Cleveland State University
Cleveland-Marshall College of Law

Criminal Justice Forum I

Justice Richard J. Goldstone

Establishing a New Constitutional Court for South Africa: Adapting the Common Law to Reflect a Democratic Criminal Justice System

Friday, September 9, 2011
5:00 p.m.
The Joseph W. Bartunek III Moot Court Room

1.0 CLE Hour Approved

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA

Case No. CCT/3/94

In the matter of:

THE STATE

versus

T MAKWANYANE AND M MCHUNU

Heard on: 15 February to 17 February 1995

Delivered on: 6 June 1995

JUDGMENT

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[1] **CHASKALSON P:** The two accused in this matter were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. They appealed to the Appellate Division of the Supreme Court against the convictions and sentences. The Appellate Division dismissed the appeals against the convictions and came to the conclusion that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible according to law.

[2] *Section* 277(1)(a) of the Criminal Procedure Act No. 51 of 1977 prescribes that the death penalty is a competent sentence for murder. Counsel for the accused was invited by the Appellate Division to consider whether this provision was consistent with the Republic of South Africa Constitution, 1993, which had come into force subsequent to the conviction and sentence by the trial court. He argued that it was not, contending that it was in conflict with the provisions of *sections* 9 and 11(2) of the Constitution.

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[5] It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case.

[6] No executions have taken place in South Africa since 1989. There are apparently over 300 persons, and possibly as many as 400 if persons sentenced in the former Transkei, Bophuthatswana and Venda are taken into account, who have been sentenced to death by the Courts and who are on death row waiting for this issue to be resolved. Some of these convictions date back to 1988, and approximately half of the persons on death row were sentenced more than two years ago. This is an intolerable situation and it is essential that it be resolved one way or another without further delay.

The Relevant Provisions of the Constitution

[7] The Constitution

> ... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[4]

It is a transitional constitution but one which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched and in which the Constitution:

> ... shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.[5]

[8] Chapter Three of the Constitution sets out the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the Chapter is to be interpreted by the Courts. It does not deal specifically with the death penalty, but in *section* 11(2), it prohibits "cruel, inhuman or degrading treatment or punishment." There is no definition of what is to be regarded as "cruel, inhuman or degrading" and we therefore have to give meaning to these words ourselves.

[9] In *S v Zuma and Two Others*,[6] this Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in Chapter Three of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution. . . .

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[4] These words are taken from the first paragraph of the provision on National Unity and Reconciliation with which the Constitution concludes. *Section* 232(4) provides that for the purposes of interpreting the Constitution, this provision shall be deemed to be part of the substance of the Constitution, and shall not have a lesser status than any other provision of the Constitution.

[5] *Section* 4(1) of the Constitution.

[6] Constitutional Court Case No. CCT/5/94 (5 April 1995).

[10] Without seeking in any way to qualify anything that was said in *Zuma*'s case, I need say no more in this judgment than that *section* 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part. It must also be construed in a way which secures for "individuals the full measure" of its protection. Rights with which *section* 11(2) is associated in Chapter Three of the Constitution, and which are of particular importance to a decision on the constitutionality of the death penalty are included in *section* 9, "every person shall have the right to life", *section* 10, "every person shall have the right to respect for and protection of his or her dignity", and *section* 8, "every person shall have the right to equality before the law and to equal protection of the law." Punishment must meet the requirements of *sections* 8, 9 and 10; and this is so, whether these sections are treated as giving meaning to *Section* 11(2) or as prescribing separate and independent standards with which all punishments must comply.

[11] * * *

Legislative History

[12] The written argument of the South African government deals with the debate which took place in regard to the death penalty before the commencement of the constitutional negotiations. The information that it placed before us was not disputed. It was argued that this background information forms part of the context within which the Constitution should be interpreted.

[13] Our Courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question. . . . .

[14] Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining "the mischief aimed at [by] the statutory enactment in question." These principles were derived in part from English law. In England, the courts have recently relaxed this exclusionary rule . . . .

[15] [A] . . . similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand. Whether our Courts should follow these examples and extend the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case. We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts as well as the fundamental rights of every person which must be respected in exercising such powers.

[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the provision was adopted. The German Constitutional Court also has regard to such evidence. The Canadian Supreme Court has held such evidence to be admissible, and has referred to the historical background including the pre-confederation debates for the purpose of interpreting provisions of the Canadian Constitution, although it attaches less weight to such information than the United States Supreme Court does. . . . The European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be informed by *travaux préparatoires*.

[17] Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.

[18] It has been said in respect of the Canadian constitution that:

> ...the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors ... the comments of a few federal civil servants can in any way be determinative.[24]

Our Constitution is also the product of a multiplicity of persons, some of whom took part in the negotiations, and others who as members of Parliament enacted the final draft. The same caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played.

[19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. . . . . [W]here the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case.

[24] Reference re s.94(2) of the Motor Vehicle Act (British Columbia), *supra* note 19, at 49.

[20] Capital punishment was the subject of debate before and during the constitution-making process, and it is clear that the failure to deal specifically in the Constitution with this issue was not accidental.[25]

[21] In February 1990, Mr F W de Klerk, then President of the Republic of South Africa, stated in Parliament that "the death penalty had been the subject of intensive discussion in recent months", which had led to concrete proposals for reform under which the death penalty should be retained as an option to be used in "extreme cases", the judicial discretion in regard to the imposition of the death sentence should be broadened, and an automatic right of appeal allowed to those under sentence of death.[26] These proposals were later enacted into law by the Criminal Law Amendment Act No. 107 of 1990.

[22] In August 1991, the South African Law Commission in its Interim Report on Group and Human Rights described the imposition of the death penalty as "highly controversial".[27] A working paper of the Commission which preceded the Interim Report had proposed that the right to life be recognised in a bill of rights, subject to the proviso that the discretionary imposition of the sentence of death be allowed for the most serious crimes. As a result of the comments it received, the Law Commission decided to change the draft and to adopt a "Solomonic solution"[28] under which a constitutional court would be required to decide whether a right to life expressed in unqualified terms could be circumscribed by a limitations clause contained in a bill of rights.[29] "This proposed solution" it said "naturally imposes an onerous task on the Constitutional Court. But it is a task which this Court will in future have to carry out in respect of many other laws and executive and administrative acts. The Court must not shrink from this task, otherwise we shall be back to parliamentary sovereignty."[30]

[23] In March 1992, the then Minister of Justice issued a press statement in which he said:

> Opinions regarding the death penalty differ substantially. There are those who feel that the death penalty is a cruel and inhuman form of punishment. Others are of the opinion that it is in some extreme cases the community's only effective safeguard against violent crime and that it gives effect in such cases to the retributive and deterrent purposes of punishment.

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[25] The brief account that follows is taken from the written submissions of the South African Government. These facts were not disputed at the hearing.

[26] Address to Parliament on 2 February 1990. In this speech it was said that the last execution in South Africa had been on 14 November 1989.

[27] South African Law Commission, Interim Report on Group and Human Rights, Project 58, August 1991, para. 7.31.

[28] "The Commission ... considers that a Solomonic solution is necessary: a middle course between the retention of capital punishment and the abolition thereof must be chosen in the proposed bill of rights." Id. at 7.33.

[29] Id. at para. 7.36.

[30] Id. at para. 7.37.

He went on to say that policy in regard to the death penalty might be settled during negotiations on the terms of a Bill of Fundamental Rights, and that pending the outcome of such negotiations, execution of death sentences which had not been commuted, would be suspended. He concluded his statement by saying that:

> The government wishes to see a speedy settlement of the future constitutionality of this form of punishment and urges interested parties to join in the discussions on a Bill of Fundamental Rights.

[24] The moratorium was in respect of the carrying out, and not the imposition, of the death sentence. The death sentence remained a lawful punishment and although the courts may possibly have been influenced by the moratorium, they continued to impose it in cases in which it was considered to be the "only proper" sentence. According to the statistics provided to us by the Attorney General, 243 persons have been sentenced to death since the amendment to *section* 277 in 1990, and of these sentences, 143 have been confirmed by the Appellate Division.

