

## The boy and his microscope: Interpreting section 56(1) of the National Health Act

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This article discusses the classic conflict between freedom and propriety with reference to the use of human gametes (sperm and egg cells) in South African law. The core question addressed is whether it is legal to use one's own gametes, or others' with their consent, for non-medical, non-sexual-intercourse purposes. This question is answered divergently by the two possible interpretations of the relevant statutory law – section 56(1) of the National Health Act – which is ambivalent. Since these two possible interpretations are representative of the two poles of the freedom v. propriety dichotomy, this matter can be perceived as a test of the depth of the South African juristic commitment to the principle of freedom. Section 56(1) is analysed, using the applicable common law presumptions as well as human rights. To illustrate the practical implications of these analyses, a hypothetical case study of a boy who studies human spermatozoa under his microscope at home is outlined and used throughout the article. The analyses conclude that the interpretation must be followed that answers the core question in the affirmative (in favour of freedom), namely that it is indeed legal to use one's own gametes, or others' with their consent, for non-medical, non-sexual-intercourse purposes.

### Part 1: Ambiguity and common-law presumptions

#### 1. Introduction

How does the classic conflict between freedom and propriety play itself out in the contemporary South African legal system? I do not attempt a general answer, but focus this article on one particular issue: the use of human gametes – sperm and egg cells. I pose the following question: Is it legal to use one's own gametes, or others' gametes with their consent, for non-medical and non-sexual-intercourse purposes? (Such possible purposes are plentiful, which I leave to the reader's imagination.) Using gametes for one's own purposes is admittedly not the most pressing social or legal problem facing our country; yet, as a matter of principle, this issue may be a test case for how deep our country's commitment to freedom really runs. In the memorable words of Mill, freedom entails 'doing as we like ... without impediment from our fellow-creatures, so long as what we do does not harm them *even though they should think our conduct foolish, perverse, or wrong*' (my emphasis).<sup>1</sup>

What does the law say about non-medical, non-sexual-intercourse gamete use? The relevant statutory provision is section 56(1) of the National Health Act.<sup>2</sup> In this article, I argue that the formulation of section 56(1) is ambiguous and admits of two possible meanings with vastly different consequences upon freedom. My arguments regarding the interpretation of section 56(1) are presented in two parts: Part 1 introduces the ambiguity in the Act and focuses on the traditional common law presumptions of statutory interpretation; and Part 2 analyses the human rights dimensions of section 56(1) and concludes with a suggested interpretation.

It should be noted that Chapter 8 of the Act, which includes section 56(1), has not yet taken effect: only once regulations relating to this chapter have been finalised, will this chapter be signed into effect by the President.<sup>3</sup> Several draft regulations relating to Chapter 8 have been published for public comment since the beginning of 2007.<sup>4-6</sup>

#### 2. Ambiguous formulation

Section 56(1) of the Act provides the following regarding the use of gametes:

A person may use ... gametes removed ... from a living person only for such medical or dental purposes as may be prescribed.

Section 1 of the Act defines 'prescribed' as meaning 'prescribed by regulation'. What is clear is that section 56(1) is only applicable to gametes outside the body, and is therefore not applicable to the use (as a necessary consequence) of gametes for the purpose of sexual intercourse. What is *not* clear, however, is whether gametes outside the human body may only be used for medical or dental purposes, or whether this section only applies to the *kinds* of medical and dental purposes that such gametes may be used for, and it therefore does not apply to the use of such gametes for non-medical purposes. The qualification 'medical or dental' renders the sentence a classic textbook example of ambiguity: does 'medical or dental' qualify (i) the *prescription*, i.e. that the regulations are only intended to prescribe within the parameters of medical and dental use and that use outside those parameters is per implication not prescribed and hence permissible (the restrictive interpretation); or does it qualify (ii) *use*, i.e. that use is confined to medical or dental use on a general level and that the regulations will be an additional layer of specific limitations (the extensive interpretation)?

If the intention of the legislature were the restrictive interpretation, the following clearer formulation is proposed: 'A person may use ... gametes removed ... from a living person, *where such use is for medical or dental purposes, only as prescribed*'. If, however, the intention of the legislature were the extensive interpretation, a clearer formulation of such intention would have been: 'A person may use ... gametes removed ... from a living person *only for medical or dental purposes, and only as prescribed*'.

