot be performed by using a common normative currency such as the legal convictions of the community as it forms part of a wider political, social or moral decision-making process in an open democratic society [47, 48].

The right to life comprises much more than debating the legal medical and moral implications regarding abortion, the constitutionality of the death penalty [34, 35] or the right to die with dignity [49]. Emphasis must be placed on allowing everyone to live life in the fullest sense of the word. In this regard, non-discrimination, an adequate standard of living, human survival—the right to have positive steps taken to prolong life—and holistic human development—adding a new dimension to life—[42] are dynamic concepts encapsulated in the right

to life that must be taken cognisance of despite them presenting enormous challenges in optimally implementing the right to life in practice [33]. The mammoth task herein lies in overcoming the many encounters inhibiting humans to better themselves, optimally developing their talents and abilities to their fullest potential whilst living a responsible life in a society to which they feel a sense of belonging and wherein they can be free to be themselves [30]. With regard to living responsible lives, it is cautioned that, although people may differ on the interests which justify the right to life, they can nonetheless reach agreement that all has this right and use it as a basis to live and let live [50, 51]. The latter requires all to acknowledge that every right, even those inborn rights, has a concomitant duty.

Despite the fact that South African law does not provide for a hierarchy of fundamental rights [28], the Constitutional Court [34, 35] identified the rights to life and human dignity as the most superior fundamental right. This is due to the fact that the Constitutional Court found the right to life being a precursor to all other fundamental rights seeing that humans cannot exercise any of the rights enshrined in the Bill of Rights of the RSA without life itself. It is, in this regard, important also to mention that the normative burdens that are imposed by all other human rights must not be destructive of life or health, that deprive people of fundamental freedoms or that treat people in ways that are severely cruel or unfair [52, 53]. Whenever the rights to life and dignity, albeit being unqualified rights in contrast with international law [22, 43], are thus limited in terms of the limitation clause (section 36 of the Constitution of the RSA), they carry a great deal of weight when balanced against any justifications for their infringement [44–46]. Such limitations must thus serve a purpose which is particularly compelling in an open and democratic society [28].

With regard to life and human dignity, it is, for example, not believed that there could readily be legitimate purposes, which can justify its infringement/limitation [54]. Perhaps this can only be the case when the purpose of the limitation contains the protection of the life and/or human dignity of others or the protection of other rights, the limitation of which automatically involves the belittling of another's life, human dignity and/or physical and psychological integrity. Even then, the relation between the limitation and the purpose will be scrutinised very closely in respect of the inclination of the limitation to indeed achieve the purpose, as well as in respect of the possibility that the purpose can be achieved by alternative means [55, 56].

Although international law places both positive and negative duties on State Parties, as explained in the introduction of this chapter, when giving effect to the right to life, the positive duties of States necessitate more attention. States are obliged to view the right to life more positively and act more proactively—take deliberate, concrete and clearly targeted steps—in realising it in practice [42]. This is especially applicable to the State's duty to take action to protect human life against violation by others [34, 35 para. 117] and fulfil the most basic needs of humans. The latter entails specific focus being placed on the well-being and health of humans as well as the need for transformative State accountability in dealing with socio-economic rights. The latter requires more than just setting out abstract norms, but entails the formulation of realistic policies and workable programmes to ensure the implementation and ongoing evaluation of socio-economic rights as well as the provision of remedies in the event of violations [57]. In light hereof, the next part will cast a light on whether the State indeed fulfilled this obligation.

3. The realisation of the right to life in reality

The emphasis placed on the right to life is, *par excellence*, influenced by the current life experiences of the people living in South Africa. The history of the past decades has been such that the values of life and human dignity for the majority have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retribution and revenge of which the multiple xenophobia attacks and killings are but one example. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has played a huge part in this degeneration, not only because of its role in the conflicts of the past, but also by holding on to punishments which did not conform to a high regard for the dignity of humans and the value of every human life [34, 35, 58].

Subsequently to the adoption of the final Constitution of the Republic of South Africa, 108 of 1996, hopes were placed in the notion of freedom and a better life for all. The right to life, as guaranteed to everyone, validated a promise of opening the doors to a better and positive future for at least the majority of people, thus creating a legitimate expectation amongst the nation [59].

South Africans viewed the Constitution as signifying a significant break with the past, as it gave expression to the values of a more developed society, which relies heavily on morals rather than force, freedom rather than oppression and on equal opportunities rather than discrimination. As such, it was believed that the history of this country should influence the future positively and that all future actions should involve thoughtful thinking about the oppression and human injustices of the past in a manner providing normative direction for an improved future [60].