[25] In the constitutional negotiations which followed, the issue was not resolved. Instead, the "Solomonic solution" was adopted.[33] The death sentence was, in terms, neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with Chapter Three of the Constitution. If they are, the death sentence remains a competent sentence for murder in cases in which those provisions are applicable, unless and until Parliament otherwise decides; if they are not, it is our duty to say so, and to declare such provisions to be unconstitutional.

Section 11(2) - Cruel, Inhuman or Degrading Punishment

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[33] This is apparent from the reports of the Technical Committee on Fundamental Rights and, in particular, the Fourth to the Seventh reports, which were brought to our attention by counsel. The reports show that the question whether the death penalty should be made an exception to the right to life was "up for debate" in the Negotiating Council. The Sixth Report contained the following references to the right to life:

> Life: (1) Every person shall have the right to life. (2) A law in force at the commencement of subsection (1) relating to capital punishment or abortion shall remain in force until repealed or amended by the [legislature]. (3) No sentence of death shall be carried out until the [Constitutional Assembly] has pronounced finally on the abolition or retention of capital punishment.
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> [Comment: The Council still has to decide on the inclusion of this right and if so whether its formulation should admit of qualification of the type suggested above. The unqualified inclusion of the right will result in the [Constitutional Court] having to decide on the validity of any law relating to capital punishment or abortion.] Sixth Report, 15 July 1993 at 5.

In the Seventh Report the right to life was formulated in the terms in which it now appears in *section* 9 of the Constitution. The report contained the following comment:

> [Comment: The Ad Hoc Committee appointed by the Planning Committee recommends the unqualified inclusion of this right in the Chapter. We support this proposal.] Seventh Report, 29 July 1993 at 3.

[26] Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity",[34] and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of *section* 11(2) of our Constitution.[35] The accused, who rely on *section* 11(2) of the Constitution, carry the initial onus of establishing this proposition.

The Contentions of the Parties

[27] The principal arguments advanced by counsel for the accused in support of their contention that the imposition of the death penalty for murder is a "cruel, inhuman or degrading punishment," were that the death sentence is an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it. The Attorney General argued that the death penalty is recognised as a legitimate form of punishment in many parts of the world, it is a deterrent to violent crime, it meets society's need for adequate retribution for heinous offences, and it is regarded by South African society as an acceptable form of punishment. He asserted that it is, therefore, not cruel, inhuman or degrading within the meaning of *section* 11(2) of the Constitution. These arguments for and against the death sentence are well known and have been considered in many of the foreign authorities and cases to which

[34] Furman v. Georgia, 408 U.S. 238, 290 (1972)(Brennan, J., concurring).

[35] This has been the approach of certain of the justices of the United States Supreme Court. Thus, White, J., concurring, who said in Furman v. Georgia, *supra* note 34, at 312, that "[T]he imposition and execution of the death penalty are obviously cruel in the dictionary sense", was one of the justices who held in Gregg v Georgia, *infra* note 60, that capital punishment was not per se cruel and unusual punishment within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. Burger, CJ., dissenting, refers in Furman's case at 379, 380, and 382 to a punishment being cruel "in the constitutional sense". *See also*, comments by Justice Stewart, concurring in Furman's case at 309, "... the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the... guarantee against cruel and unusual punishments...it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the legislatures have determined to be necessary [citing Weems v. United States, 217 U.S. 349 (1910)]...death sentences [imposed arbitrarily] are cruel and unusual in the same way that being struck by lightning is cruel and unusual".

we were referred. We must deal with them now in the light of the provisions of our own Constitution.

The Effect of the Disparity in the Laws Governing Capital Punishment

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International and Foreign Comparative Law

[33] The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy. As societies became more enlightened, they restricted the offences for which this penalty could be imposed. The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime, its use has been restricted to extreme cases. According to Amnesty International, 1,831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China, which means that only 412 executions were carried out in the rest of the world in that year. Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola. In most of those countries where it is retained, as the Amnesty International statistics show, it is seldom used.

[34] In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to *section* 35(1) of the Constitution, which states:

> In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

[35] Customary international law and the ratification and accession to international agreements is dealt with in *section* 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of *section* 35(1), public international law would include non-binding as well as binding law. They may both be used under the *section* as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission

on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.

[36] Capital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of *section* 11(2). International human rights agreements differ, however, from our Constitution in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law.[52] This has influenced the way international tribunals have dealt with issues relating to capital punishment, and is relevant to a proper understanding of such decisions.

[37] Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by *section* 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution.[53] This . . . is implicit in the injunction given to the Courts in *section* 35(1), which in permissive terms allows the Courts to "have regard to" such law. There is no injunction to do more than this.

[38] When challenges to the death sentence in international or foreign courts and tribunals have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions sanctioned by law. The only case to which we were referred in which there were not such express provisions in the Constitution, was the decision of the Hungarian Constitutional Court. There the challenge succeeded and the death penalty was declared to be unconstitutional.

[39] Our Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of

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[52] The pertinent part of *article* 6 of the ICCPR reads:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> 2. ...sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant ...

Article 4(2) of the American Convention on Human Rights and *article* 2 of the European Convention of Human Rights contain similar provisions. *Article* 4 of the African Charter of Human an People's Rights provides:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. (Emphasis supplied)

[53] *See* S v Zuma and Two Others, *supra* note 6.

legislation that negates the essential content of an entrenched right. In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

Capital Punishment in the United States of America

[40] The earliest litigation on the validity of the death sentence seems to have been pursued in the courts of the United States of America. It has been said there that the "Constitution itself poses the first obstacle to [the] argument that capital punishment is per se unconstitutional".[57] From the beginning, the United States Constitution recognised capital punishment as lawful. The Fifth Amendment (adopted in 1791) refers in specific terms to capital punishment and impliedly recognises its validity. The Fourteenth Amendment (adopted in 1868) obliges the states, not to "deprive any person of life, liberty, or property, without due process of law" and it too impliedly recognises the right of the states to make laws for such purposes.[58] The argument that capital punishment is unconstitutional was based on the Eighth Amendment, which prohibits cruel and unusual punishment.[59] Although the Eighth Amendment "has not been regarded as a static concept"[60] and as drawing its meaning "from the evolving standards of decency that mark the progress of a maturing society",[61] the fact that the Constitution recognises the lawfulness of capital punishment has proved to be an obstacle in the way of the acceptance of this argument, and this is stressed in some of the judgments of the United States Supreme Court.[62]

[41] Although challenges under state constitutions to the validity of the death sentence have been successful,[63] the federal constitutionality of the death sentence as a legitimate form of punishment for murder was affirmed by the United States Supreme Court in *Gregg v.*

[57] Furman v. Georgia, *supra* note 34, at 418 (Powell, J., joined by Burger, CJ., Blackmun, J. and Rehnquist, J., dissenting).

[58] *See* Furman v. Georgia, *supra* note 34.

[59] Id.

[60] Gregg v. Georgia, 428 U.S. 153, 173 (1976)(Stewart, Powell and Stevens, JJ.).

[61] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[62] *See* Furman v. Georgia, *supra* note 34, at 380-384, and at 417-420 (Burger, CJ., and Powell, J., respectively, dissenting). *See also*, Gregg v. Georgia, *supra* note 60, at 176-180; and Callins v Collins, 114 S.Ct. 1127 (1994)(judgement denying cert.)(Scalia, J., concurring). Those who take the contrary view say that these provisions do no more than recognise the existence of the death penalty at the time of the adoption of the Constitution, but do not exempt it from the cruel and unusual punishment clause. Furman v Georgia at 283-284 (Brennan, J., concurring); People v. Anderson, 493 P.2d 880, 886 (Cal. 1972)(Wright, CJ.).

[63] *See infra* paras. 91-92.