The nomenclature of purported medical or dental purposes that are prescribed by the draft Regulations on diagnostic testing, health research and therapeutics do not assist in solving the ambiguity – in fact, the formulation of the phrase 'may be removed or withdrawn from living persons and used for the following specific medical and dental purposes' is similarly open to ambiguous interpretation. Regulation 4 reads as follows:

DNA, RNA, cultured cells, amniocytes, stem cells, gametes, polar bodies, blastomeres and small tissue biopsies including single cells from developing blastocysts, may be removed or withdrawn from living persons and used for the following specific medical and dental purposes –

- (a) DNA, RNA and chromosome-based genetic testing including:
- (i) diagnostic tests;
  - (ii) testing for genetic carrier status;
  - (iii) antenatal diagnosis;
  - (iv) voluntary presymptomatic, predictive or susceptibility testing, screening tests, drug response or toxicity tests, identity or paternity testing;
  - (v) tests that are performed post-natally;
  - (vi) preimplantation DNA tests to be carried out on a polar body of an ovum, in order to ensure that an ovum that does not carry a mutation that causes a serious genetic condition can be selected for *in vitro* fertilisation;
  - (vii) preimplantation DNA tests following the removal of a polar body or one or two blastomeres of a developing embryo can be carried out for the purpose of ensuring implantation of an embryo, without a mutation that causes a serious genetic condition;
- (b) health research referred to in section 69(3) of the Act; or
- (c) studies of archaeological, medical or heritage value on DNA obtained from human genetic material, conducted in terms of the of the National Heritage Resources Act, 1999 (Act No. 25 of 1999).

The draft Regulations on artificial fertilisation only deal with the use of gametes for the purpose of artificial fertilisation and therefore do not provide further insight into the meaning of section 56(1).

### 3. The boy and his microscope: a hypothetical case study

To practically illustrate the legal implications of the two possible interpretations, I employ a hypothetical case study: A 14-year-old boy, whose favourite subject at school is biology, is given a microscope as a present. Alone in his room, he decides to take some of his sperm and look at it under the microscope. He does this purely out of curiosity, with no medical or dental purpose in mind. I submit that there is certainly an element of *use*, the object of which is *removed gametes*; further, that it would be a highly strained argument to aver that the boy's actions are for medical or dental purposes, since it is neither the subjective intention of his actions nor does he have the level of medical or dental knowledge that would reasonably be expected of someone who engages in research for medical or dental purposes.

- Assuming the restrictive interpretation: the boy's experiments would fall outside the ambit of section 56(1) and would hence not constitute a contravention of the Act.
- Assuming the extensive interpretation: the boy would be guilty of contravening section 56(1) of the Act. Note that even if 'medical or dental purposes' are given an outrageously broad interpretation to include the boy's actions (which is contrary to my submission, but goes to prove the point that under the extensive interpretation the boy would be guilty regardless), they would fall outside the draft Regulations' nomenclature of allowed uses, therefore making him guilty of contravening section 56(1) of the Act; he would secondly also be in contravention of section 56(2)(a)(iii) of the Act, which states that gametes may not be removed from persons under the age of 18 for the purposes of section 56(1).

This case study can easily be expanded on: fascinated by this new living microscopic world, the boy starts conducting simple experiments with his sperm, such as adding common household chemicals and studying their reaction and how long they survive. The boy's friends – all of his age and educational level – begin to take a keen interest in his experiments, and provide sperm for the experiments that they conduct under the microscope.

- Assuming the restrictive interpretation: similar to the initial case study, the boy and his friends' experiments would fall outside the ambit of section 56(1) and would hence not constitute a contravention of the Act.
- Assuming the extensive interpretation: all the boys would be in contravention of section 56(1). Similar to the initial case study, should 'medical or dental purposes' be construed to include the boys' actions, they would all be in contravention of sections 56(1) and 56(2)(a)(iii) of the Act.

The case study of the boy and his microscope and its alternative legal implications will, in the subsequent analyses, serve as a reference to illustrate the abstract concepts of the Act in an applied, concrete manner.

### 4. *De minimis*?

At this point, with the case study freshly in mind, we need to address the question of whether the whole subject of non-medical, non-sexual-intercourse uses of gametes is not a matter so inconsequential that it should just be dismissed as a triviality according to the maxim *De minimis non curat lex* (The law does not concern itself with trifles.). I argue that the application of *de minimis* is as a matter of principle not appropriate and, moreover, offers all but a certain outcome in practice.

Firstly, what is at stake here is the *principle* of freedom. If freedom – however trivial the particular freedom may seem to the observer – is to be limited by law, there must be reasonable justification. If we are to sweep the subject of non-medical, non-sexual-intercourse uses of gametes under the carpet of *de minimis*, we not only devalue the principle of freedom but also create a dangerous precedent: to avoid confronting and dealing with principles (such as freedom and its legitimate sphere) but rather opt for apparently expedient solutions (such as categorising a freedom as trivial and calling upon *de minimis*). *De minimis* is not a proper defender of freedom.