In this regard, the Bill of Rights of the RSA, guaranteeing the fundamental right to life to everyone, is regarded as playing a pivotal role in the inclusive building of South Africa's new democracy. Its legitimacy is, however, inevitably influenced by the prevalent legality of the democratic order as a whole [39, 40]. This part of the chapter illustrates the dangers of the right to life, as embedded in section 11, having mere symbolic value, if the implementation thereof is approached from a pure legal point of view, thus negating the multidimensional nature of the right to life encapsulating in reality a quality, dignified and enjoyable life.

It is argued that the noble ideals of the Constitution remained an ideal for the majority of South Africans since the concrete, practical daily lives lived by them and the facts they must endure on a daily basis still constitute a direct violation of their right to life [61]. Some of the most vulnerable and marginalised members of society are still being discriminated against and have not, even for a day, felt worthy of human existence [39, 40]. Research conducted in 2012—already 16 years into democracy—for example, found that poverty amongst South Africans and unequal treatment together remain to pose a significant threat to democracy [62]. As a direct result, the legitimacy levels of democracy in this country remain relatively low in comparison with other countries in Africa, albeit its value is supported by the majority [63]. Despite the fact that many factors still inhibit the full realisation of South African's right to life, emphasis can only be placed on these aspects, namely poverty and unequal treatment, within the scope of this chapter.

3.1. Poverty

Various authors [52, 53, 64], judges [60, 65] and policies [66] urgently call for the realisation of the human freedom from severe poverty, homelessness, poor health and hunger. This is done by endorsing an interest-based approach to human rights viewing poverty, consisting of a momentous level of material deprivation posing a serious threat to a number of interests such as health, physical security, autonomy, belonging, dignity, participation and friendship. It is argued that this freedom from poverty carries sufficient weight as to justify the imposition of positive duties upon others and the State specifically to protect the extreme poor from further impoverishment and assist those already suffering from severe material deprivation which puts inescapable constrain on their quality of life. This must, however, not remain an ideal in modern society as it did in South Africa. Despite government efforts in the form of allocating 60% of its budget to social wages, spending R1.5 million on erecting free homes and providing for free basic education to the poorest 60% of learners in 2013 alone, statistics indicate that 10.2 million people still suffered from extreme poverty, i.e., those living below the food poverty line, in 2011 [67].

The failure of bridging the economic divide, on which the past was built, has consequently led to increasing inequalities and undiminished levels of crime in this country [61]. It is well documented that criminals often come from the poorer section of society and that, whilst the majority of society are not involved in criminal acts, they live under constant fear of becoming victims of crime. There is thus no denying that criminal justice and criminal sanctions are essential elements of social order [47, 48].

The High Court concomitantly indicated, in *K v Minister of Safety and Security*, 2005 (6) SA 419 (CC) par. 10, that crimes violate the public's constitutional rights to privacy by invading the victims' personal spheres and murders violate the victim's right to life and, in most cases, his/her family of the right to maintenance and/or support. The Constitutional Court equally emphasised in *Steenkamp NO v Provincial Tender Board, Eastern Cape*, 2007 (3) SA 122 ((CC) para. 37), that the crime of murder entails a direct violation of the constitutional right to life.

In this regard, the State needs to be hold accountable for the high crime rate in South Africa and the legislature should carry the burden of proof to show what is proactively done to stop criminal behaviour, thus respecting everyone's right to life and social security [47, 48]. The State has, moreover, often been found to be the instigators of crimes against humanity thus negating the right to life, dignity and freedom and security of the person [39, 40]. Examples hereof include the extra-judicial killings by the police during violent suppressions of peaceful demonstrations of which the recent Marikana massacre [68] is but one example. It was in 2012 that the South African Police Force opened fire on striking mineworkers, which ended up in the fateful death of 34 mineworkers and 78 wounded. This amounted to the biggest event of police ruthlessness since the beginning of democracy, and it revived sad memories of the brutality suffered during this country's past. Further examples include the deaths and torture of people whilst being detained as a result of the bad conditions, over populated prisons or the ill treatment of prisoners [42].

Another example include the State's inability to safeguard its nation by providing immunity from arrest and surrender to the President of Sudan, Al Bashir, charged with a crime of genocide

by the International Criminal Court in the case of *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*, 2016 (3) SA 317 (SCA). It is argued that the State, in doing so, failed to protect their inhabitants' right to be protected against people making themselves guilty of war crimes and crimes against humanity and thus also their rights to life, human dignity and the right to freedom and security of the person. As such, the State also negated their obligation to always promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) thereof. The Supreme Court of Appeal, subsequently, found that the Litigation Centre's failure to deliver Al Bashir to the International Criminal Court was inconsistent with the State's obligations in terms of section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and thus unlawful.