Georgia.[64] Both before and after *Gregg*'s case, decisions upholding and rejecting challenges to death penalty statutes have divided the Supreme Court, and have led at times to sharply-worded judgments.[65] The decisions ultimately turned on the votes of those judges who considered the nature of the discretion given to the sentencing authority to be the crucial factor.

[42] Statutes providing for mandatory death sentences, or too little discretion in sentencing, have been rejected by the Supreme Court because they do not allow for consideration of factors peculiar to the convicted person facing sentence, which may distinguish his or her case from other cases.[66] For the same reason, statutes which allow too wide a discretion to judges or juries have also been struck down on the grounds that the exercise of such discretion leads to arbitrary results.[67] In sum, therefore, if there is no discretion, too little discretion, or an unbounded discretion, the provision authorising the death sentence has been struck down as being contrary to the Eighth Amendment; where the discretion has been "suitably directed and limited so as to minimise the risk of wholly arbitrary and capricious action",[68] the challenge to the statute has failed.[69]

Arbitrariness and Inequality

[43] Basing his argument on the reasons which found favour with the majority of the United States Supreme Court in *Furman v. Georgia*, Mr Trengove contended on behalf of the accused that the imprecise language of *section* 277, and the unbounded discretion vested by it in the Courts, make its provisions unconstitutional.

* * *

[47] There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate Division for the imposition of the death sentence [in South Africa.] {***Editor's Note: 1. According to South African practice, sentencing decisions in major criminal cases are made by a judge sitting with two trained assistants ("assessors") rather than by a lay jury acting under judicial***

[64] *Supra* note 60, at 187.

[65] *See, e.g.*, the concurring opinion of Scalia, J., in Callins v. Collins, *supra* note 62; the opinions of Rehnquist, J., concurring in part and dissenting in part, in Lockett v. Ohio, *supra* note 66, at 628 *et seq*., and dissenting in Woodson v. North Carolina, *supra* note 66, at 308 *et seq*.

[66] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976), reh'g denied 429 U.S. 890 (1976); Lockett v. Ohio, 438 U.S. 586 (1978)(system for imposing death sentences invalid to the extent it precludes consideration by sentencing jury or judge of potentially mitigating factors).

[67] *See* Green v. Georgia 442 U.S. 95 (1979).

[68] Gregg v. Georgia, *supra* note 60, at 189.

[69] Id. *See also*, Proffitt v. Florida, 428 U.S. 242 (1976). The nature of the offence for which the sentence is imposed is also relevant. Coker v. Georgia, 433 U.S. 584 (1977).

instruction. 2. The "Appellate Division" of the "Supreme Court" had previously been South Africa's equivalent of a national Supreme Court. Under the Interim Constitution, it continued to act in that capacity, subject to the major exception that all matters and questions of interpretation and application of the new constitution were assigned exclusively to the jurisdiction of the new Constitutional Court.} The fact that the Appellate Division, a court of experienced judges, takes the final decision in all cases is, in my view, more likely to result in consistency of sentencing, than will be the case where sentencing is in the hands of jurors who are offered statutory guidance as to how that discretion should be exercised.

[48] The argument that the imposition of the death sentence [in South Africa] . . . is arbitrary and capricious does not, however, end there. It also focuses on what is alleged to be the arbitrariness [found] . . . in practice. Of the thousands of persons put on trial for murder, only a very small percentage are sentenced to death by a trial court, and of those, a large number escape the ultimate penalty on appeal. At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors.

[49] Most accused facing a possible death sentence are unable to afford legal assistance, and are defended under the *pro deo* system. The defending counsel is more often than not young and inexperienced, frequently of a different race to his or her client, and if this is the case, usually has to consult through an interpreter. *Pro deo* counsel are paid only a nominal fee for the defence, and generally lack the financial resources and the infrastructural support to undertake the necessary investigations and research, to employ expert witnesses to give advice, including advice on matters relevant to sentence, to assemble witnesses, to bargain with the prosecution, and generally to conduct an effective defence. Accused persons who have the money to do so, are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research, and as a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services.[79]

[50] * * *

[51] It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by the judges, and as far as possible, taken into account by them. But in itself this is no answer to the complaint of arbitrariness; on the contrary, it may introduce an additional factor of arbitrariness that would also have to be taken into account. Some, but

[79] I do not want to be understood as being critical of the *pro deo* counsel who perform an invaluable service, often under extremely difficult conditions, and to whom the courts are much indebted. But the unpalatable truth is that most capital cases involve poor people who cannot afford and do not receive as good a defence as those who have means. In this process, the poor and the ignorant have proven to be the most vulnerable, and are the persons most likely to be sentenced to death.

not all accused persons may be acquitted because such allowances are made, and others who are convicted, but not all, may for the same reason escape the death sentence.

[52] In holding that the imposition and the carrying out of the death penalty in the cases then under consideration constituted cruel and unusual punishment in the United States, Justice Douglas, concurring in *Furman v. Georgia*, said that "[a]ny law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment." Discretionary statutes are:

> ...pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.[81]

[53] It was contended that we should follow this approach and hold that the factors to which I have referred, make the application of [the death penalty], in practice, arbitrary and capricious and, for that reason, any resulting death sentence is cruel, inhuman and degrading punishment.

[54] The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems. . . . Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is, whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable.

[55] In the United States, the Supreme Court has addressed itself primarily to the requirement of due process. Statutes have to be clear and discretion curtailed without ignoring the peculiar circumstances of each accused person. Verdicts are set aside if the defence has not been adequate, and persons sentenced to death are allowed wide rights of appeal and review. This attempt to ensure the utmost procedural fairness has itself led to problems. The most notorious is the "death row phenomenon" in which prisoners cling to life, exhausting every possible avenue of redress, and using every device to put off the date of execution, in the natural and understandable hope that there will be a reprieve from the Courts or the executive. It is common for prisoners in the United States to remain on death row for many

[81] Furman v. Georgia, *supra* note 34, at 257.

years, and this dragging out of the process has been characterised as being cruel and degrading.[84] The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity, is apparent. Justice Blackmun, who sided with the majority in *Gregg*'s case, ultimately came to the conclusion that it is not possible to design a system that avoids arbitrariness.[85] To design a system that avoids arbitrariness and delays in carrying out the sentence is even more difficult.

[56] The United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred,[86] but from which they have drawn different conclusions, persuade me that we should not follow this route.

The Right to Dignity

[57] Although the United States Constitution does not contain a specific guarantee of human dignity, it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of "cruel and unusual punishment" by the Eighth and Fourteenth Amendments.[87] For Brennan J this was decisive of the question in *Gregg v. Georgia*.

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[84] Furman v. Georgia, *supra* note 34, at 288-289 (Brennan, J., concurring). Although in the United States prolonged delay extending even to more than ten years has not been held, in itself, a reason for setting aside a death sentence, Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990)(rejecting a claim that execution after sixteen years on death row would constitute curel and unusual punishment in violation of the Eighth and Fourteenth Amendments), in other jurisdictions a different view is taken.

> It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

Pratt v Attorney-General for Jamaica, *supra* note 3, at 1014.

[85] Callins v. Collins, *supra* note 62, (Blackmun, J., dissenting).

[86] Id. (compare Scalia, J., concurring, with Blackmun, J., dissenting).

[87] Trop v. Dulles, *supra* note 61, at 100. *See also*, Furman v. Georgia, *supra* note 34, at 270-281 (Brennan, J., concurring); Gregg v Georgia, *supra* note 60, at 173; People v. Anderson, *supra* note 62, at 895 ("The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment.").

> The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."[88]

[58] Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary'. The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries. {***Chaskalson P then reviewed constitutional decisions from Germany, Canada, and India, and decisions of the Human Rights Committee of the United Nations (applying the International Covenant on Civil and Political Rights), and the European Court of Human Rights (applying the European Convention on Human Rights).***}

* * *

The Right to Life

[80] The unqualified right to life vested in every person by *section* 9 of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of *section* 11(2) of our Constitution. In this respect our Constitution differs materially from the Constitutions of the United States and India. It also differs materially from the European Convention and the International Covenant. Yet in the cases decided under these constitutions and treaties there were judges who dissented and held that notwithstanding the specific language of the constitution or instrument concerned, capital punishment should not be permitted.

