CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/98

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY	First Applicant
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Second Applicant
versus	
THE MINISTER OF JUSTICE	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE ATTORNEY-GENERAL OF THE WITWATERSRAND	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 -

(a) section 20A of the Sexual Offences Act, 1957;

(b) the inclusion of sodomy as an item in Schedule 1 of the Criminal

Procedure Act, 1977 ("Schedule 1 of the CPA"); and

(c) the inclusion of sodomy as an item in the schedule to the Security Officers Act, 1987 ("the Security Officers Act Schedule");

made by Heher J in the Witwatersrand High Court on 8 May 1998.[1] These declarations were made and referred to this Court for confirmation under section 172(2)(a) of the 1996 Constitution.[2]

[2] The full order made by Heher J reads as follows:

"1. It is declared that the common-law offence of sodomy is inconsistent with the Constitution of the Republic of South Africa 1996.

2. It is declared that the common-law offence of commission of an unnatural sexual act is inconsistent with the Constitution of the Republic of South Africa 1996 to the extent that it criminalises acts

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1 Reported as *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W).

2 The Constitution of the Republic of South Africa 1996. The new Rules of the Constitutional Court were only promulgated on 29 May 1998 and the present referral by the High Court took place according to the procedure sanctioned by this Court in *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) at paras 1 to 6.

committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute an offence.

3. It is declared that section 20A of the Sexual Offences Act, 1957 is inconsistent with the Constitution and invalid.

4. It is declared that the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 1977 is inconsistent with the Constitution and invalid.

5. It is declared that the inclusion of sodomy as an item in the Schedule to the Security Officers Act, 1987 is inconsistent with the Constitution and invalid.

6. The aforementioned orders, in so far as they declare provisions of Acts of Parliament invalid, are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of Act 108 of 1996."

The learned judge correctly did not refer orders (1) and (2) to this Court for confirmation because section 172(2)(a)[3] of the 1996 Constitution neither requires confirmation by the Constitutional Court of orders of constitutional invalidity of common law offences nor

[3] Which provides as follows:

"The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

empowers a referral for such purpose.

[3] Orders (1) and (2) would ordinarily become final when the period for instituting appeal proceedings against these orders to the Supreme Court of Appeal or this Court lapsed and no such appeal proceedings had been commenced by that time. I shall deal later with the problems that can arise because the Constitution makes no provision for an obligatory referral in such cases.

[4] The first applicant is the National Coalition for Gay and Lesbian Equality, a voluntary association of gay, lesbian, bisexual and transgendered people in South Africa and of 70 organisations and associations representing gay, lesbian, bisexual and transgendered people in South Africa. The second applicant is the South African Human Rights Commission which functions under section 184 of the 1996 Constitution.[4] The three respondents are the Minister of Justice, the Minister of Safety and Security, and the Attorney-General of the Witwatersrand. Initially the applicants sought the following relief in the High Court:

> "(a) an order declaring that the common-law offence of sodomy is inconsistent with the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution") and invalid;

[4] The Human Rights Commission was established under section 115 of the interim Constitution (the Constitution of the Republic of South Africa, 1993) and continues to function as such by virtue of item 20 of Schedule 6 to the 1996 Constitution.

(b) an order invalidating any conviction for the offence of sodomy if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired;

(c) an order declaring that the common-law offence of commission of an unnatural sexual act between men is inconsistent with the Constitution and invalid;

(d) an order invalidating any conviction for the offence of commission of an unnatural sexual act between men if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired;

(e) an order declaring that section 20A of the Sexual Offences Act, 1957 (Act 23 of 1957) is inconsistent with the Constitution and invalid;

(f) an order setting aside any conviction for the offence of contravening section 20A of the Sexual Offences Act 1957 (Act 23 of 1957), if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment is pending or the time for noting an appeal from that judgment has not yet expired;

(g) an order declaring the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is inconsistent with the Constitution and invalid;

(h) an order invalidating any act performed after 27 April 1994 under authority of the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act (Act 51 of 1977);

(i) an order declaring that the inclusion of sodomy as an item in the Schedule to the

Security Officers Act, 1987 (Act 92 of 1987) is inconsistent with the Constitution and invalid;

(j) an order invalidating any act performed after 27 April 1994 under authority of the inclusion of sodomy as an item in the Schedule to the Security Officers Act (Act 92 of 1987);

(k) an order granting the Applicants further and/or alternative relief;

(l) only if this application should be opposed, an order directing the Respondent or Respondents so opposing to pay the First Applicant's costs."

[5] The second and third respondents at no stage opposed the application. The first respondent initially opposed the application on very limited grounds. When, however, the applicants withdrew their prayers (h) and (j) above, before the hearing in the High Court commenced, the first respondent withdrew such opposition and consequently no order for costs was sought by the applicants. At a later stage of the High Court proceedings, the applicants abandoned the relief sought in prayers (b) and (d). Without abandoning the relief sought in prayer (f), the applicants did not pursue such relief in the High Court because they were of the view that only the Constitutional Court had jurisdiction to grant relief having the generalised effect of this prayer. These matters are alluded to because of the difficulties arising from the orders sought from this Court, which will be dealt with later in this judgment.

[6] The second and third respondents were not represented at the hearing before this

Court, despite being invited to do so in the directions of the President under rule 15(5) of the Constitutional Court Rules.[5] On behalf of the first respondent, the State Attorney intimated that the first respondent abided by the orders made in the High Court, that no written argument would be lodged on his behalf as requested in the President's directions and that he would be represented at the hearing "to assist the court in the event the court puts any questions to his representative." At the hearing the first respondent was represented by Ms Masemola. The Centre for Applied Legal Studies was admitted as amicus curiae under rule 9, lodged heads of argument and was allowed to present oral argument before the Court.

[7] The CPA and various other statutes contain provisions linked to certain offences which are not expressly identified in such provisions, but are merely described as offences listed in Schedule 1 of the CPA. The effect of the inclusion of the offence of sodomy in Schedule 1 is, amongst other things, the following:

(i) Section 37(1)(a)(iv) of the CPA empowers any police official to take fingerprints, palm-prints or footprints of any person on whom a summons has been served in respect of the offence of sodomy;

(ii) Section 40(1)(b) of the CPA allows a peace officer to arrest any person

5 Above n 2.

with or without a valid warrant, if the officer reasonably suspects that that person has committed sodomy;

(iii) Section 42(1)(a) of the CPA allows a private person to arrest any person with or without a valid warrant if the private person reasonably suspects the individual has committed sodomy;

(iv) Section 49(2) of the CPA allows a person authorised to arrest an individual suspected of having committed sodomy to kill the suspect if, upon attempting to arrest the suspect, such person cannot arrest the suspect, or the suspect flees, and there is no other way to arrest the suspect or to prevent him from fleeing;

(v) Sections 60(4)(a), 60(5)(e) and 60(5)(g) of the CPA provide that bail may be refused to an accused who is likely to commit sodomy and, in determining whether that will happen, the Court may take into account that the accused has a disposition to do so or has previously committed sodomy while released on bail;

(vi) Section 185A(1) of the CPA provides for the protection of witnesses who have given or who are likely to give material evidence with reference to the

offence of sodomy;

(vii) Section 3(1)(b) of the Interception and Monitoring Prohibition Act, 127 of 1992 (read with the definition of "serious offence" under section 1 of that Act), allows the state to intercept postal articles and private communications necessary for investigating sodomy;

(viii) Section 13(8) of the South African Police Service Act, 68 of 1995 gives wide powers to members of the South African Police Service to erect roadblocks in the prevention, detection and investigation of the offence of sodomy;

(ix) Section 1(8) and (9) of the Special Pensions Act, 69 of 1996 disqualifies persons convicted of the offence of sodomy from receiving or continuing to receive a pension in terms of section 1 of that Act;

(x) Section 2(1)(c) of the Special Pensions Act precludes a surviving spouse or surviving dependent from receiving a surviving dependant's pension if the pensioner has been convicted of the offence of sodomy.

[8] In terms of the Security Officers Act certain negative consequences follow if a

person is found guilty of certain offences or commits certain acts listed in the Schedule to such Act. The offence of sodomy is listed in such schedule. The effect of the inclusion of the offence of sodomy in the Security Officers Act Schedule is the following:

(i) Under section 12(1)(b) of the Security Officers Act any person convicted of sodomy is prohibited from registering as a security officer.

(ii) Under section 15(1)(a)(i) the registration of a security officer who is found guilty of sodomy may be withdrawn.

(iii) Under section 20(1)(b) a security officer who commits sodomy may be found guilty of improper conduct.

[9] Although the constitutionality of the common law offence of sodomy is not directly before us, a finding of constitutional invalidity is an indispensable and unavoidable step in concluding that the provisions referred to in paragraphs (4) and (5) of the order are constitutionally invalid. In this indirect sense the correctness or otherwise of the High Court's finding regarding the offence of sodomy is before this Court and has to be decided.

[10] Before dealing with the judgment in the High Court it is convenient to quote the

provisions of the two Constitutions dealing with the guarantee of equality. Both are relevant for issues to be dealt with later. Section 8 of the interim Constitution,[6] to the extent presently relevant, provided:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
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> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
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> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
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> (b) . . . .
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> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

Section 9 of the 1996 Constitution stipulates:

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6 The Constitution of the Republic of South Africa, 1993.

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The High Court Judgment

[11] Heher J, in the High Court, based his judgment declaring the common law crime of sodomy to be inconsistent with the 1996 Constitution exclusively on the breach of the right to equality. So too did Farlam J (Ngcobo J concurring) in *S v K*,[7] a case heavily relied on by Heher J in coming to the conclusion that the common law crime of sodomy

[7] 1997 (9) BCLR 1283 (C); 1997 (4) SA 469 (C).

ceased to exist after the coming into effect of the interim Constitution[8]. Before the new constitutional order came into operation in our country, the common law offence of sodomy differentiated between gays and heterosexuals and between gays and lesbians. It criminally proscribed sodomy between men and men, even in private between consenting adults, but not between men and women; nor did it proscribe intimate sexual acts in private between consenting adult women. As far as there being any rational connection between such differentiation and a legitimate government purpose,[9] Heher J simply held that:

> ". . . respondents have not suggested a reasoned basis for the differentiation which may further the aims of government and I am unable to think of any."[10]

Heher J pointed out that if the differentiation was on one of the grounds listed in section 9(3) of the 1996 Constitution (in the present case on the ground of "sexual orientation") it was presumed to be unfair (under section 9(5)). He immediately proceeded to consider whether the offence of sodomy was justified under section 36 of the 1996 Constitution, without expressly considering the question whether, notwithstanding the presumption under section 9(3), it had been established that the discrimination was fair. He found (by

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8 Above n 1 at 750G.