Although the principle argument is sufficient to rule out *de minimis* as a solution to the legal position of non-medical, non-sexual-intercourse uses of gametes, it can in addition also be argued that, on a practical level, *de minimis* offers a very uncertain solution. Judging by case law history, the chance of successfully arguing for the application of the *de minimis* maxim in the case of statutory offences is slim: although the maxim has been argued with varying degrees of success in cases dealing with common law crimes,<sup>7-10</sup> our courts in the case of statutory crimes have been consistently reluctant to apply the maxim.<sup>11-17</sup> If case law proves anything, it is that there is a distinct possibility that the state may prosecute for trivialities and likewise that especially the lower courts will pass guilty judgements in such cases.

On a legal comparative note, it has been established as a general rule in American law that the *de minimis* maxim will not excuse trifling irregularities in complying with statutory requirements.<sup>18(p168),19-20</sup> With reference to contemporary Dutch law, Labuschagne has suggested that triviality should only impinge on sentencing and not on guilt.<sup>21</sup>

All of the above considered, applying *de minimis* firstly avoids addressing the principle at stake, and secondly does not offer a

sure escape from the criminal law implications of contravening the Act, should the extensive interpretation of section 56(1) be adopted. Our journey to find an answer to the question posed at the beginning of this article – Is it legal to use gametes for non-medical, non-sexual-intercourse purposes? – therefore continues.

## 5. The common law presumptions of interpretation

In cases of statutory ambiguity such as the present, the common law presumptions of interpretation are called in aid.<sup>22</sup> Although some commentators<sup>23,24</sup> have expressed pessimistic views regarding the future of the presumptions in the new constitutional dispensation, arguing that the presumptions have 'now largely been supplanted' by the Constitution in general and the Bill of Rights in particular,<sup>25</sup> De Ville suggests that the courts' reliance on the presumptions in statutory interpretation has not visibly declined since the onset of the new constitutional dispensation.<sup>25(p166)</sup> It should be noted that, although the Constitutional Court has on occasion expressed the opinion (per Sachs J) that 'a question mark has to be placed over the usefulness of common law presumptions in interpreting the Constitution',<sup>26(para115)</sup> no such reservation has been expressed regarding the role of the presumptions in statutory interpretation.<sup>27(p152)</sup> I therefore agree with Du Plessis' submission<sup>27(p153)</sup> that the presumptions could still fulfil a number of useful functions, of which the following are of relevance to our current project: (i) They can supplement, facilitate and mediate resort to constitutional values in statutory interpretation, in accordance with the requirements of Section 39(2) of the Constitution; (ii) they can advance values that are implicit in the Constitution; and (iii) they can amplify values that are, although explicit in the Constitution, fragmented.

In the following analysis, I consider the following presumptions:

- that statute law is not unjust, inequitable and unreasonable; and
- that the legislature does not intend to alter the existing law more than necessary.

### 5.1 The presumption that statute law is not unjust, inequitable and unreasonable

This presumption is well established in our law and is still relied on by courts in the new constitutional era.<sup>28-31</sup> Du Plessis submits, however, that the Constitution can be perceived as a codification of the values of justice, equity and reasonableness as they are encountered in an open and democratic society based on human dignity, equality and freedom; and that the more specific and clearly articulated provisions of the Constitution have subsumed much of the presumption.<sup>27(p155)</sup> He therefore suggests that:

At present the 'clear language' of the statute cannot trump the Constitution, and constitutional jurisprudence on many exigencies for which the presumption has traditionally catered, is forceful and to the point. In these instances it is desirable that constitutional provisions, as expounded in the case law, take the place of the presumption.

In the light of the ambiguous formulation of section 56(1) – the lack of 'clear language' – I submit that reliance on the presumption is suitable. This will be complemented in Part 2 of this article by a comprehensive human rights (constitutional) analysis of section 56(1).

Two specific applications of this presumption are relevant to our present project, namely (i) onerous provisions and (ii) preference for the most beneficial interpretation, as elaborated on below.

### 5.1.1 Onerous provisions

What are the criminal law implications of section 56(1) – what would be the penal consequences of the boys' actions if the extensive interpretation of section 56(1) is followed? In contrast with section 57, which deals with human cloning, that creates a criminal norm (for example: 'act X constitutes an offence') and criminal sanction (for example: 'offence X is liable on conviction to imprisonment for a period of Y years'), section 56 provides for neither; it only creates a *legal norm*. Contravention of section 56(1) *per se* would therefore not be a criminal offence.<sup>32-35</sup> The Act does, however, make provision for the appointment of so-called health officers (section 80) who have the duty to monitor and enforce compliance with the Act (section 81). Contravention of the legal norm created by section 56(1) would therefore expose a person to administrative action by a health officer, who could issue a compliance notice to such a person. Should the person who is in contravention of section 56(1) fail to comply with the *compliance notice*, such person would be guilty of an offence (section 89(1)(f)) and liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment (section 89(2)). The valid execution of a prior, very specific administrative act by the State is therefore a *conditio sine qua non* for each instance of enforcement of section 56(1). Therefore: the boys in the case study can be exposed to administrative action by a health officer and, should they still persist, they would be criminally prosecuted.