[81] In some instances the dissent focused on the right to life. . . .* * *

{***Chaskalson P then reviewed Hungarian decisions invalidating the death penalty under a constitutional guarantee of the right to life.***}

* * *

[86] The fact that in both the United States and India, which sanction capital punishment, the highest courts have intervened on constitutional grounds in particular cases to prevent the carrying out of death sentences, because in the particular circumstances of such cases, it would have been cruel to do so, evidences the importance attached to the protection of life and the strict scrutiny to which the imposition and carrying out of death sentences are subjected when a constitutional challenge is raised. The same concern is apparent in the

[88] Gregg v. Georgia, *supra* note 60, at 230 (Brennan, J., dissenting) (quoting his opinion in Furman v. Georgia, at 273). *See also*, Furman v. Georgia, *supra* note 34, at 296, where Brennan, J., concurring, states: "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death."

decisions of the European Court of Human Rights and the United Nations Committee on Human Rights. . . .

Public Opinion

[87] The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

[88] Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

[89] This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.[110] Justice Powell's comment in his dissent in *Furman v Georgia* bears repetition:

[110] "The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority. It is the function of the court to examine legislative acts in the light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual (citations omitted)...Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and article I, section 6, of the Constitution would be superfluous." People v. Anderson, *supra* note 62, at 888. This was also the approach of the President of the Hungarian Constitutional Court in his concurring opinion on the constitutionality of capital punishment, where he said: "The Constitutional Court is not bound either by the will of the majority or by public sentiments." *Supra* note 55, at 12. *See also*, Gregg v. Georgia, *supra* note 60, at 880. In the decisive judgment of the Court, Justices Stewart, Powell and Stevens, accepted that "...the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment." (citation omitted)

> ...the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.[111]

So too does the comment of Justice Jackson in *West Virginia State Board of Education v Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[112]

Cruel, Inhuman and Degrading Punishment

[90] The United Nations Committee on Human Rights has held that the death sentence by definition is cruel and degrading punishment. So has the Hungarian Constitutional Court, and three judges of the Canadian Supreme Court. The death sentence has also been held to be cruel or unusual punishment and thus unconstitutional under the state constitutions of Massachusetts and California.[113]

[91] The California decision is *People v. Anderson*.[114] . . . .

[92] In the Massachusetts decision in *District Attorney for the Suffolk District v. Watson*,[117] where the Constitution of the State of Massachusetts prohibited cruel or unusual punishment, the death sentence was also held, by six of the seven judges, to be impermissibly cruel.[118]

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[111] *Supra* note 34, at 443.

[112] 319 U.S. 624, 638 (1943).

[113] The Californian Constitution was subsequently amended to sanction capital punishment.

[114] *Supra* note 62.

[117] 381 Mass. 648 (1980).

[118] "...[T]he death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror." Id. at 664. "All murderers are extreme offenders. Fine distinctions, designed to select a very few from the many, are inescapably capricious when applied to murders and murderers." Id. at 665. "...[A]rbitrariness and discrimination...inevitably persist even under a statute which meets the demands of *Furman*." Id. at 670. "...[T]he supreme punishment of death, inflicted as it is by chance and caprice, may not stand." Id. at 671. "The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live. But that negation of his personality carries through the entire period between

[93] In both cases the disjunctive effect of "or" was referred to as enabling the Courts to declare capital punishment unconstitutional even if it was not "unusual". Under our Constitution it will not meet the requirements of *section* 11(2) if it is cruel, *or* inhuman, *or* degrading.

[94] Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading.[119] No Court would today uphold the constitutionality of a statute that makes the death sentence a competent sentence for the cutting down of trees or the killing of deer, which were capital offences in England in the 18th Century.[120] But murder is not to be equated with such "offences." The wilful taking of an innocent life calls for a severe penalty, and there are many countries which still retain the death penalty as a sentencing option for such cases. Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue. It may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But these factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by *section* 11(2) has been crossed[121] they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life.

[95] The carrying out of the death sentence destroys life, which is protected without reservation under *section* 9 of our Constitution, it annihilates human dignity which is protected under *section* 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of *section* 11(2) the broader meaning

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sentence and execution." Id. at 683 (Liacos, J., concurring).

[119] *E.g.*, Coker v. Georgia, 433 U.S. 782 (1977)(imposition of the death penalty for rape violates due process guarantees because the sentence is grossly disproportionate punishment for a nonlethal offence). *See also*, Gregg v. Georgia, *supra* note 60, at 187 ("[W]e must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed."), and Furman v. Georgia, *supra* note 34, at 273 ("...a punishment may be degrading simply by reason of its enormity.").

[120] The Black Act: 9 George I. C.22, as cited in E.P. THOMPSON, WHIGS AND HUNTERS, THE ORIGIN OF THE BLACK ACT 211 (Pantheon). The author notes that these provisions were described by Lord Chief Justice Hardwicke as "necessary for the present state and condition of things and to suppress mischiefs, which were growing frequent among us."

[121] This was the approach of Brennan, J., in Furman v. Georgia, *supra* note 34, at 282 ("The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society [a determination he makes based on the infrequency of use in relation to the number of offences for which such punishment may apply], and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the [clause prohibiting cruel and unusual punishment].").

to which they are entitled at this stage of the enquiry, rather than a narrow meaning,[122] I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.

Is capital punishment for murder justifiable?

[96] The question that now has to be considered is whether the imposition of such punishment is nonetheless justifiable as a penalty for murder in the circumstances contemplated by *sections* 277(1)(a), 316A and 322(2A) of the Criminal Procedure Act.

[97] It is difficult to conceive of any circumstances in which torture, which is specifically prohibited under *section* 11(2), could ever be justified. But that does not necessarily apply to capital punishment. Capital punishment, unlike torture, has not been absolutely prohibited by public international law. It is therefore not inappropriate to consider whether the death penalty is justifiable under our Constitution as a penalty for murder. This calls for an enquiry similar to that undertaken by Brennan J in *Furman*'s case[123] in dealing with the contention that "death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment."[124]. . . Under the United States Constitution . . ., which [has] no limitation clause[], this enquiry had to be conducted within the larger question of the definition of the right. With us, however, the question has to be dealt with under *section* 33(1).

[98] *Section* 33(1) of the Constitution provides, in part, that:

> The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
>
> (a) shall be permissible only to the extent that it is-
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question.

[99] *Section* 33(1)(b) goes on to provide that the limitation of certain rights, including the rights referred to in *section* 10 and *section* 11 "shall, in addition to being reasonable as required in paragraph (a)(I), also be necessary."

The Two-Stage Approach

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[122] S v Zuma and Two Others, *supra* note 6, para. 21.

[123] Furman v. Georgia, *supra* note 34, at 300. Brennan, J., was dealing here with the proposition that "an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted."

[124] Id.

[100] Our Constitution deals with the limitation of rights through a general limitations clause. As was pointed out by Kentridge AJ in *Zuma*'s case,[125] this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of *section* 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the "two-stage" approach may often produce the same result as the "one-stage" approach, this will not always be the case.

[101] The practical consequences of this difference in approach are evident in the present case. In *Gregg v. Georgia,* the conclusion reached in the judgment of the plurality was summed up as follows:

> In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification, and is thus not unconstitutionally severe.[128]

[102] Under our Constitution, the position is different. It is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by *section* 33. It is not whether the infliction of death as a punishment for murder "is not without justification", it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of *section* 33. It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.[129]

The Application of Section 33

[103] The criteria prescribed by *section* 33(1) for any limitation of the rights contained in *section* 11(2) are that the limitation must be justifiable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right.

[104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an

[125] S v Zuma and Two Others, *supra* note 6.

[128] *Supra* note 60, at 186-187.