9 As to which see *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) para 53 (a) (quoted in paragraph 17 below) dealing with the equality analysis under the interim Constitution. As is pointed out in para 18 below it is not in all cases obligatory to embark on the rational connection analysis.

10 Above n 1 at 746G.

necessary implication) that no such justification existed and held that the crime in question could not withstand constitutional scrutiny in as much as "no rational basis for [its] retention . . . can be offered."[11]

[12] Heher J's approach to the common law offence of committing an unnatural sexual act was different. Having found, under section 9(1) of the 1996 Constitution, that there was no connection between the differentiation involved in this offence and any legitimate governmental purpose, he immediately turned to the question of justification. He concluded that there was no justification for maintaining the common law crime of committing an unnatural sexual act by a man or between men, if such act would not constitute an offence if committed by a woman, between women or between a man and a woman; and made a declaration of constitutional inconsistency accordingly.

[13] Section 20A of the Sexual Offences Act provides as follows:

> "(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
>
> (2) For the purposes of subsection (1) 'a party' means any occasion where more than two persons are present.
>
> (3) The provisions of subsection (1) do not derogate from the common law, any

[11] Id at 750E.

other provision of this Act or a provision of any other law."

The High Court found that these provisions manifested a twofold differentiation. First, differentiation on the grounds of "sex (gender)" because the provisions criminalised only certain conduct by men; no acts of an equivalent nature performed by women or by men and women together are criminalised under the Act. Second, on grounds of sexual orientation, because "the target of the section is plainly men with homosexual tendencies albeit that the wording is wide enough to embrace heterosexuals."[12] Neither basis for differentiation, the judgment proceeds, bears a rational connection to any legitimate governmental purpose. As both are listed in section 9(3) unfairness is presumed, and without considering whether fairness had been established, Heher J immediately proceeded to consider whether the violation of section 9 could be justified under section 36.[13] He found that it could not.[14] Having found the offence of sodomy to be constitutionally invalid Heher J concluded, as an inescapable consequence (and correctly

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12 Id at 751G-H.

13 Id at 751I-752B. In this passage reference is made to section 8 of the Constitution, which might be thought to be a reference to the interim Constitution. This is clearly a slip of the pen, for in the immediately succeeding paragraphs the learned judge proceeds to consider the justification question under section 36 of the 1996 Constitution.

14 Id at 752B-753C.

so on that premise), that the inclusion of sodomy in Schedule 1 of the CPA and in the Security Officers Act was likewise constitutionally invalid.

The Constitutional Validity of the Common Law Offence of Sodomy

[14] 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.[15] 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".[16] 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

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15 Namely, in *S v H* 1995 (1) SA 120 (C); *S v K* above n 7, in which a very helpful historical analysis is conducted, and in the High Court judgment in the present case.

16 Burchell and Milton *Principles of Criminal Law* 1ed (Juta Cape Town 1991) at 571 and 572. Snyman *Criminal Law* 2ed (Butterworths, Durban 1989) at 378-9 is to the same effect. The qualification "prior to the coming into force of the interim Constitution" is added because of the fact that certain academic writers have argued that, notwithstanding the fact that sodomy in private between consenting adult males did not survive as an offence in the face of the interim Constitution, there are instances of sodomy, for example the cases of "male" anal rape which occurs without the consent of the victim or where the victim is incapable of giving consent, which survive as sodomy. See, for example, Milton *South African Law of Criminal Law and Procedure* vol II 3ed (Juta, Cape Town 1996) at 250 and Snyman *Criminal Law* 3ed (Butterworths, Durban 1995) at 341.

any sexual act, in private, between consenting adult females so punishable.

The Infringement of the Equality Guarantee

The Equality Analysis.

[15] In what follows I will proceed on the assumption that the equality jurisprudence and analysis developed by this Court in relation to section 8 of the interim Constitution[17] is applicable equally to section 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions. It is relevant to mention at this point that Mr Davis, who appeared for the amicus curiae, submitted that a more substantive interpretation should be given to the provisions of section 9(1) of the 1996 Constitution than this Court has given to the provisions of section 8(1) of the interim Constitution. Mr Davis did not suggest that the outcome of this referral should be other than supported by Mr Marcus. His argument went to the reasoning used to arrive at that result. I shall deal with these submissions later in this judgment.

[16] Neither section 8 of the interim Constitution nor section 9 of the 1996 Constitution envisages a passive or purely negative concept of equality; quite the contrary. In *Brink v Kitshoff NO*, O'Regan J, with the concurrence of all the members of the Court, stated:

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17 Namely in *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC); and *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC).

> "Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4)."[18]

[17] In *Prinsloo*[19] and in *Harksen*[20] a multi-stage enquiry was postulated as being necessary when an attack of constitutional invalidity was based on section 8 of the interim Constitution. In *Harksen* the approach was summarised as follows:

> "At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

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18 Above n 17 at para 42.

19 Above n 17 at paras 22-41.

20 Above n 17.

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."[21]

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21 Id at para 53.

[18] This does not mean, however, that in all cases the rational connection inquiry of stage (a) must inevitably precede stage (b). The stage (a) rational connection inquiry 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.

[19] 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 nature of the unfairness contemplated by the provisions of section 8 was considered in paragraphs 41 and 43 of the majority judgment in the *Hugo* case.
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> . . . .

In paragraph 41 dignity was referred to as an underlying consideration in the determination of unfairness. 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. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;

(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.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge

> as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair."[22] (Footnotes omitted).

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

[20] 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]

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22 Id at paras 50 and 51.

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".

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."[24]

[21] 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.[25]

[22] 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."[26]

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24 Id at 452.

25 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.

26 Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Basil Blackwell, Oxford 1983)

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

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at xiii.

> "It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy."[27]

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

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27 Per Cory J, delivering part of the joint judgment of the Canadian Supreme Court in *Vriend v Alberta* (an as yet unreported judgment of the Supreme Court of Canada, File No: 25285, delivered on 2 April 1998) at para 69.

28 Cameron above n 23 at 455.

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*:[30]

> "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.

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

30 Above n 27 per Cory J at para 102.

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

[25] The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves.[32] They are accordingly almost exclusively reliant on the Bill of Rights for their protection.

[26] 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 and referred to in paragraph 19 above:

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

32 Cameron above n 23 at 458 says the following in this context:

> "Traditionally disadvantaged groups such as women and blacks both constitute a majority of the South African population. Gays and lesbians, by contrast, are by definition a minority. Paradoxically, their perpetuation as a social category is dependent on the survival of the procreative heterosexual majority. Their seclusion from political power is in a sense thus ordained, and they will never on their own be able to use political power to secure legislation in their favour."

(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.

[27] The above analysis confirms that the discrimination is unfair.[33] 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

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[33] See *Hugo*'s case, above n 17 at para 112 where, in a separate concurring judgment, O'Regan J said the following:

> "The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."

Constitution.

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

[28] 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. 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. . .".

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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).

Dignity is a difficult concept to capture in precise terms.[35] 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.

[29] Counsel for the applicant argued, in the alternative, that the provisions were in

35 See the judgment of L'Heureux-Dube J in *Egan v Canada* (1995) 29 CRR (2d) 79 at 106.

breach of section 14 of the Constitution, the right to privacy. In so doing, however, the applicant adopted the reasoning of Cameron:

> "[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."[36]

[30] 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

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36 Cameron above n 23 at 464, cited in *S v K* above n 7 at para 25.

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.

[31] 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*,[37] 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

[37] 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at para 67.

accordingly."[38]

[32] 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

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[38] Id. See also *Mistry v Interim National Medical and Dental Council of South Africa and others* 1998 (7) BCLR 880 (CC) at para 16.

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

[33] 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

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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

in *S v Makwanyane and Another*[41] as the ". . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests."

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.

41 Above n 34 at para 104.

[34] 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."[42] 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 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]."[43] 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.

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42 Id.

43 See *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at para 86.

[35] 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.[44]

[36] 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.

[37] 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

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[44] Id at para 88.

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.

[38] As far as religious views and influences are concerned I would repeat what was stated in *S v H*:[45]

> "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."

[45] Above n 15 at 125A-B.

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[48]. 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.

[39] There is nothing in the jurisprudence of other open and democratic societies based

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46 Under section 16 of the 1996 Constitution.

47 Under section 15 thereof.

48 See, for example, Professor John M Finnis "Law, Morality and Sexual Orientation" in 69 *Notre Dame Law Review* 1049 (1994).

on human dignity, equality and freedom which would lead me to a different conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalisation.

[40] In 1967 in England and Wales,[49] and in 1980 in Scotland,[50] sodomy between consenting adult males in private was decriminalised. However, in Northern Ireland the criminal law relating to sodomy remained unchanged. In 1981, in *Dudgeon v United Kingdom*,[51] the European Court of Human Rights held that the sodomy laws of Northern Ireland was in breach of the article 8[52] privacy provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") to the extent that they criminalised sodomy between adult consenting males in private. In 1982 Northern Ireland amended its laws accordingly.[53] The same conclusion was reached

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49 By the 1967 Sexual Offences Act and see *S v K* above n 7 at paras 33 and 41.

50 By the Criminal Justice (Scotland) Act 1980.

51 (1982) 4 EHHR 149 at para 61.

52 Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

53 Homosexual Offence (Northern Ireland) Order 1982, N.I. Statutes, SI 1982/1536 (N.I.19).

in 1988 in *Norris v Ireland*.[54] It took Ireland nearly five years to comply with *Norris* but it eventually did so in 1993.[55]

54 Above n 29.

55 Criminal Law (Sexual Offences) Act, 1993, No.20, sections 2-4 (in force on 7 July 1993).

[41] In *S v Makwanyane*[56] the President of the Court pointed out that because of the "margin of appreciation" allowed to the national authorities by the European Court of Human Rights, the jurisprudence of the European Court would not necessarily be a safe guide as to what would be appropriate under section 33(1) of the interim Constitution.[57] This is particularly true in the case where the European Court finds that there is no infringement of a Convention right. It was to this situation in particular that the President was, in my view, addressing himself. But when the European Court finds that there has been a contravention, it reaches this finding after due regard has been had to the particular national authority's margin of appreciation. This suggests that there must be a very clear breach.