Since section 56(1) has a penal nature, the common law maxim *In poenis strictissima verborum significatio accipiendi est* ('in the case of penal laws, the strictest interpretation of their terms should be accepted') is applicable.<sup>36-43</sup> This maxim very clearly determines in favour of the restrictive interpretation of section 56(1).

### 5.1.2 Preference for the most beneficial interpretation

The common law maxim *Semper in dubiis benigniora praeferenda sunt* ('in cases of doubt, the most beneficial interpretations are to be preferred') suggests the same result.<sup>44-50</sup> with reference to the case study of the boy and his microscope, it should be clear that the restrictive interpretation which allows the boy to conduct his experiments is the most beneficial interpretation of section 56(1). The Court states it clearly in *Rossouw v. Sachs*:<sup>51-56</sup>

If a statute is couched in ambiguous language, the court will give it the meaning which least interferes with the liberty of the individual.

### 5.1.3 Conclusion

I therefore submit that the presumption that statute law is not unjust, inequitable and unreasonable clearly favours the restrictive interpretation of section 56(1), namely that, outside the sphere of use for medical or dental purposes, the use of gametes is *not* prohibited, in contrast with the extensive interpretation that prohibits all uses of gametes, such as the boy's experiments in our case study.

### 5.2 The presumption that the legislature does not intend to alter the existing law more than necessary

Let us now consider the applicability of the presumption that the legislature does not intend to alter the existing law more than necessary. The purpose of this presumption is to enhance legal certainty<sup>57</sup> and has been described as the 'most fundamental of all the presumptions'.<sup>58(p159),59,60</sup> The 'existing law' may of course be either common law or statute law. In the present case, the Act was preceded by a number of statutes; the statute that pertains to section 56(1) specifically is the Human Tissue Act.<sup>61</sup> Section 19 of the Human Tissue Act states that:

Any ... gamete removed or withdrawn from the body of a living person shall, subject to the regulations, only be used for medical or dental purposes ...

The position of the Human Tissue Act is clearly similar to the extensive interpretation of section 56(1) and could therefore be used to argue for such interpretation. Such an argument would however be critically flawed, as it would confuse preceding law with existing law. The nature of the presumption, insofar as it relates to statute law which is the current case, was explained as follows in *Kent NO v. South African Railways and Harbours and Another*:<sup>62-68</sup>

[I]t is necessary to bear in mind a well-known principle of statutory interpretation, viz. that statutes must be read together and the later one must not be so construed as to *repeal* the provision of an earlier one, or to take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later statute. The inference must be a necessary one and not merely a possible one [my emphasis].

This is not a case where statutes can be 'read together' – the Human Tissue Act was in fact explicitly *repealed* by the National Health Act (section 93). Once the regulations are promulgated and section 56(1) comes into force, the Human Tissue Act will cease to be law; the Human Tissue Act can therefore not be 'existing law' for the purposes of the presumption that the legislature does not intend to alter the existing law more than necessary, rendering this presumption not applicable to the interpretation of section 56(1).

Prefacing my subsequent human rights analysis of section 56(1), a reference to Du Plessis' submission regarding the present presumption might be noteworthy: Du Plessis opines that, under the Constitution, the 'necessary' element of the presumption has become a concept different to what it used to be – that 'necessary' has now acquired a meaning equivalent to 'required to be in line with the Constitution'. This interpretation of the 'necessary' element of the presumption therefore creates the opportunity to use this common law artefact to promote the values of the Constitution and prevents it from impeding the advance of these values by entrenching existing (probably pre-constitutional) law. Du Plessis states his position as follows:<sup>27(p181)</sup>

[I]f the maximisation of the [existing] law through statutory interpretation comes to a result at odds with the Constitution, there can be no question: it is *necessary* to interpret the statute in a manner altering the [existing] law ... [W]hen a statute dealing with the exercise of public power is construed, it is *necessary* that the [existing] law does not enjoy any possible 'advantage' that the conventional presumption could afford it. [my emphasis]

Anticipating the (apparent) conclusion of the subsequent human rights analysis that the extensive interpretation of section 56(1) – and hence also its equivalent in section 19 of the Human Tissue Act – would be unconstitutional, it is therefore according to Du Plessis *necessary* to interpret section 56(1) in a manner altering the previous position as per the Human Tissue Act; moreover, since section 56(1) deals with the exercise of public power, it is *necessary* that the hypothetical existing law (which does not even exist in the present case) does not enjoy any possible advantage that the conventional presumption could afford it.