[129] S v Zuma and Two Others, *supra* note 6.

assessment based on proportionality.[130] This is implicit in the provisions of *section* 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of *section* 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."[131] * * *

{*Chaskalson P then discussed the interpretation and application of "limitation clauses" in Canada, Germany, and Europe under the European Convention on Human Rights.*}

* * *

Is Capital Punishment for Murder Justifiable under the South African Constitution?

[110] Like Kentridge AJ [in *Zuma's Case*], "I see no reason in this case... to attempt to fit our analysis into the Canadian pattern,"[145] or for that matter to fit it into the pattern followed by any of the other courts to which reference has been made. *Section* 33 prescribes in specific terms the criteria to be applied for the limitation of different categories of rights and it is in the light of these criteria that the death sentence for murder has to be justified.

[111] "Every person" is entitled to claim the protection of the rights enshrined in Chapter Three, and "no" person shall be denied the protection that they offer. Respect for life and dignity which are at the heart of *section* 11(2) are values of the highest order under our Constitution. The carrying out of the death penalty would destroy these and all other rights that the convicted person has, and a clear and convincing case must be made out to justify such action.

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[130] A proportionality test is applied to the limitation of fundamental rights by the Canadian courts, the German Federal Constitutional Court and the European Court of Human Rights. Although the approach of these Courts to proportionality is not identical, all recognise that proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality is also inherent in the different levels of scrutiny applied by United States courts to governmental action.

[131] Reference re ss. 193 and 195(1)(c) of the Criminal Code of Manitoba, *infra* note 135.

[145] S v Zuma and Two Others, *supra* note 122, para. 35.

[112] The Attorney General contended that the imposition of the death penalty for murder in the most serious cases could be justified according to the prescribed criteria. The argument went as follows. The death sentence meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do. It has a greater deterrent effect than life imprisonment; it ensures that the worst murderers will not endanger the lives of prisoners and warders who would be at risk if the "worst of the murderers" were to be imprisoned and not executed; and it also meets the need for retribution which is demanded by society as a response to the high level of crime. In the circumstances presently prevailing in the country, it is therefore a necessary component of the criminal justice system. . . .

* * *

Deterrence

[116] The Attorney General attached considerable weight to the need for a deterrent to violent crime. He argued that the countries which had abolished the death penalty were on the whole developed and peaceful countries in which other penalties might be sufficient deterrents. We had not reached that stage of development, he said. If in years to come we did so, we could do away with the death penalty. Parliament could decide when that time has come. At present, however, so the argument went, the death sentence is an indispensable weapon if we are serious about combatting violent crime.

[117] The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The state is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his *amicus brief*. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law. The question is whether the death sentence for murder can legitimately be made part of that law. And this depends on whether it meets the criteria prescribed by *section* 33(1).

[118] * * *

[119] The cause of the high incidence of violent crime cannot simply be attributed to [practical suspension of the death sentence ovee the preceding several years]. The upsurge in violent crime came at a time of great social change associated with political turmoil and conflict,

particularly during the period 1990 to 1994. It is facile to attribute the increase in violent crime during this period to the moratorium on executions. It was a progression that started before the moratorium was announced. There are many factors that have to be taken into account in looking for the cause of this phenomenon. It is a matter of common knowledge that the political conflict during this period, particularly in Natal and the Witwatersrand, resulted in violence and destruction of a kind not previously experienced. No-go areas, random killings on trains, attacks and counter attacks upon political opponents, created a violent and unstable environment, manipulated by political dissidents and criminal elements alike.

[120] Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave. And there is also the important factor that the police and prosecuting authorities have been unable to cope with this. . . .

[121] We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be more of them if imprisonment is the only sanction. No information was placed before us by the Attorney General in regard to the rising crime rate other than the bare statistics, and they alone prove nothing, other than that we are living in a violent society in which most crime goes unpunished - something that we all know.

[122] The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

[123] In the debate as to the deterrent effect of the death sentence, the issue is sometimes dealt with as if the choice to be made is between the death sentence and the murder going unpunished. That is of course not so. The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which, in an appropriate case, could be a sentence of life imprisonment. Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect, and whether the Constitution sanctions the limitation of rights affected thereby.

[124] In the course of his argument the Attorney General contended that if sentences imposed by the Courts on convicted criminals are too lenient, the law will be brought into disrepute, and members of society will then take the law into their own hands. Law is brought into disrepute if the justice system is ineffective and criminals are not punished. But if the justice system is effective and criminals are apprehended, brought to trial and in serious cases subjected to severe sentences, the law will not fall into disrepute. We have made the commitment to "a future founded on the recognition of human rights, democracy and

peaceful co-existence...for all South Africans."[154] Respect for life and dignity lies at the heart of that commitment. One of the reasons for the prohibition of capital punishment is "that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society."[155] Our country needs such role models.

[125] The Attorney General also contended that if even one innocent life should be saved by the execution of perpetrators of vile murders, this would provide sufficient justification for the death penalty. The hypothesis that innocent lives might be saved must be weighed against the values underlying the Constitution, and the ability of the State to serve "as a role model". In the long run more lives may be saved through the inculcation of a rights culture, than through the execution of murderers.

[126] * * *

[127] It was accepted by the Attorney General that [deterrence] is a much disputed issue in the literature on the death sentence. He contended that it is common sense that the most feared penalty will provide the greatest deterrent, but accepted that there is no proof that the death sentence is in fact a greater deterrent than life imprisonment for a long period. It is, he said, a proposition that is not capable of proof, because one never knows about those who have been deterred; we know only about those who have not been deterred, and who have committed terrible crimes. This is no doubt true, and the fact that there is no proof that the death sentence is a greater deterrent than imprisonment does not necessarily mean that the requirements of *section* 33 cannot be met. It is, however, a major obstacle in the way of the Attorney General's argument, for he has to satisfy us that the penalty is reasonable and necessary, and the doubt which exists in regard to the deterrent effect of the sentence must weigh heavily against his argument. . . .

Prevention

[128] Prevention is another object of punishment. The death sentence ensures that the criminal will never again commit murders, but it is not the only way of doing so, and life imprisonment also serves this purpose. Although there are cases of gaol murders, imprisonment is regarded as sufficient for the purpose of prevention in the overwhelming number of cases in which there are murder convictions, and there is nothing to suggest that it is necessary for this purpose in the few cases in which death sentences are imposed.

Retribution

[129] Retribution is one of the objects of punishment, but it carries less weight than deterrence. The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital

[154] This statement is taken from the provision on National Reconciliation.

[155] Sopinka J (La Forest, Gonthier, Iacobucci and Major JJ, concurring) in Rodriquez v British Columbia (1994) 17 CRR(2d) 193 at 218.

punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. . . . The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.

[130] Retribution ought not to be given undue weight in the balancing process. The Constitution is premised on the assumption that ours will be a constitutional state founded on the recognition of human rights.[159] The concluding provision on National Unity and Reconciliation contains the following commitment:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and *revenge*.
>
> These can now be addressed on the basis that there is a need for understanding but *not for vengeance*, a need for reparation but *not for retaliation*, a need for *ubuntu* but *not for victimisation*. (Emphasis supplied)

[131] Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu* ours should be a society that "wishes to prevent crime...[not] to kill criminals simply to get even with them."[160]

The Essential Content of the Right

{***Since this element has been omitted from the limitation clause – § 36 – of the 1996 constitution, this part of Chaskalson P's discussion is omitted.***}

* * *

The Balancing Process

[135] In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.

* * *

[159] The Preamble to the Constitution records that the new order will be a "constitutional state in which...all citizens shall be able to enjoy and exercise their fundamental rights and freedoms." The commitment to recognition of human rights is reaffirmed in the concluding provision on National Unity and Reconciliation.

[160] Brennan, J., in Furman v. Georgia, *supra* note 34, at 305.

[141] The Attorney General argued that all punishment involves an impairment of dignity. Imprisonment, which is the alternative to the death sentence, severely limits a prisoner's fundamental rights and freedoms. There is only the barest freedom of movement or of residence in prison, and other basic rights such as freedom of expression and freedom of assembly are severely curtailed.