[42] If nothing else, the judgments in *Dudgeon* and *Norris* are indicative of the changes in judicial and social attitudes in recent years. In *Dudgeon*, a judgment delivered nearly seventeen years ago, the following was stated:[58]

> "As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the

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56 Above n 34 at para 109.

57 See *S v K* above n 7 at para 41.

58 Above n 52 at 167 para 60. *Dudgeon* and *Norris* were affirmed again in 1993 in *Modinos v Cyprus* 16 EHRR 485.

> kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States." (Footnote omitted).

[43] Article 3.3 of the German Grundgesetz (GG)[59] does not include sexual orientation as a ground on which a person may not be "favoured or disfavoured". Under section 175 of the German Criminal Law Code ("CLC") of 1935 a man who committed a sexual act ("Unzucht treibt") on another man or permitted a sexual act to be committed on himself was punishable with imprisonment; an exception could be made in the case of a man under 21 years of age. Section 175a prescribed minimum and maximum sentences for particular cases of "Unzucht treiben".[60] This section was repealed in 1969.

[44] Section 175 of the CLC was finally repealed in 1994, with the consequence that private consensual sexual relations between males are no longer criminalised. All men and women under the age of 16 now receive the same protection under section 182 of the CLC in respect of sexual acts, whether they are heterosexual, gay or lesbian.[61]

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59 Article 3 reads thus:

> "(1) All persons shall be equal before the law.
> (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
> (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability."

60 For example, where it was procured by violence or under threat of harm to life or limb section 175a(1)1 prescribed a maximum sentence of ten years.

61 See also Troendle *Strafgesetzbuch* 48e Auflage, section 182, Rn 1.

[45] Laws prohibiting homosexual activity between consenting adults in private have been eradicated within 23 member states that had joined the Council of Europe by 1989 and of the ten European countries that have joined since (as at 10 February 1995) nine had similarly decriminalised sodomy either before or shortly after their membership applications were granted.[62]

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62 Robert Wintemute *Sexual Orientation and Human Rights* (Clarendon Press, Oxford 1995). Wintemute also points out at 4-5 that discrimination on the basis of sexual orientation had already been prohibited in the state constitutions of Mato Grosso and Sergipe in Brazil in 1989. In 1992 and 1993 respectively the German Länder of Brandenburg and Thüringen introduced provisions in their constitutions expressly prohibiting discrimination based on sexual orientation. Other than the South African Constitution I am not aware that such constitutional protection has been given in any national constitution; Wintemute confirms this.

[46] In Australia, all the states, with the exception of Tasmania, had by 1992 decriminalised sexual acts in private between consenting adults and some had also passed anti-discrimination laws which prohibited discrimination on the ground, amongst others, of sexual orientation.[63] However, in *Toonen v Australia*[64] the United Nations Human

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63 South Australia became the first state to decriminalise homosexual conduct between consenting adults in 1972, followed by the Australian Capital Territory in 1976, Victoria in 1981, and both the Northern Territory and New South Wales in 1984. (See B Gaze & M Jones *Law, Liberty and Australian Democracy* (The Law Book Company, Sydney Ltd 1990) at 363.) Sections 5(1) and 29(3) of the 1984 South Australia Equal Opportunity Act (South Australia Act 95 of 1984) prohibits discrimination on the ground of "sexuality", which is defined to include heterosexuality, homosexuality, bisexuality or transsexuality. South Australia thus also became the first state to recognise sexual orientation as a prohibited ground of discrimination. Western Australia decriminalised private adult gay sex in the Law Reform (Decriminalisation of Sodomy) Act No 32 of 1989. In 1991, the Australian Capital Territory enacted the Discrimination Act, No 81 of 1991. Section 7 of this Act explicitly includes sexuality as a prohibited ground of discrimination. Queensland, where homosexual conduct had been illegal until 1990, enacted its Anti-Discrimination Act in 1991, prohibiting discrimination on the ground of "lawful sexual activity". This was followed in 1992 by the Northern Territory's Anti Discrimination Act in 1992, No 80 of 1992. Section 19(1)(c) of this Act declared sexuality a prohibited ground of discrimination.

64 Communication Number 488/1992 (31 March 1994) UN Human Rights Committee Document No. CCPR/C/50/D/488/1992.

Rights Committee found that the Tasmanian laws prohibiting sexual activity between men violates the privacy provision of the International Covenant on Civil and Political Rights (ICCPR),[65] which entered into force for Australia on 25 December 1991.

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65 Article 17 of the ICCPR determines:

> "(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

[47] The *Toonen* finding inspired the national Human Rights (Sexual Conduct) Act[66] in 1994, promulgated to implement Australia's international obligations under article 17 of the ICCPR. Article 4(1) of this Act provides that "[s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17. . .". 1994 also saw New South Wales amending its Anti-Discrimination Act[67] to include a provision banning discrimination on the ground of homosexuality. Tasmania repealed the offending sections in its Criminal Code (the subject of the *Toonen* finding) in 1997. This marked the final decriminalisation of consensual homosexual sex in Australia.

66 Act 179 of 1994.

67 Act 48 of 1977.

[48] Consensual sexual relations between adult males have been decriminalised in New Zealand[68]. Although the New Zealand Bill of Rights (1990) does not refer to discrimination on the ground of sexual orientation,[69] the Human Rights Act, 82 of 1993 includes sexual orientation ("which means a heterosexual, homosexual, lesbian, or bisexual orientation") as a prohibited ground of discrimination under section 21(1)(m)[70].

[49] Despite the fact that section 15(1) of the Canadian Charter[71] does not expressly include sexual orientation as a prohibited ground of discrimination, the Canadian Supreme Court has held that sexual orientation is a ground analogous to those listed in section 15(1):

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68 The Homosexual Law Reform Act 33 of 1986 removed criminal sanctions against consensual homosexual conduct between males by repealing offending sections of the Crimes Act of 1961. These were replaced by provisions criminalising sexual relations with a boy under the age of 16; sexual relations with mentally subnormal people; and indecent assault.

69 Article 19 New Zealand Bill of Rights Act 1990 reads:

> "19. Freedom from discrimination -
> (1) Everyone has the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of person disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination."

70 Other prohibited grounds of discrimination in section 21 include sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status and family status.

71 Section 15 (1) reads:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability."

"In *Egan*, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para 176), as well as previous judicial decisions (at para 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."[72]

[72] In *Vriend v Alberta* above n 27 per Cory J at para 90.

[50] In Canada, consensual adult sodomy ("buggery") and so-called "gross indecency" were decriminalised by statute in 1969 in respect of such acts committed in private between persons 21 years and older.[73] Currently section 159(1) and (2) of the Canadian Criminal Code, R.S.C. 1985, c. C-46 provides the following:

> "(1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
>
> (2) Subsection (1) does not apply to any act engaged in, in private, between
>
> (a) husband and wife, or
>
> (b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act."

According to Canadian law -

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73 Criminal Law Amendment Act, 1968-69, SC 1968-69, c. 38, s. 7. "Buggery" applied to both same-sex and opposite-sex anal intercourse. '[G]ross indecency' applied to sexual acts between any two persons, and "therefore potentially to all sexual activity between men or between women, and to opposite-sex oral intercourse." (See Wintemute above n 62 at 150.)

"[a]nyone who is 14 or older, whether married or not, can consent to most forms of non-exploitative sexual conduct, including vaginal intercourse, without criminal consequences."[74]

[74] (1995) 30 CRR (2d) 112 (Ontario Court of Appeal).

[51] In *R v M (C)*[75] the Ontario Court of Appeal held that section 159 infringes section 15(1) of the Charter. Abella JA based her finding on the ground of sexual orientation and Goodman and Catzman JJA on grounds of age. The learned Justices all agreed that the infringement was not justifiable under section 1 of the Charter. Abella JA, in her judgment dealing with the infringement of section 15(1) concluded that the distinction in age found in section 159 imposes a burden based on sexual orientation and arbitrarily disadvantages gay men by:

> "denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married."

She held that it has an adverse impact on them and arbitrarily and stereotypically perpetuates rather than narrows the gap for a historically disadvantaged group.[76]

[52] The above survey shows that in 1967 a process of change commenced in Western democracies in legal attitudes towards sexual orientation. This process has culminated, in many jurisdictions, in the decriminalisation of sodomy in private between consenting adults. By 1996 sodomy in private between consenting adults had been decriminalised in the United Kingdom and Ireland, throughout most of Western Europe, Australia (with the

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75 Id.

76 Id at 119-120.

exception of Tasmania), New Zealand and Canada.

[53] An exception to this trend is the United States of America, as illustrated by the judgment of the Supreme Court in *Bowers v Hardwick.*[77] In this case, a sharply divided Court, by a majority of five to four, declared itself unpersuaded that the sodomy laws of some 25 states should be invalidated.

[77] 478 US 186 (1986).

[54] *Bowers v Hardwick* has been the subject of sustained criticism.[78] It is interesting to note that in the recent case of *Romer v Evans*,[79] the United States Supreme Court has, without referring to its decision in *Bowers v Hardwick*, struck down an amendment to the Colorado State Constitution which prohibited public measures designed to protect persons based on their sexual orientation.

78 See, for example, Tribe *American Constitutional Law* 2ed 1428 and T Grey "Bowers v Hardwick Diminished" (1997) 68 *University of Colorado Law Review* 373.

79 134 L Ed 2d 855 (1996).

[55] For purposes of the present case I consider it unnecessary to consider such criticism nor what the present standing of *Bowers* is in the United States. Our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgment in *Bowers* can really offer us no assistance in the construction and application of our own Constitution. The 1996 Constitution contains express privacy and dignity guarantees[80] as well as an express prohibition of unfair discrimination on the ground of sexual orientation, which the United States Constitution does not. Nor does our Constitution or jurisprudence require us, in the way that the United States Constitution requires of its Supreme Court, in the case of ". . . rights not readily identifiable in the Constitution's text," to ". . . identify the nature of the rights qualifying for heightened judicial protection".[81]

[56] There are other democratic countries beside the United States which have not yet decriminalised sodomy in private between consenting adult males. Unlike the constitutions of these countries, however, our 1996 Constitution specifically mentions "sexual orientation" as a listed ground in section 9(3) on which the state may not unfairly discriminate, it being presumed (until the contrary is established) that discrimination on such ground constitutes unfair discrimination and thus a breach of section 9.[82]

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80 Sections 14 and 10 respectively.

81 *Bowers* above n 77 at 191-2 per Justice White.

82 Section 9(5).

[57] 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.