### 5.3 Conclusion on the presumptions

In the analysis of common law presumptions, I have considered two presumptions that *ex facie* seemed to be relevant: (i) the presumption that statute law is not unjust, inequitable and unreason-

able clearly indicated the restrictive interpretation of section 56(1); and (ii) the presumption that the legislature does not intend to alter the existing law more than necessary was indicated to be not relevant since it requires existing law, which is lacking in the present case. It must therefore be concluded that the common law presumptions of interpretation determine that the restrictive interpretation of section 56(1) must be adopted; namely, that outside the sphere of use for medical or dental purposes, the use of gametes is *not* prohibited.

This conclusion of the traditional common law analysis ends Part 1. However, our constitutional dispensation requires a new dimension to statutory interpretation; namely, the promotion of human rights, which will be the focus of Part 2.

## Part 2: The human rights dimensions

### 6. The human rights dimensions of section 56(1)

Section 39(2) of the Constitution<sup>69</sup> places a general duty on the court, when interpreting any legislation, to promote the spirit, purpose and objects of the Bill of Rights. This duty applies irrespective of whether any of the parties to the litigation raised or relied on any section of the Bill.<sup>70</sup> De Ville suggests that the constitutional era has supplemented the nomenclature of common law presumptions of interpretation with a new presumption of interpretation: the presumption that a statute is constitutional.<sup>25(p223)</sup>

What are the human rights dimensions of section 56(1) of the National Health Act? In the following, I argue that the extensive interpretation of section 56(1) infringes on at least one constitutionally guaranteed right, namely that of privacy (section 14 of the Constitution), and that such infringement will not be justifiable in terms of the limitation clause (section 36 of the Constitution); the restrictive interpretation, in contrast, does not constitute any such infringement.

#### 6.1 Interpreting privacy

South African case law has interpreted the right to privacy as (i) admitting to degrees of protection depending on proximity of the relevant interest to the personal in contrast with the communal sphere; and (ii) largely instrumental in achieving further values – primarily, human dignity. A comprehensive basis for this interpretation was laid in *Bernstein v. Bester NO*.<sup>71</sup> Ackermann J, for the majority of the court, defined the scope of privacy to those aspects in regard to which a 'legitimate expectation of privacy' can be harboured. This 'legitimate expectation of privacy' consists of both a subjective expectation of privacy as well as a component of objective reasonableness.<sup>71(para75)</sup> A useful 'tool' to ascertain the reasonableness is the 'continuum of privacy interests' (coined by Sachs J in *Mistry*<sup>72(para27)</sup>) that has been explained in *Bernstein* as follows:<sup>71(para67)</sup>

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 continuum-of-privacy-interests doctrine therefore establishes a direct correlation between the proximity of an interest to the personal sphere and the degree of protection it will be afforded under the right to privacy.

As Currie and De Waal point out, the continuum-of-privacy-interests doctrine does not completely flesh out the concept of reasonableness, and the concept of reasonableness needs to be linked to other values against which to measure it.<sup>73(p318)</sup> On this concep-

tion, the protection of privacy does not have intrinsic value, but serves an instrumental function in promoting these other values that are the measure of reasonableness.<sup>73(p319)</sup> In *Bernstein*, this end-value is articulated as 'one's own autonomous identity'.<sup>71(para65)</sup> In the subsequent *Hyundai Motor Manufacturers*, 'autonomous identity' is substituted for the more conventional value of 'human dignity'.<sup>74(para18)</sup> The two concepts of 'identity' and 'human dignity' are of course very closely linked: The German Constitutional Court has in its interpretation of the meaning of human dignity specifically included 'own identity' as a constituent element.<sup>75</sup> The concept substitution of 'autonomous identity' with 'human dignity' *qua* end-value in *Hyundai* must therefore be seen as substance broadening of privacy's end-value rather than substance substitution: 'human dignity' includes the original concept 'autonomous identity' *qua* constituent element.

Human dignity *qua* end-value of privacy requires more attention: Another key element of human dignity (besides identity) that is of particular relevance to our current project is individual autonomy – South African constitutional scholar Haysom identifies individual autonomy as (i) a key element of human dignity, and (ii) instrumental in achieving a further value integral to human dignity, namely individual self-actualisation.<sup>76(p131,138)</sup> Individual autonomy and self-actualisation can therefore *qua* constituent elements of human dignity, serve as specific measures of the reasonableness of a subjective expectation of privacy, and hence of the legitimacy of the privacy expectation. A direct conceptual nexus between privacy and individual autonomy was established by the Constitutional Court in the recent high-profile case of *NM v. Smith*:<sup>77</sup> Madala J, for the majority of the court, observed that 'Privacy encompasses the right of a person to live his or her life as he or she pleases',<sup>77(para33)</sup> and also that 'the nature and the scope of the right envisage a concept of the right to be left alone'.<sup>77(para32)</sup>