The State is, however, not only an entity to be blamed for not acting proactively to protect the right to life as all citizens are obliged to respect this right. In *S v Hange* 2016 (1) NR 258, the Supreme Court of Appeal, for example, argued that, by abusing alcohol, the appellant had acted in breach of his duty of care towards the deceased and others not to infringe on their right to life and, for that reason, convicted the appellant of culpable homicide.

Another important consequence of severe poverty that needs mentioning is the fact that the poor, apart from being deprived of living a minimum desired lifestyle, is repeatedly denied of participation to democracy and social life at large [69]. This is mainly due to the fact that such people are experiencing concomitant extreme levels of desperation—if a person is starving and withered by the illnesses of malnutrition or HIV/AIDS, exposed to high children mortality, and poor psychological well-being, he/she may well not be able to vote or participate to any meaningful degree in political and democratic realm. As such, the very basis of participatory democracy which is endangered as the poor has an immense role to play in ensuring the practical realisation of socio-economic rights and thus shaping democratic politics [70]. The latter will not be possible or equitable unless it addresses the material conditions that impede such participation which is adequately addressed [71].

It is, in this regard, that emphasis should be placed on government's responsibility to guarantee at least a minimum core threshold of social rights that ensures that everyone is free from the general threats to his or her survival [72, 73]. Government needs to be held accountable for enhancing the general health of its society by providing preventative health-care measures such as immunisation, the provision of ample education on nutrition, hygiene and environmental sanitation [30]. Such freedom and the worth thereof are demonstrated by the incorporation of socio-economic rights in the Constitution of the RSA (and internationally), as providing an entitlement to an adequate, not a low minimum, but a higher standard of living, will enable all individuals to live decent lives [72, 73].

One example of living a decent life is access for all to a sufficient water supply as guaranteed by section 27(1) (b) of the Constitution of the RSA. In the matter of *Mazibuko v City of Johannesburg* CCT 39/09 (2009) ZACC 28, the applicants challenged the said municipality's water policy for its potential of depriving the extremely poor Phiri community of their constitutional right to sufficient water. It was claimed that the free basic water provided to them was not sufficient to guarantee them a life with dignity. They based their claim on the

constitutional promises to improve quality of life and to make every individual fit to survive and argued that the water policy was given effect to by a municipality obsessed with cost recovery through a metering system that mechanically disconnected the water supply once the basic allowance was exhausted, thus leaving the poorest amongst this community without access to sufficient water. The court was left with the mammoth task of determining the quantity of water needed to guarantee a right to life and dignity. In doing so, the court considered the obligation imposed on government by these two fundamental rights and whether or not the water policy and other measures taken were sufficient to at least ensure the progressive realisation of this community's right to water. In concluding that it was the municipality's (administrative sphere of government) prerogative and not that of the judiciary to quantify the water needed for basic human survival, the court sidestepped this task and found in favour of the municipality.

The Mazibuko judgement has been widely discussed. Some [74] agree that the municipality recognised the need to redistribute water resources and services more equitably in adopting a progressive water policy, guaranteeing the provision of a sustenance quantity of water per household per month. Others [42, 75, 76], to the contrary, argue that the municipality should have been held more accountable due to their constitutional obligations and the protection of the severely poor applicants who were subsequently deprived of water, an essential to livelihood.

The court's decision is therefore criticised, as it was based solely on the fulfilment of socio-economic rights instead of seeing the bigger infringement on the right to life as water is life. Adopting such a context-specific approach in line with the *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C)-case regarding the provision of adequate housing is critiqued as it is regarded that the judiciary negated their duty to protect citizens from the coercive powers of the State and thus to advance democratic transformation. In this regard, cognisance must also be taken of the reasons why rights often come into conflict with each other. Such conflict is generally created because of the opposing responsibilities they generate for the bearers thereof which cannot always be performed simultaneously—and those responsibilities conflict because the interests they serve clashes [50, 51, 76, 77]. This is especially true when the realisation of socio-economic rights by municipalities is involved. Whilst their responsibility to create better living conditions for their community is evident, they often misuse resources for personal gain (corruption).

It is, conversely, understandable that the judiciary, as but one of the three tiers of government, is cautious of overstepping their authority when socio-economic rights are involved due to the fact that the Constitution of the RSA makes provision in section 27(2) for the State taking reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of socio-economic rights, thus opening the door for placing more emphasis on available resources that the right to a dignified and quality life that will free everyone's potential [52, 53]. The inevitable result of depriving especially the poor is denying them of becoming full partners in society [71, 78]. This brings us to the second factor identified by research, which poses a threat to democracy, namely the persistence of unequal treatment.