Submission on Behalf of the Amicus Curiae

[58] It is convenient at this stage to deal with the submissions advanced on behalf of the amicus curiae. As already mentioned above it is not suggested that these submissions would or should lead to a result any different from that contended for by Mr Marcus on behalf of the applicant. The thrust of Mr Davis's submissions was that this Court's interpretation of section 8(1) of the interim Constitution is inadequate in that it does not give sufficient weight or emphasis to what he called substantive equality. He contended that section 9(1) differed substantially from its predecessor chiefly because the words "and benefit" had been added to the words "equal protection".

[59] There is no substance in this last submission. Whatever the proper construction of section 9 as a whole may be, the addition of the words "and benefit" in section 9(1) has not resulted in any change of substance in its objectives. Section 9(1) makes clear what was already manifestly implicit in section 8(1) of the interim Constitution, namely, that both in conferring benefits on persons and by imposing restraints on state and other action, the state had to do so in a way which results in the equal treatment of all persons. It was indeed so decided in *Hugo's* case, where a benefit granted to the mothers of children below the age of twelve years, but not to the fathers of such children, was held to constitute discrimination for purposes of section 8(2) of the interim Constitution and presumed to be unfair, because the discrimination was based on a combination of grounds listed in section 8(2).[83]

[60] Before dealing with Mr Davis's remaining submissions, it is necessary to comment on the nature of substantive equality, a contested expression which is not found in either of our Constitutions. Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of

which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

[61] The need for such remedial or restitutionary measures has therefore been recognised in sections 8(2) and 9(3) of the interim and 1996 Constitutions respectively. One could refer to such equality as remedial or restitutionary equality. In addition, as was recognised in *Hugo*, treating people identically can sometimes result in inequality:

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83 Above n 17 at paras 32 and 108.

> "We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[84]

It is in this latter way that we have encapsulated the notion of substantive as opposed to formal equality.

[62] Section 9 of the 1996 Constitution, like its predecessor, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms." The State is further obliged "to promote the achievement of such equality" by "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination," which envisages remedial equality. This is not to suggest that principles underlying remedial equality do not operate

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84 Above n 17 at para 41. In a footnote to the above passage the following is stated:

> " It is the logical corollary of the principle that 'like should be treated like', that treating unlike alike may be as unequal as treating like unlike. See the discussion in Kentridge 'Equality' in Chaskalson et al *Constitutional Law of South Africa* (Juta & Co Ltd, Kenwyn 1996) at para 14.2."

elsewhere. This was clearly recognised in *Harksen* when, in dealing with the purpose of the provision or power as a factor to be considered in deciding whether the discriminatory provision has impacted unfairly on complainants, Goldstone J held:

> "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. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair ..."[85] (Footnote omitted).

[63] It is clear, moreover, that under section 8(1) of the interim Constitution the inquiry would encompass both direct and indirect differentiation. This must necessarily follow from the reference in section 8(2) to "direct and indirect discrimination". That was implicitly held in *Harksen* (where the Court did not have to deal with indirect discrimination) and explicitly in *Walker;* the latter being a case where indirect discrimination was present and where Langa DP, on behalf of the Court, held that the

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[85] Above n 17 at para 51(b).

section 8(1) test was satisfied.[86]

[64] In my opinion Mr Davis's remaining contentions cannot be sustained for the following reasons:

(a) This Court has given effect to substantive equality in its interpretation of section 8 of the interim Constitution;

(b) That analysis is no less applicable to section 9 of the 1996 Constitution and the additional words "and benefit" in section 9(1) take the matter no further;

(c) There is accordingly no need to fashion a new interpretation of section 9(1) of the 1996 Constitution. Indeed, in this judgment I have engaged in a substantive analysis in support of the conclusion for which both Mr Marcus and Mr Davis contend.

Consensual and Non-Consensual Sodomy

86 Above n 17 at paras 27 and 30-33.

[65] Thus far consideration has been given only to the criminal proscription of sodomy in private between consenting males. The common law definition of sodomy is more extensive, however, and is not limited to private consensual sex per anum between adult males. It also applies to anal sex under circumstances where one male has not consented or when one partner is below the age of consent; cases of so-called "anal rape" or "male rape", whether the victim is an adult male or a male child or infant.[87]

87 See Milton *South African Criminal Law and Procedure vol II, Common-law Crimes* 3ed (Juta, Cape Town 1996) at 254-5 and Snyman *Criminal Law* 3ed (Butterworths, Durban 1995) at 341.

[66] I am not aware of any jurisdiction which, when decriminalising private consensual sex between adult males, has not retained or simultaneously created an offence which continues to criminalise sexual relations per anum even when they occur in private, where such occur without consent or where one partner is under the age of consent. The legislature usually fixes a minimum age for the parties to enjoy the benefit of the decriminalisation. The need for retaining some control, even over consensual acts of sodomy committed in private, was recognised in *Dudgeon v United Kingdom*.[88] So too, in Canada, for example, anal intercourse is criminalised in general terms by statute and the only acts excluded are those committed in private between husband and wife, or between any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.[89] It must be emphasised, however, that provisions so made have invariably been by way of statute.

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88 Above n 51 at 163 to 164, paras 47-9.

89 See para 50 above for the relevant provisions of the statute.

[67] The question which arises is whether, in declaring the common-law offence of sodomy to be constitutionally invalid, this Court should do so only to the extent that the offence is inconsistent with the Constitution or whether this Court has the power to declare the offence invalid in its entirety. The latter was the course adopted by Heher J, notwithstanding the fact that the applicants had in argument limited their claim to relief in relation to consensual acts committed in private.[90] Section 172(1)(a)[91] of the 1996 Constitution only permits a court having the competence to do so to declare a law that is inconsistent with the Constitution invalid "to the extent of its inconsistency". Beyond that the Court is not empowered to go. It is notionally possible to declare the offence of sodomy invalid to the extent that it relates to sexual relations per anum in private between consenting males who are over the age of consent and capable of giving such consent. That is, however, not necessarily the end of the inquiry.

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90 Above n 1 at 750G-H.

91 Section 172(1)(a) provides:

"When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the

Constitution is invalid to the extent of its inconsistency. . .”

[68] We have on occasion declared statutory provisions to be constitutionally invalid, despite the fact that this has involved a complicated formulation of the extent to which a provision was inconsistent with the Constitution.[92] Yet notional partial inconsistency is not on its own sufficient to justify such a limited order of constitutional invalidity; the issue of severability has also to be addressed. In this regard Kriegler J, in *Coetzee v Government of the Republic of South Africa and Others; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*, formulated the following test for the Court:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The

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92 Thus in *Ferreira v Levin* above n 34 at para 157 the following order was made:

"1. The provisions of section 417(2)(b) of the Companies Act 1973 are, with immediate effect declared invalid, to the extent only that the words:

'and any answer given to any such question may thereafter be used in evidence against him'

in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily."

> test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[93]

[69] In the present case we are of course dealing with the constitutional inconsistency and invalidity of a common-law offence, but I can see no valid reason why the constitutional principles underlying the above approach should not, suitably adapted, also apply to the instant case where, on a direct application of the Bill of Rights, we have found the very core of the offence to be constitutionally invalid. There can be no doubt that the existence of the common-law offence was not dictated by the objective of punishing "male rape". The sole reason for its existence was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which we have found to be flagrantly inconsistent with the Constitution. The fact that the ambit of the offence was extensive enough to include "male rape" was really coincidental. The core of the offence was to outlaw gay sexual expression of a particular kind.

[70] We are entitled, in my view, to have regard to criminal law policy in the context of the common-law formation and development of the offence in question. If, at the time of

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93 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC) at para 16. The footnote reference in the text quoted has been omitted but the footnote itself reads: "*Johannesburg City Council v Chesterfield House* 1952 (3) SA 809 (A) at 822 D - E. See also *S v Lasker* 1991 (1) SA 558 (CPD) at 566."

the common-law recognition of the offence in question, legal and societal norms were such that gay sexual expression was not considered something which ought to be criminally proscribed, it is very difficult to conceive that this particular offence would have come into existence purely in order to criminalise male rape. Such an offence would in any event have been punishable as a form of assault, as indeed was anal intercourse with a woman without her consent.

[71] If one applies this approach at the present time, the same conclusion follows. Subject to the qualifications which will be expressed later in this judgment regarding the retrospectivity of the orders of constitutional invalidity, neither the coherence of the common law, nor judicial policy, requires the continued existence of a severely truncated form of the common-law offence. Acts of male rape still constitute crimes at common law, whether in the form of indecent assault or assault with intent to do grievous bodily harm. These are the criminal forms by means of which anal intercourse with a woman, without her consent, is punished. The competent punishments which can be imposed for such offences have not been restricted by statute and the severity of such punishments can be tailored to the severity of the offences committed. While refraining from any comment, one way or the other, on the constitutional validity of the age limits or differential age limits prescribed in section 14 of the Sexual Offences Act, it must be pointed out that its provisions do protect persons below a certain age against both heterosexual and homosexual acts of a prescribed nature being performed with them.

Declaring the offence to be invalid in its entirety will leave no hiatus in the criminal law.

[72] The Minister has not appealed against the unqualified order of constitutional invalidity made by the High Court nor has there been any suggestion in argument on his behalf that we ought to interfere with its ambit. As indicated above, other democratic countries have dealt with male rape by way of new statutory provisions in this regard. Whether or not our legislature will follow that example is a matter for it to decide. For all the above reasons I am of the view that there is no adequate justification for making a limited declaration of invalidity in regard to the common-law offence of sodomy and that consequently there is no warrant for interfering with the ambit of the order made in the High Court in declaring the offence of sodomy constitutionally invalid in its entirety.

[73] Although, as indicated earlier in this judgment, the correctness of paragraph 1 of the High Court's order is not formally before this Court, we are obliged to consider its correctness, or the extent of its correctness, in order to consider the terms on which paragraphs 4 and 5 of the order ought to be confirmed. In my view this Court has the power to do so, inasmuch as it is an issue unavoidably connected with a decision on a constitutional matter for purposes of section 167(3)(b) of the 1996 Constitution. As a constitutional matter within its power, the Court is obliged under section 172(1)(a) to declare the offense in question invalid to the extent of its inconsistency with the Constitution. I would accordingly endorse paragraph 1 of the High Court's order declaring the common law offence of sodomy to be inconsistent with the 1996

Constitution and invalid.