[142] Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity. But a prisoner does not lose all his or her rights on entering prison. . . .

[143] A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality . . . are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three subject only to limitations imposed by the prison regime that are justifiable under *section* 33. Of these, none are more important than the *section* 11(2) right not to be subjected to "torture of any kind...nor to cruel, inhuman or degrading treatment or punishment." There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether. It is that difference with which we are concerned in the present case.

Conclusion

[144] The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

[145] In the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet.

[146] Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into

account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of *section* 33(1) have accordingly not been satisfied, and it follows that the [a law prescribing the death penalty in any circumstances] must be held to be inconsistent with *section* 11(2) of the Constitution. In the circumstances, it is not necessary for me to consider whether the section would also be inconsistent with *sections* 8, 9 or 10 of the Constitution if they had been dealt with separately and not treated together as giving meaning to *section* 11(2).

A. CHASKALSON
PRESIDENT, CONSTITUTIONAL COURT

[Nine other justices of the Constitutional Court heard this case, and all of them filed opinions. (The eleventh justice, Richard Goldstone, was occupied elsewhere in early 1995, when the case was heard, and had not yet assumed his duties with the Court.) Most of the other justices expressed general agreement with and acceptance of the reasoning of Chaskalson P. None suggested sharp disagreement. All had matters of approach, emphasis, or analysis they wished to voice. Some would have placed the main, formal weight of the judgment on one of the other bill of rights guarantees rather than that contained in section 11(2). In subsequent work, the Court has treated Chaskalson P's opinion as the Court's authoritative statement in *Makwanyane*, but members do sometimes refer to the others, as we'll see. The other opinion make interesting reading. They are available here in the file named "Makwanyane Other Opinions."

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/98

THE NATIONAL COALITION FOR GAY AND
LESBIAN EQUALITY, et al. Second Applicant

versus

THE MINISTER OF JUSTICE, et al. Third Respondent

Heard on : 27 August 1998

Decided on : 9 October 1998

JUDGMENT

ACKERMANN J:

Introduction

[1] This matter concerns the confirmation of a declaration of constitutional invalidity of [Section 20A of the Sexual Offences Act, and certain other statutes attaching punitive consequences to the common-law crime of sodomy] . . . .

* * *

The Constitutional Validity of the Common Law Offence of Sodomy

[2] I shall for the moment deal only with sodomy which takes place in private between consenting males. The long history relating to the ways in which the South African criminal common law differentiated in its treatment of gays as opposed to its treatment of heterosexuals and lesbians, prior to the passing of the interim Constitution, has already been dealt with in at least three judgments of the High Court. The conclusions can be briefly stated. The offence of sodomy, prior to the coming into force of the interim Constitution, was defined as "unlawful and intentional sexual intercourse per anum between human males", consent not depriving the act of unlawfulness, "and thus both parties commit the crime". Neither anal nor oral sex in private between a consenting adult male and a consenting adult female was punishable by the criminal law. Nor was any sexual act, in private, between consenting adult females so punishable.

* * *

The Common-law Offence of Sodomy as an Infringement of the Rights to Dignity and Privacy

[26] Thus far I have considered only the common-law crime of sodomy on the basis of its inconsistency with the right to equality. This was the primary basis on which the case was argued. [We shall look later at the Court's treatment of the equality clause claim -- ed.] In my view, however, the common-law crime of sodomy also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution. As we have emphasised on several occasions,[34] the right to dignity is a cornerstone of our Constitution. Its importance is further emphasised by the role accorded to it in section 36 of the Constitution which provides that:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . .".

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.

[27] Counsel for the applicant argued, in the alternative, that the provisions were in breach of section 14 of the Constitution, the right to privacy. In so doing, however, the applicant adopted the reasoning of Cameron:

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[34] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at paras 328-330; *Hugo* above n 17 at para 41; *Prinsloo* above n 17 at paras 31-33; *Ferreira v Levin NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).

> "[T]he privacy argument has detrimental effects on the search for a society which is truly non-stigmatizing as far as sexual orientation is concerned. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom — but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms."

[28] It seems to me that these remarks should be understood in the context in which they were made. They were made during an inaugural lecture given on 27 October 1992 at the time that negotiations concerning the new Constitution were imminent. At the time, there was considerable discussion as to what rights should or should not be included in a Bill of Rights, and the subject of the lecture was the question of how sexual orientation ought to be protected in the new Constitution. The author was asserting that sexual orientation should be treated as a ground for non-discrimination in the new Constitution and that reliance on privacy alone would be inadequate. Cameron's concern that discrimination against gay men ought not to be proscribed on the ground of the right to privacy only, is understandable. I would emphasise that in this judgment I find the offence of sodomy to be unconstitutional because it breaches the rights of equality, dignity and privacy. The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy.

[29] It does not seem to me that we should conclude from these remarks that where our law places a blanket criminal ban on certain forms of sexual conduct, it does not result in a breach of privacy. That cannot, in my view, be the correct interpretation of those remarks. This court has considered the right to privacy entrenched in our Constitution on several occasions. In *Bernstein v Bester*, it was said that rights should not be construed absolutely or individualistically in ways which denied that all individuals are members of a broader community and are defined in significant ways by that membership:

> "In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community . . . . 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."

[30] 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 way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. Our society has a poor record of

seeking to regulate the sexual expression of South Africans. In some cases, as in this one, the reason for the regulation was discriminatory; our law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.

Justification

[31] Although section 36(1)[39] of the 1996 Constitution differs in various respects from section 33 of the interim Constitution[40] its application still involves a process, described in *S v Makwanyane and Another* as the ". . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests."

[32] In *Makwanyane* the relevant considerations in the balancing process were stated to include ". . . the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." The relevant considerations in the balancing process are now expressly stated in section 36(1) of the 1996 Constitution to include those itemised in paragraphs (a) to (e) thereof. In my view this does not in any material respect alter the approach

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[39] Which provides thus:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[40] More particularly in that the prohibition against the negation of "the essential content of the right in question" in section 33(1)(b) and the "necessary" requirement in the proviso to section 33(1) have been omitted from section 36(1) of the 1996 Constitution.

expounded in *Makwanyane*, save that paragraph (e) requires that account be taken in each limitation evaluation of "less restrictive means to achieve the purpose [of the limitation]." Although section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

[33] The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.

[34] The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.

[35] Against this must be considered whether the limitation has any purpose and, if so, its importance. No valid purpose has been suggested. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation.

[36] As far as religious views and influences are concerned I would repeat what was stated in *S v H*:

> "There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds the view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homo-sexuality."

It would not be judicially proper to go further than that in the absence of properly admitted expert evidence. I think it necessary to point out, in the context of the present case, that apart from freedom

of expression,[46] freedom of conscience, religion, thought, belief and opinion are also constitutionally protected values under the 1996 Constitution.[47] The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out, that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.

[Justice Ackermann then reviewed at length the responses of several national and transnational tribunals to the question of constitutional or treaty protection of sex between consenting adult males in several countries and transnational tribunals.]

* * *

[55] A number of open and democratic societies have turned their backs on the criminalisation of sodomy in private between adult consenting males, despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Their reasons for doing so, which are referred to above, fortify the conclusion which I have reached that the limitation in question in our law regarding such criminalisation cannot be justified under section 36(1) of the 1996 Constitution. I would have reached this conclusion if the right to equality alone had been breached. The fact that the constitutional rights of gay men to dignity and privacy have also been infringed places justification even further beyond the bounds of possibility. * * *

[75] I have had the opportunity of reading the concurring judgment prepared by Sachs J. I agree with the sentiments expressed therein.

* * *

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Mokgoro J, O'Regan J and Yacoob J all concur in the judgment of Ackermann J

SACHS J:

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[115] The depreciated value given in argument to invalidation on the grounds of privacy, treating

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46 Under section 16 of the 1996 Constitution.