3.2. Unequal treatment

The Bill of Rights of the RSA places pre-eminent value on equality, human dignity and life, as well as on freedom and security of persons. These and other rights to freedom of religion and belief, expression and association exist side by side with socio-economic rights.

When persistent discrimination is concerned, the institutional patterns of cultural values that constitute some as relatively unworthy of respect or esteem in a pluralistic South Africa require serious addressing as they still present a huge challenge in optimally giving effect to everyone's right to life [78]. The balancing of the right to life and cultural values presents a mammoth task as the Constitution of the RSA also allows for everyone to participate in the cultural life of his or her choice (section 30) and that person belonging to a specific cultural community may not be denied to maintain cultural associations (section 31). It is, however, important in these instances to notice that both these sections provide that cultural rights may not be exercised in a manner inconsistent with any other provision such as the right to life, the Bill of Rights. By taking cognisance of the fact that cultural rights may not be inconsistent with the Bill of Rights and the obligation of the judiciary to protect fundamental rights that the courts found in *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)*, (369/12) [2012] 106 ZASCA para 1 and *S v Chapman* 1997 (3) SA 341 (A) that so-called corrective rape, albeit its cultural connotation, infringes on the affected women's right to dignity, bodily integrity as it constitutes a humiliating, degrading as well as brutal invasion of the privacy and dignity of the victims. It was moreover found that such women are discriminated against purely by belonging to a particular cultural community. The courts also recognised the fact that women have a legitimate entitlement to live peaceful lives and to enjoy the tranquillity of their homes and families without the fear, the anxiety and the insecurity, which continuously diminishes the quality and enjoyment of their lives.

Apart from women being attributed less respect due to cultural reasons, they are also often the victims of the proprietorial attitude of men towards them. In *S v Mathe* 2014 (2) SACR 298 (KZD), it was, for example, shown that half of women killed in this country are murdered by their own husbands/partners. By regarding murder as the ultimate negation of the right to life, the court avowed that such attitudes and the concomitant presence of domestic violence had reached particularly serious proportions in society and eroded a wide range of the constitutional rights of women, such as the rights to equality, human dignity, freedom and security of their person, bodily integrity, not to be subjected to servitude, to privacy and the right to freedom of association, thus a ridicule of the right to life. It was also found that such attitudes causing women to live in constant fear are contrary to the ideals of an open democratic society based on values of human dignity, equality and freedom [79].

It is, conversely, not only the attitude of men that constitutes a problem with regard to treating all humans as equals. People with disabilities remain to be a vulnerable group in society, being robbed of living full lives. They are often explicitly and sometimes unintentionally discriminated against. It is, in this regard, essential to take note that the law and legislation alone cannot address such prejudices [76, 80]. The broader society must be made aware of the fact that even the person with severe and profound disabilities is vested with a right to life and must be afforded special care and education to maximise his/her potential as far as possible [21].

This will ensure that they too have the possibility of being employed and thus free from poverty. Despite its noble ideal, the State has hitherto not been successful in keeping up with the promises made in White Paper 6 [81] regarding inclusive education that will meet the needs of its diverse learner population and thus freeing everyone's potential to better quality of life [82]. Contradictions were, to the contrary, found in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC) with regard to the State's policy outwardly embracing inclusive education whilst inwardly remaining exclusionary.

Society, moreover, also often discriminates against a person on the basis of his/her sexual orientation [44–46]. The Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000(2) SA 1 (CC) alluded to the fact that such discrimination is the one of section 9(3)'s listed grounds of automatically unfair discrimination that had to be adjudicated by courts during the past decade. The court also mentioned that such discrimination in society has profound negative implications for the lives lived by gay and lesbians, stretching beyond the immediate impact thereof on their human dignity and self-esteem. They also have to endure blackmailing, police entrapment, violence and peripheral discrimination including refusal to use certain facilities accommodation and opportunities. Their situation is furthermore worsened by the fact that they constitute a political minority with little access to political power to secure favourable legislation for themselves.