The Constitutional Validity of Section 20A of the Sexual Offences Act 1957

[74] For the sake of convenience, the provisions of section 20A of the Sexual Offences Act are again quoted:

> "(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.
> (2) For the purposes of subsection (1) 'a party' means any occasion where more than two persons are present.
> (3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law."

[75] The absurdly discriminatory purpose and impact of the provision can be demonstrated by numerous examples. One will suffice. A gay couple attend a social gathering attended by gay, lesbian and heterosexual couples. The gay man, in the presence of the other guests, kisses his gay partner on the mouth in a way "calculated to stimulate" both his and his partner's "sexual passion" and to give both "sexual gratification". They do no more. A lesbian and a heterosexual couple do exactly the same. The gay couple are guilty of an offence. The lesbian and heterosexual couples not. Cameron has rightly commented on the absurdity and tragic-comic consequences of this

enactment.[94]

[76] There being no similar provision in relation to acts by women with women, or acts by men with women or by women with men, the discrimination is based on sexual orientation and therefore presumed to be unfair. The impact intended and caused by the provision is flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation. Because of the infinite variety of acts it encompasses

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94 Cameron above n 23 at 455 where the following is stated:

> "The results of this enactment have at times been comical. Its jurisprudence includes a solemn decision by two judges of the Supreme Court that 'a party' did not come about when a police major, visiting a well-known gay sauna in Johannesburg for entrapment purposes, barged in on a cubicle where two men were engaging in sexual acts and turned on the light. The court held - in a liberal decision - that the two men's jumping apart when the major switched on the light prevented a 'party' from being constituted. [*S v C* 1987 (2) SA 76 (W) at 81I-J.] The outcome is a happy illustration of the absurdities attempts to enforce laws of this kind necessarily give rise to."

in its prohibition, the impact is broad and far-reaching. In relation to this provision, there is even less that can be said to counter the presumption of unfairness than in the case of sodomy. The section amounts to unfair discrimination and, for fundamentally the same reasons that were expressed above in relation to sodomy, the section cannot be justified under section 36(1) of the 1996 Constitution. There is nothing before us to show that the provision was motivated by anything other than rank prejudice and had as its purpose the stamping out of these forms of gay erotic self-expression. In my view Heher J correctly held that the provisions of section 20A of the Sexual Offences Act are inconsistent with section 9 of the Constitution and invalid.

The Constitutional Validity of Including the Offence of Sodomy in Schedule 1 of the CPA and in the Schedule to the Security Officers Act

[77] Once it is found that the offence of sodomy is inconsistent with the Constitution, its inclusion in the above schedules must necessarily also be constitutionally inconsistent. I would accordingly confirm paragraphs 4 and 5 of the High Court's order declaring that the inclusion of sodomy is inconsistent with the Constitution of the Republic of South Africa 1996 and invalid.

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

[79] Before dealing with the appropriate order to be made, it is necessary to return to the matter mentioned in passing in paragraph 3 of this judgment, namely the difficulties that can arise because the 1996 Constitution does not provide for an obligatory referral when a common-law offence is declared to be constitutionally invalid by a High Court. The present case is an apt illustration. In a very formal sense, the High Court's order regarding the constitutional invalidity of the common-law offence of sodomy is not before this Court. Yet it is impossible to consider the confirmation of the orders relating to the inclusion of sodomy in the relevant schedules to the CPA and the Security Officers Act apart from the order relating to the offence of sodomy itself. It would be constitutionally intolerable if an order by a High Court striking down the offence in its entirety had to be left standing while at the same time this Court confirmed the striking down of the offence, as included in the schedules referred to, but only to a limited extent. Fortunately, for the reasons already given,[95] we are able in the particular circumstances of this case to consider the constitutional validity of the common-law offence of sodomy itself. Analogous problems arise in regard to the degrees of retrospectivity of the orders.

[80] It is fortuitous that the same High Court in the same case dealt with the common-law offence and the statutory provisions incorporating the common-law offence. It need not have been so. The common-law offence could have been declared constitutionally

invalid in one case and the statutory provision in another, but both in the same High Court. This Court would then have been faced with the additional problem, when presented on confirmation with only the statutory provision, that the common-law offence had been dealt with in another case.

[81] An equally undesirable result could follow if there were conflicting decisions in different High Courts regarding the constitutional validity of the same common-law offence, or the extent of its invalidity, there being no express constitutional mechanism whereby such conflict could, as a matter of course, be finally determined for the entire country.

[82] For these reasons, it seems to me that parties to proceedings in which declarations of unconstitutionality are made should, when considering whether an appeal is appropriate, pay particular attention to the terms of the order made as well as to questions of unconstitutionality. There may be circumstances where an appeal against the terms of the order is appropriate even where there is no dispute concerning the conclusion of unconstitutionality itself.

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95 Above paragraph 9.

The Order

[83] For present purposes, the relevant provisions of section 172 of the Constitution read thus:

> "(1) When deciding a constitutional matter within its power, a court-
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including-
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
>
> (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> (b) . . . .
>
> (c) . . . .
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[84] Subsection (1)(b) differs in various respects from section 98(5), (6) and (7) of the

interim Constitution.[96] For present purposes the significant differences are as follows:

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[96] Sections 98(5), (6) and (7) of the interim Constitution provide as follows:

> "(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
>
> (6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -
>
> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
>
> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.
>
> (7) In the event of the Constitutional Court declaring an executive or administrative act or conduct or threatened executive or administrative

act or conduct of an organ of state to be unconstitutional, it may order the relevant organ of state to refrain from such act or conduct, or, subject to such conditions and within such time as may be specified by it, to correct such act or conduct in accordance with this Constitution."

(a) In regard to a declaration of constitutional invalidity of a law or a provision thereof, section 98(6) of the interim Constitution regulated the consequences of such a declaration differently, depending on whether the law was in existence at the time the interim Constitution came into effect or whether it was passed thereafter. The 1996 Constitution draws no such distinction.

(b) The effect of a declaration of invalidity (subject to the Constitutional Court's power to order otherwise) is dealt with more extensively under the interim Constitution in subparagraphs (a) and (b) of section 98(6). Under the 1996 Constitution, and in the absence of a contrary order by a competent court, nothing more is provided other than that it has retrospective effect. I infer this from the fact that the power of a competent court to make an order in this regard under section 172(1)(b)(i) is to limit "the retrospective effect of the order of constitutional invalidity," interpreted against the background of the principle of the objective theory of constitutional invalidity adopted in *Ferreira v Levin*[97], namely, that a pre-existing law which is inconsistent with the Constitution becomes invalid the moment the relevant provisions of the Constitution come into effect[98].

(c) The power of a competent court to make an order differing from that provided for

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97 Above n 34 at paras 26-29, in particular at para 28.

98 This is of course subject to the express power granted to a competent court under section 172(1)(b)(ii) to make "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

by the Constitution are differently formulated. Under the interim Constitution the provisions of section 98(6)(a) and (b) were dominant, the Constitutional Court being empowered to order otherwise than as provided in these paragraphs "in the interests of justice and good government". Under the 1996 Constitution the dominant provision of section 172(1)(b)(i) is to the effect that a competent court:

> "(b) may make any order that is just and equitable, including -
>
> (i) an order limiting the retrospective effect of the declaration of invalidity;"

[85] The reasons why the applicants did not proceed with the relief sought in paragraphs (b) and (d) of their Notice of Motion[99] is explained as follows in the judgment of the High Court:

> "[Applicants] submitted that the effect of the invalidity of the common-law crimes should be considered [in] individual cases which have not yet been finalised. The concern of the applicants in this regard was that the common-law crimes prohibited some conduct which may remain prohibited despite the Constitution. If, for example, a person has been convicted of sodomy (rather than indecent assault) for an act of 'male

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99 The full relief initially sought in the Notice of Motion is quoted in paragraph 4 above. Paragraphs (b) and (d) read as follows:

> "(b) an order invalidating any conviction for the offence of sodomy if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired;
>
> (d) an order invalidating any conviction for the offence of commission of an unnatural sexual act between men if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment, is pending or the time for noting an appeal from that judgment has not yet expired".

> rape' his sodomy conviction should not be set aside without being replaced by an appropriate new conviction for indecent assault. In the opinion of the applicants' counsel the broad relief sought by their clients in paragraphs (b) and (d) did not facilitate that process and they accordingly abandoned the claim to that relief."[100]

[86] The reason why the applicants did not in the result persist with the relief sought in paragraph (f)[101] of their Notice of Motion in the High Court is reflected as follows in the judgment of that Court:

> ". . . problems of the sort posed by the common-law crimes are not presented by the invalidation of convictions in terms of section 20A of the Sexual Offences Act. The

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100 Above n 1 at 731H-J.

101 "(f) an order setting aside any conviction for the offence of contravening section 20A of the Sexual Offences Act 1957 (Act 23 of 1957), if that conviction related to conduct committed after 27 April 1994 and either an appeal from, or review of the relevant judgment is pending or the time for noting an appeal from that judgment has not yet expired;"

applicants submitted however that only the Constitutional Court had jurisdiction to grant relief which would have the generalised effect of the relief sought in paragraph (f) and, if they were correct in this submission, they would in due course approach the Constitutional Court for an appropriate order."[102]

102 Above n 1 at 732A.

[87] Although in argument before this Court, counsel for the applicants did not abandon the contention that only this Court has the power to make such an order, they did not vigorously pursue it. In my view the submission cannot be sustained. All courts competent to make declarations of constitutional invalidity have the power to make an appropriate order under section 172(1)(b)(i) if such order, in the circumstances of a particular case, is "just or equitable". This was in fact so held in *S v Ntsele*.[103] The real issue is whether, in the circumstances of this case, an order limiting the retrospectivity of the declaration of invalidity would indeed be just and equitable, on a proper construction of that concept in the context of the section and the Constitution as a whole.

[88] To the extent that a court of first instance has this power, such court must grapple with its exercise. This is necessary because in a given case it might be necessary to receive evidence in order to decide whether, and in what manner, such power should be exercised. It is essential that the court of first instance receive and if necessary adjudicate on such evidence, and not a court of appeal or this Court on confirmation. The importance of following such a procedure has been stressed by this Court in similar

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103 1997 (11) BCLR 1543 (CC) at para 12.

contexts on a number of occasions.[104]

[89] The above observations afford some indication of the complexities of deciding whether to limit the retrospectivity of the order and, if deciding to limit it, what order would be just and equitable. There are other difficulties, some of which were raised with counsel in argument. In the result the Court considered it advisable to invite both the applicants and the Minister to submit written argument on the most appropriate order required by the circumstances of this case. Such written arguments were duly delivered by these parties and we have considered them. It is necessary to deal with the various paragraphs of the High Court order separately.