47 Under section 15 thereof.

it as a poor relation of equality, was a result of adopting an impoverished version of the concept of privacy itself. In my view, the underlying assumptions about privacy were doubly flawed, being far too narrow in their understanding, on the one hand, and far too wide in their implications, on the other. I will deal first with the undue narrowness of understanding.

[116] There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers, Attorney General of Georgia v. Hardwick et al* made it clear that the much-quoted "right to be left alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Just as "liberty must be viewed not merely *'negatively* or selfishly as a mere absence of restraint, but *positively* and socially as an adjustment of restraints to the end of freedom of opportunity' ",[111] so must privacy be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place.

[117] The emerging jurisprudence of this Court is fully consistent with such an affirmative approach. In *Bernstein and Others v Bester and Others NNO* Ackermann J pointed out that the scope of privacy had been closely related to the concept of identity and that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity . . . In the context of privacy this means that it is . . . the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community." Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.

[118] At the same time, there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what they do is

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[111] Brennan "Reason, Passion, and the Progress of the Law" The Forty-Second Annual Benjamin N. Cardozo Lecture, (1988) 10:3 *Cardozo Law Review* 1 at 10, quoting Cardozo *The Paradoxes of Legal Science* (1928) at 118.

sexual and done in private. In this respect, the assumptions about privacy rights are too broad. There are very few democratic societies, if any, which do not penalise persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private. Similarly, in democratic societies sex involving violence, deception, voyeurism, intrusion or harassment is punishable (if not always punished), or else actionable, wherever it takes place (there is controversy about prostitution and sado-masochistic and dangerous fetishistic sex). The privacy interest is overcome because of the perceived harm.

[119] The choice is accordingly not an all-or-nothing one between maintaining a spartan normality, at the one extreme, or entering what has been called the post-modern supermarket of satisfactions, at the other. Respect for personal privacy does not require disrespect for social standards. The law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalise what is harmful and regulate what is offensive. What is crucial for present purposes is that whatever limits are established they do not offend the Constitution.

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[1] This matter concerns the confirmation of a declaration of constitutional invalidity of [Section 20A of the Sexual Offences Act, and certain other statutes attaching punitive consequences to the common-law crime of sodomy] . . . .

* * *

The Constitutional Validity of the Common Law Offence of Sodomy

[12] . . . The offence of sodomy, prior to the coming into force of the interim Constitution, was defined as "unlawful and intentional sexual intercourse per anum between human males", consent not depriving the act of unlawfulness, "and thus both parties commit the crime". Neither anal nor oral sex in private between a consenting adult male and a consenting adult female was punishable by the criminal law. Nor was any sexual act, in private, between consenting adult females so punishable.

The Infringement of the Equality Guarantee

The Equality Analysis.

* * *

[16] . . . The stage (a) rational connection inquiry [referring to the "tabulation of the stages of inquiry" in *Harksen*] would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable. I proceed with the enquiry as to whether the differentiation on the ground of sexual orientation constitutes unfair discrimination. Being a ground listed in section 9(3) it is presumed, in terms of section 9(5), that the differentiation constitutes unfair discrimination "unless it is established that the discrimination is fair." Although nobody in this case contended that the discrimination was fair, the Court must still be satisfied, on a consideration of all the circumstances, that fairness has not been established.

[17] Although, in the final analysis, it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination, the approach to be adopted, as appears from the decision of this Court in *Harksen*, is comprehensive and nuanced. In *Harksen*, after referring to the emphasis placed on the impact of the discrimination in his judgment in *Hugo,* Goldstone J went on to say:

> " . . . The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner.
>
> . . . .
>
> In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:
>
> (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .
>
> (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature. * * *"

The Impact of the Discrimination Resulting from the Criminalisation of Sodomy on the Members of the Group(s) Affected

[18] In what follows I rely heavily on an influential article written by Prof Edwin Cameron.[23] According to the *Shorter Oxford English Dictionary* "orientation" means "[a] person's (esp. political or psychological) attitude or adjustment in relation to circumstances, ideas, etc; determination of one's mental or emotional position." As to "sexual orientation", I adopt the following definition put forward by Cameron:

> ". . . sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex."

[19] The concept "sexual orientation" as used in section 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.[24]

[20] The desire for equality is not a hope for the elimination of all differences.

> "The experience of subordination - of personal subordination, above all - lies behind the vision of equality."

To understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other". * * *

[21] The discriminatory prohibitions on sex between men reinforces already existing societal

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[23] Edwin Cameron "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *SALJ* 450. The article is a revised version of an inaugural lecture delivered by the author on 27 October 1992 on the acceptance by him of an *ad hominem* professorship in law at the University of the Witwatersrand. Despite the fact that it was conceived some 18 months prior to the adoption of the interim Constitution, its depth and lucidity of analysis is just as instructive in the present era when sexual orientation has indeed achieved constitutional protection. I have followed Cameron's use of the expressions "gay", "lesbian" and "homosexual".

[24] A similar wider meaning is supported by Kentridge in Chaskalson and Others *Constitutional Law of South Africa,* Revision Service 2 (1998) at 14-26 where the learned author states:

> "Culture, sexual orientation, gender and even sex are not necessarily immutable. Rather than extending protection only to immutable human features, it should be recognized that certain choices are so important to self-definition that these too should be protected."

Compare also, *Sexual Orientation and the Law* by the Editors of the Harvard Law Review, 1990 Harvard University Press at fn 1 at 1.

prejudices and severely increases the negative effects of such prejudices on their lives.

> "Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation." (Footnotes omitted).[28]

The European Court of Human Rights has correctly, in my view, recognised the often serious psychological harm for gays which results from such discriminatory provisions:

> "[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow . . ."[29]

So has the Supreme Court of Canada in *Vriend v Alberta*:

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."

These observations were made in the context of discrimination on grounds of sexual orientation in the employment field and would apply with even greater force to the criminalisation of consensual sodomy in private between adult males.

[22] But such provisions also impinge peripherally in other harmful ways on gay men which go beyond the immediate impact on their dignity and self-esteem. Their consequences -

> "legitimate or encourage blackmail, police entrapment, violence ('queer-bashing') and

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28 Cameron above n 23 at 455.

29 *Norris v Republic of Ireland* (1991) 13 EHRR 186 at 192 para 21 quoting with approval the finding of an Irish judge.

> peripheral discrimination, such as refusal of facilities, accommodation and opportunities."[31]

[23] The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that [unlike some other traditionally advantaged groups such as women and blacks] they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.

[24] I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court [in *Harksen*]:

> (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
>
> (b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
>
> (c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

[25] The above analysis confirms that the discrimination is unfair. There is nothing which can be placed in the other balance of the scale. The inevitable conclusion is that the discrimination in question is unfair and therefore in breach of section 9 of the 1996 Constitution.

* * *

Justification

[For Ackermann J's discussion of justification under s 36(1), see "Gay&Les1" in part 7 of the course syllabus, paras 31-55]

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[75] I have had the opportunity of reading the concurring judgment prepared by Sachs J. I agree with the sentiments expressed therein.

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[31] Cameron above n 23 at 456 (footnote omitted).

* * *

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Mokgoro J, O'Regan J and Yacoob J all concur in the judgment of Ackermann J

SACHS J:

* * *

Equality and Privacy

[110] . . . [I]t is understandable that the applicants should urge this Court to base its invalidation of the anti-sodomy laws on the ground that they violated the equality provisions in the Bill of Rights. Less acceptable however, is the manner in which applicants treated the right to privacy . . . [as discussed in the excerpts from Sachs J's opinion in "gay&les1," syllabus part 7]. . . .

[111] I consider that [the applicants' concerns about reliance on privacy arise from a set of assumptions that are flawed as to how equality and privacy rights interrelate . . . . [T]he approach adopted by the applicants subjects equality and privacy rights to inappropriate sequential ordering, [and a result] is . . . to put the general development of human rights jurisprudence on a false track.

[112] I [now] deal . . . with the . . . assumption that in a case like the present, rights have to be compartmentalised and then ranked in descending order of value. The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. . . . This requires looking at rights and their violations . . . contextually rather than abstractly.