Because of South Africa's history of discrimination based on race, so-called reversed discrimination also poses a mammoth task especially in the workplace due to section 9(2) of the Constitution of the RSA making provision for affirmative action. The latter has led to employment opportunities being specifically reserved for Black people to the detriment of White citizens. This has taken its toll on especially elder White men becoming unemployed and ending up living under severe poverty. Two very recent court cases, *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] 11 BLLR 1025 (CC) and *South African Restructuring and Insolvency Practitioners Association vs the Minister of Justice and Constitutional Development* (Case Number 4314/2014), addressed this new phenomena by specifically differentiating between numerical goals and quotas as part of an employment equity plan in terms of the Employment Equity Act. Emphasis was placed on section 15 of this Act defining affirmative action measures as processes designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented at all occupational levels in the workforce. It furthermore states that such processes must not unfairly discriminate against anyone and that the concept affirmative action includes preferential treatment and numerical goals, but excludes quotas (section 15(3)). As such, this Act does not require of employers to take decisions regarding their employment policy or practice that would create an absolute barrier (reversed discrimination) to the potential or continued employment or advancement of people who are not from designated groups. The main aim of employment equity plans should thus be directed solely at achieving “equitable” representation (section 20). Such plans should not concentrate on inflexible quotas, which are based on rational considerations, including job qualifications, the degree of underrepresentation, barriers and attempts to eliminate those from non-designated groups, as well as the pool of suitably qualified candidates. The hiring, promotion or reservation of a fixed number or percentage of persons or posts from the designated group alone—making designated group

status the only or dominant criterion—is thus prohibited and thus invalid although it very often still happens in South Africa and reverts to unfair discrimination. Employment equity plans should rather be founded on numerical goals which are grounded on realistic numbers of vacancies and which aim at appointing the best qualified applicants in vacancies.

4. Concluding remarks

Although it is well recognised that life itself is a moral human entitlement independent of the law, this chapter outlined the importance of international, regional and foreign law as well as, specifically, the Constitution of the RSA guaranteeing everyone the right to life. The latter lies in the fact, that the law attributes value to the sanctity of life, and concomitantly place both negative and positive duties upon States in this regard. In cautioning that the mere legislative recognition of such a right is not sufficient, emphasis was placed on the State's positive duties of optimally realising everyone's right to life by taking proactive, concrete and clearly targeted steps to not only protect this right from infringement, but also to do everything in their power to give effect to the development of humans and creating an environment in which everyone can realise his or her potential optimally.

By taking regard of South Africa's history mainly mirroring the total disregard for the value of the lives of the majority of its inhabitants, it was showed that fast amounts of continued severe poverty which lead to high crime rates and the persistence of unequal treatment do not even closely portray a definite commitment by the State to create better life conditions and opportunities for its society. As such, the transformational State has not fulfilled, albeit some improvement, the legitimate expectations created amongst South Africans by the 1996 Constitution of the RSA and the hopes instilled in them at the advent of a new and open democracy.

The mammoth task that lies ahead was highlighted with regard to the fact that the right to life entails more than mere human existence and thus a rhetoric concerning the moral implications regarding abortion, euthanasia and the constitutionality of the death penalty. The right to life rather involves the State and every living person to acknowledge their responsibility to one another and be accountable for developing all holistically, as well as creating the circumstances under which people live to such an extent that everyone can live life in the fullest sense of the word. In this instance, a culture of respect for life and other fundamental rights must be generated. This entails the equal treatment of all as well as the formation of an adequate standard of living and not mere survival of the fittest. For this to realise, extreme measures must be taken to eliminate the severe poverty amongst South Africans. The enormous responsibility herein lies in overcoming the many encounters still inhibiting humans to better themselves, of optimally developing their talents and abilities to their fullest potential whilst living a responsible life in a society to which they feel a sense of belonging and wherein they can be free to be themselves.

In order to achieve the above, the realisation of socio-economic rights is indispensable, as it encapsulates a right to the basic necessities of life, such as housing, electricity, water, basic education and health care without which no one can live a dignified, decent, better, full, participatory and

higher standard of living. The positive duties placed on government by socio-economic rights coupled with the right to life are enormous. Government cannot merely set abstract norms or shy away from their responsibility by continuing to use limited available resources as an excuse. They are required to formulate realistic and achievable policies and workable programmes to ensure the implementation and ongoing evaluation of socio-economic rights as well as the provision of remedies in the event of violations, thus accepting accountability. Such actions will not only better the lives of everyone but also alleviate poverty and the extreme high crime levels in this country to a remarkable degree.

Another aspect of this mammoth task that was identified in this chapter concerns the proper balancing of conflicting fundamental rights in ensuring the equal treatment of all. In doing so, the superiority of the rights to life and human dignity, thus carrying more weight than other fundamental rights must be the starting point of any balancing process. All must be made aware of the normative burdens imposed on them by democracy, never to act in a manner that may be destructive of life or health, which may deprive others of their fundamental freedoms, or that may treat people in ways that are severely cruel, degrading or unfair. Viewed against South Africa's discriminatory history, all must moreover be careful of not repeating the past by practicing so-called reversed discrimination especially in the workplace, thus depriving a different group of people of living quality lives.

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