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11 October 2021

Judge Róbert Spanó
President of the European Court, Grand Chamber
The European Court of Human Rights
Allée des Droits de l'Homme, 67000
Strasbourg,
France

Our ref: L. Naidu | 50814701
Your ref: *Mokgadi Caster Semenya v Switzerland* | Case no: 10934/21

By registered letter with acknowledgement of receipt and facsimile (+ 33 3 88 41 27 30)

Dear Judge Spanó,

Submission of Third Party Intervener in *Mokgadi Caster Semenya v Switzerland* (Case no: 10934/21)

1. The South African Human Rights Commission (**SAHRC or the Commission**) is grateful to the Court for this opportunity to make submission in this matter, pursuant to the Court's letter dated 31 August 2021.

2. As directed by the Court, the SAHRC's submission is limited to ten pages and addresses only the general principles applicable to the determination of this matter. In accordance with the Court's Practice Direction on written pleadings, the SAHRC has also provided an Annex which lists all evidence referred to in the written submissions, together with a bundle of supporting documents.

3. The SAHRC takes this opportunity to note that, if the Court is ultimately minded to grant a hearing in this case, the SAHRC will request permission to take part in that hearing pursuant to Rule 44(3), by way of short oral submissions, within such time limit as the Court may direct.

4. The circumstances of this case are exceptional. In particular, this case raises complex questions around the rights of the applicant to dignity and respect; uniquely, the proper approach to intersectional discrimination, and the approach that should be taken to justifying any discrimination found on those bases. Respectfully, therefore, the Court may be assisted by such a hearing.

5. Moreover, as to the SAHRC's involvement, it is respectfully noted that the SAHRC's submissions do not contain duplication with the matters to be addressed by the applicant, and rather seek to inform the Court of a significant area of relevant jurisprudence by the Constitutional Court of South Africa: a Court which has had to grapple with such issues in the context in particular of intersectional discrimination. Any oral submissions permitted by the Court would be equally focussed, and would seek only to bring further clarity to the

Court on that extensive and nuanced jurisprudence and its relevance to the matters before it.

6. The SAHRC remains at your disposal for any further information you may require. We can be contacted through our legal representatives at Baker McKenzie. Please direct all communication for the attention of both Xavier Salvatore (Xavier.Salvatore@bakermckenzie.com) and Romain Bizzini (Romain.Bizzini@bakermckenzie.com) at the following address:

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7. We would of course be willing to provide further information if it would be of assistance.

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IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 10934/21

In the matter between:

SEMENYA Appellant

and

SWITZERLAND Respondent

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Intervener

SOUTH AFRICAN HUMAN RIGHTS COMMISSION'S WRITTEN SUBMISSIONS

A. Introduction

1. Pursuant to the Court's letter dated 31 August 2021, these submissions are filed on behalf of the South African Human Rights Commission ("the SAHRC"). As directed, they are limited to ten pages; do not include any comments on the facts or merits of the case; and address only the general principles applicable to its determination. They seek to assist the Court's consideration of the case particularly by referring to comparable South African caselaw.

2. South Africa is a particularly instructive comparative jurisdiction by virtue of its constitution being the first in the world explicitly to entrench protection against discrimination on the ground of sex, gender and sexual orientation[1] (including the ground of intersexuality).[2] South Africa also has a developed body of case law relating to a key legal principle arising in this case:[3]

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[1] Brickhill *Public Interest Litigation in South Africa* (Juta & Co Ltd, Cape Town 2018) at 239 (A/25).

[2] As the South African High Court explained in *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC) para 20 fn 22, "[t]he labels of transsexual, transgenderist, intersexed, transvestite, heterosexual, homosexual, bisexual and pansexual are all labels that are used in an attempt to describe the many permutations of human identity and sexuality" and the CC "tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds" (A/14/1129). However, the CC has subsequently clarified in *Rahube v Rahube* 2019 (2) SA 54 (CC) para 19 fn 22 that "references to the word 'sex' refer to the biological characteristics that define humans as female, male or intersex" and that "[t]his is usually assigned at birth and differentiation between people is made on the basis of external genitalia, chromosomes, hormones and the reproductive system (A/15/1160-1161). Gender is both a social construct and a personal identity. In social terms gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies, regardless of their sex." In *Rahube v Rahube* the CC considered the impugned provision on the grounds both of sex and gender.

[3] Atrey *Intersectional Discrimination* (OUP, Oxford 2019) at 2 and 14-15 (A/26/1842-1843).

intersectionality.[4] It is in this context that the SAHRC advances the following submissions, referring in what follows substantially to caselaw by the apex court of South Africa, the Constitutional Court ("the CC").[5] The SAHRC has provided a bundle of supporting documents with these submissions. References are in the form [Annex/Tab/Page number (if applicable)].

B. South African comparative caselaw on equality and intersectionality

3. The CC's caselaw on equality commences (in its first judgment on the equality provision in the interim Constitution) by referring to "patterns of disadvantage" being "particularly acute in the case of black women, as race and gender discrimination overlap."[6] This was an early recognition of the phenomenon to which the intersectionality concept responds.[7] It has spawned principles of particular importance in adjudicating cases like the present matter.