[113] One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both,[100] that is, globally and contextually, not separately and abstractly.[101] The

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100 This approach seems to be contemplated by the words "on one or more grounds" in section 9(3). See n 2 above.

101 Critical race feminists are at the forefront of the movement towards a contextual treatment and understanding of the lives of those who face multiple discrimination. A major thrust of the critical race genre is to focus on the multileveled identities and multiple consciousness of women of colour, in particular, who are often discriminated against on the basis of race, gender and economic class. In doing so, critical race feminism draws

objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring[102] of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.[103]

[114] Conversely, a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights. The case before us is in point. The group in question is

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attention to the need for conscious consideration of fundamental rights within the context of persons whose identities may involve the intersection of race, gender, class, sexual orientation, physical disadvantage or other characteristics which often serve as the basis for unfair discrimination. See, for example, a recent anthology: Wing (ed) *Critical Race Feminism, a reader* (New York University Press, New York and London 1997).

[102] One of the many complex forms of scarring was famously described by Du Bois thus:

> "It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of the world that looks on in amused contempt and pity. One ever feels his twoness - an American, a Negro." Du Bois *The Souls of Black Folk: Essays and Sketches* (Dado, Mead and New York, 1979) at 3 quoted in Minnow *Making all the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, Ithaca and London, 1990) at 68.

Williams refers to the same near schizophrenic experience speaking of:

> ". . . the phenomenon of multiple consciousness, multiple voice, double-voicedness - the shifting consciousness which is the daily experience of people of color and of women. When I was younger, I use to associate that dreamy, many sided feeling of the world with fears that I was schizophrenic. Now that I am older (and postmodern) I think that there is much sanity in that world- view. If indeed we are mirrors of each other in this society, if I have a sense of self-concept that is in any way whatsoever dependent upon the regard of others, upon the looks that I sometimes get in other people's eyes as judgment of me - if these others indeed supply some part of my sense of myself, then it makes a certain amount of social sense to be in touch with, rather than unconscious of, that doubleness of myself, that me that stares back in the eyes of others." in Williams "Response to Mari Matsuda" (1989) 11 *Womens Rights Law Reporter* 11 at 11.

[103] See Simons *African Women: Their Legal Status in South Africa* C Hurst & Co, London 1968) at 285:

> "Women carry a double burden of disabilities. They are discriminated against on the grounds of both sex and race. The two kinds of discrimination interact and reinforce each other." See generally the chapter on "Widows in Distress".

discriminated against because of the one characteristic of sexual orientation. The measures that assail their personhood are clustered around this particular personal trait. Yet the impact of these laws on the group is of such a nature that a number of different protected rights are simultaneously infringed. In these circumstances it would be as artificial in law as it would be in life to treat the categories as alternative rather than interactive. In some contexts, rights collide and an appropriate balancing is required.[104] In others, such as the present, they inter-relate and give extra dimension to the extent and impact of the infringement. Thus, the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives. The Bill of Rights tells us how we should analyse this interaction: in technical terms, the gross interference with privacy will bear strongly on the unfairness of the discrimination, while the discriminatory manner in which groups are targeted for invasions of privacy will destroy any possibility of justification for such invasions.

* * *

Equality and Dignity

[120] It will be noted that the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity. This Court has on a number of occasions emphasised the centrality of the concept of dignity and self-worth to the idea of equality. In an interesting argument, the Centre for Applied Legal Studies (the Centre) has mounted a frontal challenge to this approach, arguing that the equality clause is intended to advance equality, not dignity, and that the dignity provisions in the Bill of Rights[105] should take care of protecting dignity. This was part of an invitation to the Court to re-visit its whole approach to equality jurisprudence, shifting from what the Centre called the defensive posture of reliance on unlawful discrimination under section 9(3) to what it claimed to be an affirmative position of promoting equality under the broad provisions of section 9(1). The constitutional vocation of section 9(1), it argued, had been reduced from that of the guarantor of substantive equality to that of a gatekeeper for claims of violation of dignity.

[121] [The judgment of Ackermann J in this case is itself a response to the assertion that the Court has failed to promote substantive as opposed to formal equality. [His judgment refuses] to follow a formal equality test, which could have based invalidity simply on the different treatment accorded

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104 See *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC); 1996 (3) SA 850 (CC) at para 55, per Kentridge AJ:

> "A claim for defamation, for instance, raises a tension between the right to freedom of expression and the right to dignity."

105 Section 10 provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

by the law to anal intercourse according to whether the partner was male or female. Instead, the judgment has with appropriate sensitivity for the way anti-gay prejudice has impinged on the dignity of members of the gay community, focussed on the manner in which the anti-sodomy laws have reinforced systemic disadvantage both of a practical and a spiritual nature. Furthermore, it has done so not by adopting the viewpoint of the so-called reasonable lawmaker who accepts as objective all the prejudices of heterosexual society as incorporated into the laws in question, but by responding to the request of the applicants to look at the matter from the perspective of those whose lives and sense of self-worth are affected by the measures.

[122] [I disagree with the Centre's suggestion] to the effect that section 9(1) should be interpreted so as to carry virtually the whole burden of securing equality . . . . There are, I believe, [important] . . . considerations supporting a structured focus on non-discrimination as the heart of implementable equality guarantees: institutional aptness,[126] functional effectiveness,[127] technical discipline,[128] historical congruency,[129] compatibility with international practice[130] and conceptual sensitivity.

[123] By developing its equality jurisprudence around the concept of unfair discrimination this Court engages in a structured discourse centred on respect for human rights and non-discrimination. It reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasising the Court's special responsibility for protecting fundamental rights in an affirmative manner. It also diminishes the possibility of the Court being inundated by unmeritorious claims, and

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126 See Nowak and Rotunda *Constitutional Law* 5 ed (West Publishing Company, St. Paul Minn 1995) at 601.

127 Hogg comments:

> "A study prepared in 1988, only three years after the coming into force of s 15 . . . found 591 cases (two-thirds of which were reported in full) in which a law had been challenged on the basis of s 15. Most of the challenges seemed unmeritorious, and most were unsuccessful; but the absence of any clear standards for the application of s 15 encouraged lawyers to keep trying to use s. 15 whenever a statutory distinction worked to the disadvantage of a client." in Hogg*Constitutional Law of Canada* 3 ed (Carswell Professional Publishing, Canada 1992) at 1162.

128 Sections 9(3), (4) and (5) of the 1996 Constitution provide the structure for focused and candid judicial analysis.

129 The extensive list of grounds of discrimination specifically enumerated in section 9(3) underlines the special weight given by the Bill of Rights to combatting unfair discrimination in the many guises it has been wont to adopt.

130 Far from the concept of non-discrimination being weak and negative, Sieghart refers to it as possibly the strongest principle of all to be found in international human rights law. See Sieghart *The International Law of Human Rights* (Clarendon Press, Oxford 1983), referred to in *In re: the Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC); 1996 (3) SA 165 (CC) at para 71.

best enables the Court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility. Finally, it places the Court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history.

[124] Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

[125] Once again, it is my view that the equality principle and the dignity principle should not be seen as competitive but rather as complementary. Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim.

[126] One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.

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The Treatment of Difference in an Open Society

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[132] The present case shows well that equality should not be confused with uniformity; in fact,

uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

[133] Section 9 of the Constitution is unambiguous: discrimination on the grounds of being gay or lesbian, is presumptively unfair and a violation of fundamental rights. This judgment holds that in determining the normative limits of permissible sexual conduct, homosexual erotic activity must be treated on an equal basis with heterosexual, in other words, that the same-sex quality of the conduct must not be a consideration in determining where and how the law should intervene. . . .

[134] The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are. The concept of sexual deviance needs to be reviewed. A heterosexual norm was established, gays were labelled deviant from the norm and difference was located in them. What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.

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[136] A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

[137] The fact that the state may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree

with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society. . . . Having made these observations, I express my full concurrence in Ackermann J's judgment and order.