Beyond South African case law, values other than human dignity have also been suggested as end-values of privacy. The conception of privacy as an instrumental right that serves other end-values is common in international jurisprudence. Edmundson identifies several such end-values, *inter alia*: inquiry; learning, creativity and relaxation; personhood and moral ownership of one's body.<sup>78</sup>

Now, to apply the theory to our case study of the boy and his microscope, I submit that the boy's interest in conducting his experiments is located very proximate to the core of the personal sphere on the continuum-of-privacy interests. In general, what you study under your own microscope in the privacy of your own home should fall squarely within the protection of privacy. The fact that the object of the study is the boy's own sperm makes the case for privacy protection even stronger. The objective moral importance and personal nature of any male's sperm to himself should be apparent and is in my observation widely acknowledged in our society: sperm (i) originate in the body; (ii) become distinct from the body through – and are therefore associated with – the very intimate act of sex; (iii) are the designated carriers of one's genetic heritage; and (iv) represent the means to creating a family of one's own. One's body, sex, one's genetic heritage, and one's family are all deeply personal matters. The use of one's sperm is certainly a personal matter – certainly within the 'inner sanctum of a person', to cite Ackermann J in *Bernstein*.<sup>71(para67)</sup>

When privacy is approached as an instrumental right, I submit that the boy's interest in conducting his experiments is intimately linked with human dignity *qua* end-value of privacy: the experiments are an expression of curiosity, exploration and discovery, hence contributing to the development of an autonomous identity; moreover, the experiments are an expression of individual auto-

my that contributes to self-actualisation by answering and feeding the boy's fascination with microscopic life. The boy's actions are therefore strongly dignity-affirming.

When we turn to other possible end-values of privacy, the case for the boy's interest in conducting his experiments to be afforded privacy protection grows even stronger:

- **Inquiry.** The boy's experiments are certainly not cutting-edge science, but are inquiry par excellence. As such, privacy protection will clearly serve this end-value.
- **Learning, creativity and relaxation.** The boy may well teach himself quite a few things through his observations, such as how long sperm survive outside the human body. By occupying his time in this way – experimenting and learning – he will also be forming a habit of self-learning that may further contribute to his development of an autonomous identity.
- **Personhood and moral ownership of one's body.** The boy's experiments with his own sperm are a confirmation of his moral ownership of his own body. Also in this case, privacy protection will clearly serve this end-value.

We have now analysed the case study of the boy and his microscope from both the continuum-of-privacy-interests perspective and the instrumental perspective and must conclude that the boy's interest in conducting his experiments clearly falls within the ambit of privacy protection. We shall now proceed to the next step, namely the expanded case study.

Is the inner sanctum compromised when the case study is expanded to include the boy's friends? I submit not. Similar to family life that can be shared by multiple individuals but still remains private, so do the experiments by the boy and his friends. The fact that they are in the same (private) physical space when conducting the experiments instead of all acting in isolation is secondary to the personal nature of their activity. Sharing in this activity with a common goal may well contribute to fostering the friends' interpersonal relationships and hence touch on another end-value of privacy. The nurturing of human relationships has crystallised in our case law as a prominent aspect of privacy. Ackermann J articulates it as follows in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*:<sup>79(para32)</sup>

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.

The value of establishing and nurturing human relationships has subsequently been used fruitfully by Sachs J and O'Regan J in their minority decision in *S v. Jordan*.<sup>80(para82)</sup> They posit the establishing and nurturing of human relationships as the end-value of privacy protection in the case of sexual relationships, and consequently find that the sexual aspect of prostitution that would otherwise qualify as being in the intensely personal sphere, falls 'far away from the inner sanctum of protected privacy rights', since sex for sale in the (impersonal) open market has nothing to do with establishing and nurturing human relationships.<sup>80(para83)</sup> The boys in the case study may be sharing in a personal experience, but they are clearly far removed from entering the impersonal sphere of 'strangers in the marketplace' contemplated in *S v. Jordan*<sup>80(para83)</sup> (which could have been the case had they, for instance, sold their sperm on the open market). It must therefore be concluded that the inner sanctum of privacy protection is not compromised by the boy in the case study involving some of his friends in his experiments; on the contrary, with the value of establishing and nurturing

human relationships that comes into play, arguably incidentally, the argument for privacy protection might even be strengthened.

It has already been established that, should the extensive interpretation of section 56(1) be followed, the experiments performed by the boy (and his friends) in the case study would be prohibited; the restrictive interpretation does not cause such a ban. It has also now been concluded that the boy's (and his friends') interest in conducting his (their) experiments falls within the ambit of privacy protection. The extensive interpretation therefore constitutes an infringement on the right to privacy.