The Order Invalidating the Common-law Crime of Sodomy

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104 *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC) at para 4 - 5; *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) para at 5; *Lawrence v the State and Another; Negal v the State and Another; Solberg v The State and Another* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) at paras 14 - 16; *S v Ntsele* 1997 (11) BCLR 1543 (CC) at para13; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC) at para 15; *Mistry v Interim National Medical and Dental Council and Others* 1998 (7) BCLR 880 (CC) at para 34.

[90] In this judgment the conclusion has already been reached that this offence should be declared constitutionally invalid in its entirety. This conclusion has been reached by a direct application of the Bill of Rights to a common-law criminal offence, not by a process of developing the common law.

[91] We reached this conclusion, despite the fact that the constitutional invalidity of the common-law offence of sodomy was not itself directly before us, because it was an indispensable and unavoidable step in concluding that the inclusion of this offence in the various statutory schedules was constitutionally invalid[105]. It was therefore a constitutional matter that the Court was compelled to decide in terms of section 172(1) of the 1996 Constitution. The Court is obliged by section 172(1)(a) in the light of this finding to make an order of invalidity. Section 172(1)(b) then empowers the Court to make any order that is "just and equitable". It is in any event impossible to make an order under section 172(1)(b) of the Constitution which is just and equitable in relation to the invalidity of the inclusion of the offence in the statutory schedules, without at the same time making such an order in relation to the constitutional invalidity of the offence itself. In order for this Court to discharge its duty properly under section 172(1)(b) in the former case, it is obliged to do so in the latter case as well. There are public interest concerns involved in this regard which go beyond the interests of the parties in the present case.

The parties can in any event suffer no prejudice. It is clear that, at the time, they were under a misapprehension as to what their concessions in relation to the order meant and also as to the effect of the order made by Heher J. All the parties requested the Court, in relation to the constitutional invalidity of the offence itself, to exercise its powers under section 172(1)(b). In my view we are constitutionally obliged to do so in the present case.

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105 See paras 9 and 73 above.

[92] The criterion for the order which a court is competent to make under section 172(1)(b) of the 1996 Constitution pursuant to a declaration of constitutional invalidity is that it must be "just and equitable". The criterion under section 98(6) of the interim Constitution was "the interests of justice and good government". There has as yet been no comprehensive judgment of this Court on the meaning of "just and equitable" in section 172(1)(b) of the 1996 Constitution, although it has been alluded to in *S v Ntsele*[106] and *De Lange v Smuts NO and Others*.[107] Nor is it necessary to attempt such a comprehensive task in the present case.

[93] In *Ntsele's* case,[108] Kriegler J, dealing with the 1996 Constitution, stated that the

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106 Above n 103 at paras 12-14.

107 Above n 43 at paras 104-5.

108 Above n 103 at para 14.

principal features which have to be considered when contemplating the possibility of a retrospective order had been crisply summarised in the following passage from O'Regan J's judgment in *S v Bhulwana; S v Gwadiso*:[109]

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see *US v Johnson* 457 US 537 (1982); *Teague v Lane* 489 US 288 (1989)). On the other hand, as we stated in *S v Zuma* (at para 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* 401 US 667 (1971) at 691:
>
> > 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.'
>
> As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity."

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109 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 32.

It was not the intention in *Ntsele's* case to suggest that the tests for retrospectivity or non-retrospectivity were identical under the interim and the 1996 Constitutions. But both *Bhulwana's* case and *Ntsele's* case were concerned with the constitutional invalidity of reverse onus provisions in the Drug and Drug Trafficking Act 140 of 1992, and it was in this context that Kriegler J observed that the above quoted observations in *Bhulwana's* case " . . . are directly in point here and the type of order we granted in that case is equally appropriate here."[110]

[94] The interests of good government will always be an important consideration in deciding whether a proposed order under the 1996 Constitution is "just and equitable", for justice and equity must also be evaluated from the perspective of the state and the broad interests of society generally. As in *Ntsele's* case, it might ultimately be decisive as to what is just and equitable. At the same time the test under the 1996 Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider.

110 Above n 103 at para 14.

[95] The present is the first case in which this Court has had to consider the retrospectivity of an order declaring a statutory or common-law criminal offence to be constitutionally invalid. The issues involved differ materially from those in cases where reverse onus provisions have suffered this fate. In the latter cases an unqualified retrospective operation of the invalidating provisions could cause severe dislocation to the administration of justice and also be unfair to the prosecution who had relied in good faith on such evidentiary provisions.[111] In addition, the likely result of such an unqualified order would be numerous appeals with the possibility of proceedings having to be brought afresh.[112] In each case the issue would arise as to whether the accused in question would have been convicted, or could be convicted in the absence of reliance on the particular reverse onus provision. In hearings afresh, the necessary evidence to secure a conviction

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111 See, for example, the observations in this regard of Kentridge AJ in *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at para 43.

112 Id.

in the absence of the evidentiary provision in question might no longer be available.[113]

[96] In the present case the situation is different. From the perspective of adult gay men who have been convicted of sodomy where this occurred consensually and in private, (to which I shall for convenience refer as "consensual sodomy") it seems manifestly and grossly unjust and inequitable that such convictions should not be capable of being set aside. People have been convicted of an offence which ceased to exist when the 1996 Constitution came into effect. In fact, because of the principle of objective constitutional invalidity, the offence ceased to exist when the interim Constitution came into force on 27 April 1994, because there is no doubt that this Court, for all the reasons set forth in this judgment, would have declared the common-law offence of sodomy to be inconsistent with at least the provisions of section 8 of the interim Constitution, had a constitutional challenge been brought under it. Competent courts have wide powers under section 172(1)(b) to make orders that are "just and equitable". The chance fact that a constitutional challenge against the offence of sodomy was not brought under the interim Constitution should not deter us, in the particular circumstances of this case, from giving full retrospective effect, to 27 April 1994, to an order which justice and equity clearly require.

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113 Id.

[97] An unqualified retrospective order could easily have undesirable consequences. Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages. The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment.

[98] We should, however, limit the retrospective effect of the order declaring the offence of sodomy to be constitutionally invalid to cases of consensual sodomy. In respect of all other cases of sodomy, the order should be limited to one which takes effect from the date of this judgment. This is essential, in my view, to prevent persons convicted of sodomy which amount to "male rape" from having their past convictions set aside. To permit this would be neither just nor equitable. In the absence of such a limitation confusion might arise, upon a conviction being set aside in such cases, as to whether a conviction of indecent assault or assault with intent to do grievous bodily harm,

could validly be substituted.

The Order Declaring Section 20A of the Sexual Offences Act to be Constitutionally Invalid

[99] In substance this order has as little prospect of causing disruption as the order in relation to the common-law offence of sodomy if it is given a similar qualified retrospective effect.

The Order Declaring the Inclusion of Sodomy as an Item in Schedule 1 of the CPA to be Constitutionally Invalid

[100] The effect of including the offence of sodomy in this Schedule has been set forth in paragraph 7 above. The implication of an order declaring sodomy to be constitutionally invalid differs according to the particular section of the CPA or other statute to which Schedule 1 of the CPA relates, and different considerations apply in deciding the question of retrospectivity.

[101] Section 37(1)(a)(iv) of the CPA; section 3(1)(b) of the Intercepting and Monitoring Prohibition Act, 127 of 1992 (read with the definition of "serious offence" under section 1 of that Act); and section 13(8) of the South African Police Service Act, 68 of 1995 (the

effect whereof has been summarised in paragraph 7 (i), (vii) and (viii) respectively above) all relate to actions by means of which evidence could have been obtained and used against an accused who might have been convicted of sodomy. It must be emphasised that giving such an order qualified retrospective effect does not mean that evidence obtained by means of the above provisions was necessarily inadmissible in any such trials or will necessarily be inadmissible in future. That is an issue to be decided by the court seized of any matter pursuant to the above order and will be decided by such court having regard, where applicable, to the provisions of section 35(5) of the Constitution, which provides:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[102] The effect of sections 40(1)(b), 42(1)(a), 49(2), 60(4)(a), 60(5)(e), 60(5)(g), and 185A(1) of the CPA has been summarised in paragraph 7 (ii), (iii), (iv), (v) and (vi) above. These provisions of the CPA, with the exception of those applying to bail,[114] all relate to actions which are completed before the accused is brought to trial, or, as in the case of section 185A, stand quite outside the trial. These provisions can have no effect on the fairness of the ensuing trial itself, and to give the order retrospective effect in respect of them could conceivably open the door for civil claims against those who have

[114] Namely section 60(4)(a), 60(5)(e) and 60(5)(g) of the CPA.

performed them. Where persons performing the acts did so in good faith and on the acceptance of the validity of the provisions in question, as they related to the offence of sodomy, it would not ordinarily be just or equitable to give the order any retrospective operation at all, for the reasons stated in *De Lange v Smuts NO and Others*.[115] If the persons concerned acted in bad faith the fact that the order in this case does not operate retrospectively would not debar any action which an accused (or his or her estate in the case of section 49(2) of the CPA) might have had on the grounds of acts performed mala fide. As far as the bail provisions are concerned similar considerations would apply. They could only very obliquely affect the accused's so-called "right to a speedy trial"[116] under section 35(3)(d) of the Constitution, where the accused's appropriate remedy, namely to be granted bail in order to ameliorate the harmful consequences of delays in the trial, would be unaffected.[117] In relation to all these provisions, the argument for giving the declaration of invalidity no retrospective effect is powerful. It is not, however, possible to envisage all the possible consequences flowing from a declaration of invalidity

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115 Above n 43 at para 105, where the following was stated:

> "Moreover, if the order is granted any retrospective effect it could raise uncertainties as to whether a person unconstitutionally committed to prison in the past had a claim for damages in respect of a committal which was unassailable at common law at the time and ordered in good constitutional faith. If it were to transpire that the retrospective operation of the order does not provide a cause of action for damages, then persons unconstitutionally detained in the past suffer no prejudice in relation to damages. If it has the effect of giving rise to such a claim, then it seems to be a most undesirable consequence, having regard to the fact that the committal took place in good faith."

116 See *Wild and Another v Hoffert NO and Others* 1998 (6) BCLR 656 (CC); 1998 (3) SA 695 (CC) at para 1.

117 Id at para 34.

and it is therefore considered prudent, in the appropriate order, to confer a discretion on a court of competent jurisdiction.