## 6.2 Limitation

Is it possible to justify the infringement on privacy that the extensive interpretation poses? This question must be answered with reference to the *purpose* of section 56(1), on which the Act is not clear: neither the Objects of the Act as per section 2, nor the Preface, refer to the use of gametes *per se*. The only purpose-related statement in the Act that can potentially be made to bear on the use of gametes is the following extract from the Preface: the Act aims to 'establish a health system based on ... internationally recognised standards of research and a spirit of enquiry and advocacy which encourages participation'. I will here deal with international standards and return to a spirit of enquiry in my conclusion.

### 6.2.1 International standards

I submit that the purpose of attaining internationally recognised standards of research cannot justify the limitation on privacy as per the extensive interpretation of section 56(1), which submission I will support with three distinct arguments: the causal nexus argument, the non-existence argument, and the relative importance argument.

#### 6.2.1.1 The causal nexus argument

The first argument is essentially semantic and centres on the difference between 'research' and 'use'. Although the two concepts overlap, 'research' is clearly a species of the genus 'use' and not *vice versa*; 'research' is therefore a specific kind of 'use', while the generic 'use' includes 'research', but also has a wider meaning and can include other conceivable 'uses' in the context of gametes, such as the creation of embryos for reproductive purposes. Seen against this background, the purpose of attaining internationally recognised standards of *research* has a far narrower, more specific, ambit than the limitation imposed by the extensive interpretation of section 56(1), which prohibits all non-medical and non-dental *uses* of gametes. A complete causal connection between the limitation and its purpose is absent, as the limitation is significantly wider than its purpose. The limitation imposed by the extensive interpretation of section 56(1) therefore fails the test of the Bill of Rights' limitation clause; the limitation on privacy imposed by the extensive interpretation cannot be justified.

One may wonder what the situation would have been if the purpose were not formulated as narrowly as it is, but rather as 'internationally recognised standards of the use of gametes'. My next two arguments each conclude that, even if this were the case, the limitation would still not be justifiable.

#### 6.2.1.2 The non-existence argument

What is the substance of 'internationally recognised standards of research' – what do these international standards prescribe regarding the use of gametes? I submit that there is no international standard regarding the use of gametes: Firstly, at the echelon of international law, the relevant legal instrument (the Universal Declaration on Bioethics and Human Rights) does not even mention gametes; secondly, at the echelon of foreign law, a reading of the

comparative legislation of four comparative foreign jurisdictions gives a mixed result, further indicating the lack of any international standard:

- The British Human Fertilisation and Embryology Act of 1990 does not regulate the use of gametes in general. Only specific uses, namely cryopreservation (storage), mixing with animal gametes, and fertility treatment, are regulated.<sup>81,82(p1224,1246)</sup>
- The Dutch Act of 20 June 2002<sup>83</sup> prohibits all uses of gametes for purposes other than the purposes specifically enumerated in the act.
- The Belgian Act of 11 May 2003<sup>84</sup> has no general provision on the use of gametes – it only prohibits commercial use of gametes and specifically regulates the use of gametes to create embryos.
- Canada's Assisted Human Reproduction Act of 2004 likewise does not prohibit the use of gametes in general, but does so in the case of gametes obtained from minors (with a minor exclusion). The non-commercial use of gametes that are obtained from majors and that are not intended for creating embryos is not regulated.

The omission in international law and the divergence in foreign law render it impossible to conceive of internationally recognised standards regarding the use of gametes. The reference to internationally recognised standards in the preamble is not superfluous in the context of the Act as a whole: there are certainly internationally recognised standards regarding other important aspects with which the Act deals, such as human reproductive cloning. But in the case of the use of gametes, the purpose of attaining internationally recognised standards of research is evidently meaningless and hence not applicable.

#### 6.2.1.3 The relative importance argument

If, hypothetically, there were conflict between international law and a constitutionally guaranteed right, such as privacy in the present case, the constitutional right would in any case trump international law. In the *Fourie* case<sup>85</sup> that dealt with same-sex marriage, the state opposed same-sex marriage and tried to justify this infringement on gay couples' equality by *inter alia* arguing that such infringement is justified by international law. This argument was unanimously rejected by the Constitutional Court for two reasons: (i) although international law does not specifically support same-sex marriage, nothing in international law specifically excludes the possibility of same-sex marriage; (ii) although the Court must consider international law when interpreting the Bill of Rights, it does not mean that the Bill of Rights must necessarily conform with international law.<sup>85(para104)</sup> 'It would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right.'

Although the Court in *Fourie* approached the international law vis-à-vis guaranteed right conflict from the angle of the interpretation clause (section 39 of the Constitution that dictates that a court must consider international law when interpreting the Bill of Rights), I submit that the principle articulated in *Fourie* would be just as applicable to the same conflict when approached from the angle of international law *qua* purpose of the challenged limitation – the guaranteed right will trump international law.

#### 6.2.1.4 Conclusion on international standards *qua* purpose of the limitation

The above arguments are not interdependent; each one offers a distinct ground why the purpose of attaining internationally recognised standards of research cannot justify the limitation on privacy as per the extensive interpretation of section 56(1). The possible

contention that the extensive interpretation can be justified by this purpose can therefore be rejected with confidence.

## 6.2.2 Conclusion on limitation: propriety?

The only potential purpose for the limitation on privacy posed by the extensive interpretation of section 56(1) that could be gleaned from the Act itself (namely, international standards) has failed to justify such limitation. Is it possible to conceive of any other argument to limit privacy? Can a sense of propriety or morality qualify *qua* legitimate governmental purpose? The Court has made a clear distinction between the following two kinds of morality: (i) views of morality that, even though they may be popular in society, are not based on the Constitution;<sup>80(para113)</sup> and (ii) the morality that is embodied in the Constitution.<sup>79(para136)</sup> While the Court has made it abundantly clear that a limitation cannot be justified by the former kind of morality,<sup>80(para86),79(para37)</sup> the state can and must, however, enforce the latter, Constitutional morality.<sup>80(para105)</sup> When traditional notions of propriety regarding the use of gametes are eliminated from the equation, no objection to the private experiments in our case study can remain. I submit that there is nothing in the text and spirit of the Constitution that can conceivably be interpreted as reason for arguing for a limitation on the right to privacy in the context of the case study.

To pursue the point further: the enforcement of any moral position that objects to the use of sperm as per the case study would be absurdly inconsistent in a society that tolerates – and in mainstream youth culture celebrates – the destruction of gargantuan numbers of gametes for pure recreational sex. If the use (and inevitable destruction) of gametes is allowed for the private purpose of recreational sex, why not for the private purpose of studying it under a microscope? Such an inconsistency would be irrational and unjustifiable in an open society.<sup>86</sup>

I will conclude my analysis of the limitation of privacy by paraphrasing the Court's memorable dictum on privacy in *Case v. Minister of Safety and Security*:<sup>87(para91)</sup> What I may choose to do with my own sperm in the privacy of my home is nobody's business but mine.

## 6.3 Conclusion on the human rights dimensions

To encapsulate the human rights dimensions of section 56(1): The extensive interpretation of this section (namely, that all use of gametes outside the sphere of medical and dental research is prohibited) poses an unjustifiable infringement of the right to privacy; the restrictive interpretation (namely, that outside the sphere of medical and dental research, the use of gametes is *not* prohibited) does not pose such infringement. The extensive interpretation is therefore untenable from a human rights perspective, while the restrictive interpretation would be acceptable.

## 7. Conclusion: a spirit of enquiry

In the discussion of the preamble above, I noted that I would return to the Act's stated purpose of attaining a spirit of enquiry. Using this stated purpose *qua* interpretive aid provides a final, simple, yet powerful argument against the extensive interpretation: A spirit of enquiry, as embodied by the boy and his microscope in our case study, would be *actively countered* by the extensive interpretation. Although the restrictive interpretation is not the polar opposite of the extensive interpretation in the sense that it will actively promote a spirit of enquiry, it will at least passively allow it and is hence more proximate to the Act's purpose of attaining a spirit of enquiry and therefore clearly the preferable interpretation.

At the beginning of the article, I posed the question: Is it legal to use one's own gametes, or other's gametes with their consent, for non-medical and non-sexual-intercourse purposes? We can now confidently conclude our discussion and answer that the relevant statutory provision, section 56(1) of the National Health Act, should be so interpreted as to allow the use of gametes for such purposes. If used as a test case for the solidity of the legal system's commitment to freedom in South Africa, the result is telling, since the two possible interpretations of section 56(1) are archetypal in their exemplification of the freedom-propriety conflict – a conflict resolved in favour of freedom by both the common law presumptions of statutory interpretation, as well as the human rights analysis.

As illustrated by the case study, freedom is the essential enabler of a spirit of enquiry, which in turn is the very key to scientific discovery and ultimately the improvement of the human condition. If we are a humane society – a society that strives towards the improvement of the human condition – we should guard freedom and award the spirit of enquiry.

## 8. Recommendation

To give expression to this conclusion and avoid any legal uncertainty, the Department of Health should amend Regulation 4 of the Draft regulations on diagnostic testing, health research and therapeutics to read as follows: 'DNA, RNA, cultured cells, amniocytes, stem cells, gametes, polar bodies, blastomeres and small tissue biopsies including single cells from developing blastocysts, may be removed or withdrawn from living persons and used, *where such use is for medical or dental purposes, only for the following specific medical and dental purposes ...*'.

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