[103] The effect of section 1(8) and (9) and section 2(1)(c) of the Special Pensions Act, 69 of 1996 has been summarised in paragraph 7 (ix) and (x) above. They relate to monetary claims against the state arising directly from the operation of the statute in question and there are no grounds of justice or equity justifying any limitation on the retrospective operation of the order. No reason has been suggested why the state should not discharge its full obligations under the Special Pensions Act on the basis that the provisions relating to the offence of sodomy became constitutionally invalid as from the date on which the interim Constitution came into operation, at least in respect of consensual sodomy in private between adult males. It is not just or equitable, however, if such retrospectivity were to give rise to any cause of action against any individual who applied the provisions relating to sodomy in these sections of the Act in good faith before the date of this order. Consequently it would also be prudent to confer a discretion on a court of competent jurisdiction.

The Order Declaring the Inclusion of Sodomy as an Item in the Schedule to the Security Officers Act to be Constitutionally Invalid

[104] The effect of including the offence of sodomy in this Schedule has been considered

in paragraph 8 above. It prohibits a person convicted of sodomy from registering as a security officer, or exposes him to having such registration withdrawn, and such conviction may lead to a finding of improper conduct for purposes of the Act. Justice and equity would seem to require an order having full retrospective effect, at least in respect of consensual sodomy in private between adult males. There is little or any likelihood of disruption. Its consequence would merely be to correct the registration of persons convicted and the setting aside of any findings of improper conduct based on the conviction for such offence. At the same time, however, it would not be just or equitable if such retrospective operation gave rise to any cause of action against any individual who applied the provisions relating to sodomy in these sections of the Act in good faith before the date of this order and here, too, it would be prudent to confer a discretion on a court of competent jurisdiction.

[105] Although counsel for the applicants have conducted an audit of statutory provisions in order to identify those statutes which incorporate the offence of sodomy or otherwise rely thereon they could, understandably, give no firm assurance that the statutory provisions identified in this case are the only ones falling into this category. The possibility exists that there are further statutory provisions of this nature. It is inadvisable to attempt to make an order in the abstract relating to such statutes and the extent to which the constitutional invalidity of the offence of sodomy, as applied to such statutes, should have retrospective effect. This is a matter best left to the High Courts to deal with on a

case by case basis should the need arise.

[106] I accordingly make the following order:

1.1. The common law offence of sodomy is declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid.

1.2. In terms of section 172(1)(b) of the 1996 Constitution, it is ordered that the order in paragraph 1.1 shall not invalidate any conviction for the offence of sodomy unless that conviction relates to conduct constituting consensual sexual conduct between adult males in private committed after 27 April 1994 and either an appeal from, or a review of, the relevant judgment is pending, or the time for noting of an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a court of competent jurisdiction.

1.3 In all cases of sodomy which do not relate to conduct constituting consensual sexual conduct between adult males in private, the order in 1.1 will come into effect on the date of this judgment.

2.1. Section 20A of the Sexual Offences Act, 1957 is declared to be inconsistent with the 1996 Constitution and invalid.

2.2. In terms of section 172(1)(b) of the 1996 Constitution, it is ordered that the order in paragraph 2.1 shall not invalidate any conviction in terms of section 20A of the Sexual Offences Act, 1957 unless that conviction was related to conduct that took place after 27 April 1994 and either an appeal from, or a review of, the relevant judgment is pending, or the time for noting of an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a court of competent jurisdiction.

3.1. The inclusion of the common-law offence of sodomy in Schedule 1 of the Criminal Procedure Act, 1977 is declared to be inconsistent with the provisions of the 1996 Constitution and invalid.

3.2 In terms of section 172(1)(b) of the Constitution, it is declared that the order referred to in para 3.1 shall not invalidate anything done in reliance on the inclusion of "sodomy" in the schedule, as incorporated in the provisions of section 37(1)(a)(iv) of the Criminal Procedure Act, 51 of 1977; section 3(1)(b) of the Intercepting and Monitoring Prohibition Act, 127 of 1992 (read with the definition of "serious offence" under section 1 of that Act); and section 13(8) of the South African Police Service Act, 68 of 1995, unless a court of competent jurisdiction decides that it is just and equitable that conduct pursuant to such reliance shall be declared invalid, provided that due regard must be had to the

provisions of section 35(5) of the 1996 Constitution.

3.3 In terms of section 172(1)(b) of the Constitution, it is declared that the order referred to in para 3.1 shall, in all cases other than those mentioned in paragraph 3.2 above, not invalidate anything done in reliance on the inclusion of "sodomy" in the schedule, unless a court of competent jurisdiction decides that it is just and equitable that conduct pursuant to such reliance shall be declared invalid.

4.1. The inclusion of the common-law offence of sodomy in schedule 1 of the Security Officers Act, 92 of 1987 is declared to be inconsistent with the provisions of the 1996 Constitution and invalid.

4.2. In terms of section 172(1)(b) of the Constitution, it is declared that the order referred to in paragraph 4.1 shall not invalidate anything done in reliance on the inclusion of "sodomy" in the schedule of the Security Officers Act, 1987, unless a court of competent jurisdiction decides that it is just and equitable that conduct pursuant to such reliance shall be declared invalid.

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:

[107] Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution. In expressing my concurrence with the comprehensive and forceful judgment of Ackermann J, I feel it necessary to add some complementary observations on the broader matters. I will present my remarks - in a preliminary manner as befits their sweep and complexity - in the context of responding to three issues which emerged in the course of argument. The first concerns the relationship between equality and privacy, the second the connection between equality and dignity, and the third the question of the meaning of the right to be different in the open and democratic society contemplated by the Constitution.

Equality and Privacy

[108] It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is

violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.[118]

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118 As Foucault commented in a celebrated formulation:

> "As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts, their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature. We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted

from the moment it was characterised - Westphal's famous article of 1870 on 'contrary sexual relations' can stand as its date of birth - less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration, the homosexual was now a species." Foucault *The History of Sexuality Volume One: An Introduction* (1978) in Pantazis "The Problematic Nature of Gay Identity" (1996) 12 *SA Journal of Human Rights* 291 at 298.

[109] The effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself. I have no doubt that when the drafters of the Bill of Rights decided expressly to include sexual orientation in their list of grounds of discrimination that were presumptively unfair,[119] they had precisely these considerations in mind. There

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[119] Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

could be few stronger cases than the present for invoking the protective concern and regard offered by the Constitution.

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(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[110] Against this background it 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, presenting it in their written argument[120] as a poor second prize to be offered and received only in the event of the Court declining to invalidate the laws because of a breach of equality. Their argument may be summarised as follows: privacy analysis is inadequate because it suggests that homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom; it tends to limit the promotion of gay rights to the decriminalisation of consensual adult sex, instead of contemplating a more comprehensive normative framework that addresses discrimination generally against gays; and it assumes a dual structure - public and private - that does not capture the complexity of lived life, in which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition.[121]

[111] These concerns are undoubtedly valid. Yet, I consider that they arise from a set of assumptions that are flawed as to how equality and privacy rights interrelate and about the manner in which privacy rights should truly be understood; in the first place, the approach

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120 In his oral presentation counsel for the applicants indicated that his concern was not with the privacy argument in itself, but the way in which the judgment on privacy might be couched. It is to this concern that I address myself.

121 See Pantazis above n 1 and Cameron "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 *SA Law Journal* 450.

adopted by the applicants subjects equality and privacy rights to inappropriate sequential ordering, while secondly, it undervalues the scope and significance of privacy rights. The cumulative result is both to weaken rather than strengthen applicants' quest for human rights, and to put the general development of human rights jurisprudence on a false track.

[112] I will deal first with the question of inappropriate separation of rights and sequential ordering, that is, 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. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and

analysing them contextually rather than abstractly.[122]

[122] It was in this spirit that L'Heureux-Dubé J in *Egan v. Canada* (1995) 29 CRR (2d) 79 at 120 remarked:

> "In reality, it is no longer the 'grounds' that are dispositive of the question of whether discrimination exists, but the *social context* of the distinction that matters. [C]ontext is of primary importance and that abstract 'grounds of distinction' are simply an indirect method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: 'Does this distinction discriminate against this group of people?' "

[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,[123] that is, globally and contextually, not separately and abstractly.[124] The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring[125] of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa

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

124 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 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).

125 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*

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.[126]

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11 at 11.

126 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".

[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 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.[127] 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,[128] while the discriminatory manner in which groups are targeted for invasions of privacy will destroy any possibility of justification for such invasions.[129]

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127 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."

128 See section 9(3) above n 2.

129 Section 36 reads:

> "(1) 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, . . ."

[115] The depreciated value given in argument to invalidation on the grounds of privacy, treating 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.[130] It has become a judicial cliché to say that privacy protects people, not places.[131] Blackmun J in *Bowers, Attorney General of Georgia v. Hardwick et al*[132] 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

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130 The judgment of Ackermann J above at paras 29-32 helpfully explains the context in which Cameron came to make the distinction between equality and privacy. It also contains trenchant observations on the importance of protecting private intimacy with which I fully associate myself.

131 The phrase was first coined by Stewart J in *Katz v United States* 389 US 347, 351 (1967). See *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC) at para 21. See also n 18 below.

132 478 U.S. 186 (1985).

make fundamental decisions about your intimate relationships without penalisation.[133]

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133 Id at 205-14:

> "We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply.
>
> . . . .
>
> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.
>
> . . . .
>
> 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.' [Quoting *Stanley v Georgia* 394 U.S. 557 (1969) at 564.]
>
> . . . .
>
> [D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply

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' ",[134] 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.

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rooted in our Nation's history than tolerance of nonconformity could ever do."

134 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.

[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."[135] 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,[136] 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.

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135 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at paras 65 and 67 quoting Forst at n 90. The learned judge went on to observe that:

> "[T]his implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities . . . the scope of personal space shrinks accordingly."

It should be noted that personal space is not equated with physical space, although there can be a relation between the two. See *Mistry* above n 14 at para 21.

[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 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).[137] The privacy interest is overcome because of the perceived harm.

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136 *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) at para 31.

137 For a psychoanalyst's view see Young "Is 'Perversion' Obsolete?" (1996) *Psychology in Society (PINS)* (21) 5 at 12. He argues that the concept of perversion gave way to that of pluralism, but that there are still limits to what is acceptable in sexual behaviour.

[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.[138] Respect for personal privacy does not require disrespect for social standards.[139] 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.

Equality and Dignity

138 Id at 13.

139 See also para 133 below.

[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.[140] This Court has on a number of occasions emphasised the centrality of the concept of dignity and self-worth to the idea of equality.[141] In an interesting argument,[142] 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[143] 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)[144] to what it claimed to be an affirmative position of promoting equality under the broad provisions of section 9(1). The

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140 O'Regan J comments in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at para 328:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3."

141 *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC)*;* 1997 (4) SA 1 (CC) at para 41; *Prinsloo v van der Linde and Another* above n 19 at paras 31-3; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at para 50**.**

142 In *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 129, I had occasion to refer to the importance of ". . . a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large." The critique by the Centre is to be welcomed, even though normally such generalised observations could be expected to be made in journal articles rather than through amici arguments.

143 Section 10 provides:

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

constitutional vocation of section 9(1),[145] it argued, had been reduced from that of the guarantor of substantive equality to that of a gatekeeper for claims of violation of dignity.

144 Above n 2.

145 Id.

[121] Ackermann J has, I believe, dealt convincingly with the assertion that the Court has failed to promote substantive as opposed to formal equality. Indeed, his judgment is itself a good example of a refusal to follow a formal equality test, which could have based invalidity simply on the different treatment accorded 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.[146] I would like to endorse, and I believe, strengthen this argument by referring to reasons of principle and strategy why, when developing equality jurisprudence, the Court should continue to maintain its focus on the defined anti-discrimination principles of sections 9(3), (4) and (5), which contain respect for human dignity at their core.

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146 Ackermann J above at paras 20-27 and paras 58-64.

[122] The textual pointers against the Centre's argument to the effect that section 9(1) should be interpreted so as to carry virtually the whole burden of securing equality, have been crisply identified in Ackermann J's judgment.[147] There are, I believe, additional considerations supporting a structured focus on non-discrimination as the heart of implementable equality guarantees:[148] institutional aptness,[149] functional effectiveness,[150] technical discipline,[151] historical congruency,[152] compatibility with international practice[153] and conceptual sensitivity.

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147 See above at paragraphs 15-19. It should be noted that the question of substantive socio-economic claims has been directly attended to by means of the express inclusion of a number of socio-economic rights in the Bill of Rights coupled with an indication of the responsibility of the legislature to ensure their realisation within resource possibilities. See sections 26 (housing), 27 (health care, food, water and social security) and 29 (education) of the 1996 Constitution.

148 "We promote equality by reducing discrimination, and we reduce discrimination by reducing the gap between advantage and historic, arbitrary disadvantage." See Abella AJ in *R v M (C)* (1995) 30 CRR (2d) 112 at 119.

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

150 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.

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

152 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.

153 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.

[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.[154] 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 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.

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154 See the case of *Andrews v Law Society of British Columbia* (1989) 30 CRR (2d) 193, a landmark in equality jurisprudence.

[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.[155] 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[156] 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.

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155 See above n 26.

156 An apt phrase used by Iacobucci J in *Egan v Canada* above n 5 at 157.

[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.

[127] As Marshall J reminds us, ". . . the lessons of history and experience are surely the

best guide as to when, and with respect to what interests, society is likely to stigmatise individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure . . . as in many important legal distinctions, 'a page of history is worth a volume of logic' ".[157] In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.

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157 *City of Cleburn Text. v Cleburn Living Center* (1985) 473 US 432 at 473, quoting Holmes J in *New York Trust Co. et.* al. *v Eisner* (1921) 256 U.S. 345 at 349. The stereotyping in itself need not result in discrimination. The stereotype of the level-headed, unemotional man as being the best person to hold positions of leadership, has served many men well enough. It is when stereotypes are coupled with disadvantage that they become constitutionally offensive. Such disadvantage may take material forms, but need not do so; the Bill of Rights recognises that we do not live by bread alone. Indeed, there is no evidence before us that gays are either wealthier or poorer than the rest of society. Nor are they as individuals necessarily less represented than straights in the corridors of political, economic, social, cultural, judicial or security force power. The disadvantage they suffer comes not from a consequence of prejudice, it comes from prejudice itself. The complexity of the problems relating to stereotyping is illustrated by the contrasting positions adopted in *Hugo* above n 24 by Kriegler J at paras 80-86 and O'Regan J at para 111.

[128] This special vulnerability of gays and lesbians as a minority group whose behaviour deviates from the official norm is well brought out by Cameron in the germinal article to which my learned colleague refers.[158] Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group, pressurised by society and the law to remain invisible;[159] their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. None of these factors applies to other groups traditionally subject to discrimination, such as people of colour or women, each of whom, of course, have had to suffer their own specific forms of oppression. In my view, the learned author is quite correct when he concludes that precisely because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitutional order. For this same reason, the question of dignity is in this context central to the question of equality.

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158 See Ackermann J above at para 20.

159 Law "Homosexuality and the Social Meaning of Gender" (1988) *Wisconsin Law Review* 187 at 212, quoted in Cameron above n 4 at 459. comments:

> "The closet metaphor is more powerful for gays, since heterosexism demands that they deny their identity and central life relationships. Gender, by contrast,

is visible, like race, and women confront powerlessness, not invisibility." in

[129] At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled.[160] In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality. This aspect would not be well captured, if at all, by the Centre's approach, which falls to be rejected.

The Treatment of Difference in an Open Society

[130] Although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of public institutions which are based on and perpetuate such prejudice. From today a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, less lonely and more dignified. The law catches up with an evolving social reality. A love that for a number of years has dared openly to speak its name in bookshops, theatres, film festivals and public parades, and that has succeeded in becoming a rich and acknowledged part of South African

160 See generally Minow above n 8.

cultural life, need no longer fear prosecution for intimate expression. A law which has facilitated homophobic assaults and induced self-oppression, ceases to be. The courts, the police and the prison system are enabled to devote the time and resources formerly spent on obnoxious and futile prosecutions, to catching and prosecuting criminals who prey on gays and straights alike. Homosexuals are no longer treated as failed heterosexuals but as persons in their own right.

[131] Yet, in my view the implications of this judgment extend well beyond the gay and lesbian community. It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled, an issue central to the present matter.

[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.[161] At the very least, it affirms that

161 See Littleton in *Reconstructing Sexual Equality* (1987) 75 *California Law Review* 1279 at 1285 where she introduces an approach to reconstructing equality based on the premise of acceptance. This model focuses on creating symmetry in the lived-out experiences of all members of society by eliminating the unequal

difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

consequences arising from difference.

[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. Commentators have suggested that respect for the equality principle goes further in two respects. The first is that the gay and lesbian community must have full access to decision-making on the questions at issue, so that their experiences, sense of right and wrong and proposals for effective law-making are given equal consideration when the outcome is determined[162]. Secondly, the selection

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162 The theme of equality of voice is brought out by Dworkin in "Equality, Democracy and Constitution" (1990) Vol XXVIII, No. 2 *Alberta Law Review* 324 at page 337-41 where he argues that:

> "In a genuine democracy, the people govern not statistically but communally . . . [w]hen we insist that a genuine democracy must treat everyone with equal concern, we take a decisive step towards a deeper form of collective action in which 'we the people' is understood to comprise not a majority but everyone acting communally . . . but the idea that in an integrated community the collective life cannot include moulding the judgments of its individual members as distinct from what they do, has a distinct near-definitional importance because it sets minimal conditions for any community, of any kind, that aspires to integration rather than to monolith . . . .If the collective ambition is selective and discriminatory - if it aims only to eliminate certain beliefs collectively judged wrong or degrading - then it destroys integration for those citizens who are the objects of reform . . . "

Trakman argues similarly in "Section 15: Equality? Where" (1995) 6:4 *Constitutional Forum* 112 at 121.

> "If Section 15 [the equality clause in the Charter of Rights] has meaning, that meaning resides in the condition of communal life to which equality is directed. That condition presupposes that all persons within society are entitled to participate in that communal life with comparative equality. This condition of equality does not require that everyone share exactly equally in the social 'good'. Equality entitles different segments of society to enjoy different qualities of lives with comparative, not symmetrical, equality. Comparative equality also means that no one segment of society is entitled to define the quality of the 'good' life for all in the image of itself. Whatever its object, the legislature in a democratic society is disentitled to identify itself with the interests of select communities so as to produce comparative inequality for other communities."

of issues for investigation must not be selected and treated on the basis of stereotypes and prejudice. It is not necessary to pronounce on these complex issues in this case.

[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.[163] 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

163 Minow above n 8 argues that equality for those deemed different is precluded by five unstated and unacceptable assumptions namely that: Difference is intrinsic not a comparison; the norm need not be stated; the observer can see without a perspective; other perspectives are irrelevant; and the status quo is natural, uncoerced and good. Her focus was principally on disability rights, but the critique would seem to apply to the manner in which gay conduct has been described.

behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.

[135] The invalidation of anti-sodomy laws will mark an important moment in the maturing of an open democracy based on dignity, freedom and equality. As I have said, our future as a nation depends in large measure on how we manage difference. In the past difference has been experienced as a curse, today it can be seen as a source of interactive vitality. The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.[164]

[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.[165] What is central to the character and functioning of the state,

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164 The Preamble of the Constitution reads:

> ". . . believe that South Africa belongs to all who live in it, united in our diversity." There are many provisions that deal with associational, cultural, religious and language rights as well as rights relating to belief and expression, all of which highlight the rich diversity of our country. See for example sections 6, 18, 29, and 31 of the Constitution. See also *Gauteng Education* above n 36 at paras 49 and 52.

165 See Robertson and Merrils *Human Rights in Europe* 3 ed (1993) quoted in *Coetzee v Government of the*

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.[166]

Republic of South Africa 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC) at n 66.

166 See Abella AJ above n 31 at page 639:

> "When governments define the ambits of morality, as they do when they enunciate laws, they are obliged to do so in accordance with constitutional guarantees, not with unwarranted assumptions."

[137] The fact that the state may not impose orthodoxies of belief systems on the whole of society has two consequences.[167] 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.

[138] In my view, the decision of this Court should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind. Having made these observations, I express my full concurrence in Ackermann J's judgment and order.

For the Applicants: Mr GJ Marcus SC and Mr M Chaskalson instructed By Nichollas, Cambanis and Associates

167 See *S v Lawrence* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1176 (CC) at paras 148 and 179.

For the 1st Respondents: Ms GCM Masemola instructed by the State Attorney, Johannesburg.

For the Amicus Curiae: Mr D davis instructed by Wits Law Clinic.