(1) First principle: No adaptation or negation nor self-abnegation necessary

4. Intersectionality adopts a whole-person approach to people, requiring that they "be treated *just as they are*."[8] This the CC confirmed subsequently in its *locus classicus* on equality in the context of sexual orientation,[9] citing Canadian caselaw confirming the effect of discrimination:[10] a negation of an individual's true identity, infringing human dignity.[11] The CC held that the denial of identity, and the creation of homogeneity, uniformity or the elimination or suppression of difference is not what the right to equality contemplates.[12] Instead, it affords "equal concern and respect across difference."[13]

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[4] Based on the above text (Atrey *op cit* at 139) intersectionality and intersectional discrimination – a concept forming the subject-matter of considerable academic debate over the last three decades – can be described as a doctrine which (i) recognises that multiple causes may exist which contribute to causation in the context of discrimination; (ii) envisages the variability in pattens of group disadvantage by virtue of various characteristics of an individual, viewed holistically and contextually; and (iii) aims to transform patterns of prejudice by dismantling structures of disadvantage and systems of power (A/26/1967).

[5] The CC described intersectionality as "an approach that recognises that different identity categories can intersect and co-exist in the same individual thus creating a qualitatively different experience when compared to that of another individual" (*Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) para 76 (A/17/1315-1316)) and held that "[i]t means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play (*id* at 76).

[6] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 43 (A/1/24).

[7] See Atrey *op cit* at 41, adopting the terminology used in *Brink v Kitshoff NO supra* to explain that "intersectional disadvantage is defined in terms of patterns of inter-group and intra-group disadvantage, which embody different kinds of substantive harm in terms of oppression, powerlessness, subordination, marginalization, deprivation, domination and violence" (A/26/1869).

[8] Atrey *op cit* at 47 (A/26/1875).

[9] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 134, per Sachs J in a separate concurrence (A/5/409-410).

[10] *Vriend v Alberta* (1998) 1 SCR 493 (SCC) para 69 (A/20/1520).

[11] *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 24, per Ackermann J writing for the court (A/5/436).

[12] *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 132 (Sachs J) (A/5/406-407).

[13] *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 132 (Sachs J) (A/5/406-407).

5. The SAHRC submits that this reflects the following general principle applicable to the determination of the case (concerning particularly questions 1, 2, 3.1, 3.2 and 4.1 addressed by the Court to the parties): an individual is not required to change personal characteristics in order to qualify for inclusion,[14] nor to confine themselves to one aspect of their identity (thus foregoing inclusion or legal protection as member of a particular group)[15] to qualify for legal protection as member of another group to which the same person also belongs.[16]

(2) Second principle: Determinability of dignity

6. The CC has recognised that "[p]ast 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."[17] The CC adopts a remedial, restitutionary, and substantive approach to equality,[18] focussing on the overall impact of the discrimination on the people against whom a measure discriminates.[19]

7. The overall impact includes not only all the characteristics included as prohibited grounds of discrimination,[20] but also the impact on other fundamental rights – particularly privacy and

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[14] E.g. by undergoing medical treatment. See *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC) para 2 fn 5 (A/14/1125). The High Court cited (in the context of transgender individuals) with approval the Indian Supreme Court's judgment in *National Legal Services Authority v Union of India* AIR 2014 SC 1863 para 76 for the proposition that "(g)ender identity ... forms the core of one's personal self, based on self-identification, not on surgical or medical procedure" (A/22/1671).

[15] *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* para 132 (Sachs J), construing equality as protecting – at a minimum – against exclusion, marginalisation, stigma and penalty (A/5/406-407).

[16] E.g. by sacrificing any SOGIE equality protection for purposes of affording fellow females protection on the basis of the prohibition against sex discrimination.

[17] *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at para 60 (Ackermann J) (A/5/335). The SAHRC's research confirms subsisting prejudice presenting as gendered inequality between not only men and women, but also the LGBTIQ+ community based on SOGIE; the frequent overlapping effect of inequality with poverty, socio-economic disadvantage and race, resulting in multiple forms of discrimination particularly against women not conforming to traditional gender roles; hence the importance of recognising the intersectionality of discrimination based on people's identities and character traits, particularly in a global South country like South Africa, where poverty and socio-economic disadvantage intersect directly with race and affect women disproportionately. See SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* pp 6-10 (A/30/2110-2114).

[18] *Id* para 61 (Ackermann J) (A/5/336).

[19] *Id* para 61 (Ackermann J) (A/5/336), citing *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41 (A/2/75-76). The same approach was confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 35, holding that proper regard must be had to the operation, experience or impact of discrimination on society since discrimination does not occur in discrete areas of law but must be underst ood in the context of the experience of those on whom it impacts without evaluating impact in isolation (A/6/446).

[20] *Id* para 113 (Sachs J), referring specifically to critical race feminist theory and its recognition that women of colour are often discriminated against on the basis of race, gender and economic class; and explicitly noting the intersection of race, gender, class, sexual orientation, physical disadvantage and other characteristics which often serve as the basis for unfair discrimination (A/5/386-387).

dignity,[21] which interrelate with the right to equality.[22] The CC has accepted that a single situation can simultaneously give rise to multidimensional discrimination;[23] and multiple, overlapping and mutually-reinforcing violations of fundamental rights.[24] Key to contextualising the discrimination inquiry for the purposes of assessing the impact on an affected person is *dignity*.[25] The inquiry is accordingly not simply whether group-based differential treatment exists, but whether the differentiation perpetuates disadvantage and damages the dignity and self-worth of group members.[26]

8. The SAHRC submits that this reflects the following general principle applicable to the determination of the case (in particular questions 1, 2, 3.1, 3.2 and 4.1 to the parties): a provision which differentiates on a prohibited ground and does so in a manner which impacts adversely on an individual's dignity is problematic;[27] it cannot be justified circuitously by invoking intersectionality, least of all where the dignity of only a subgroup (but not the larger group itself) is impaired; accordingly discrimination against a sub-group (e.g. intersex or black females) cannot be justified by invoking protection against discrimination against the larger group (e.g. females).[28]

(3) Third principle: Systemically irrational rule-making discriminates

9. In a separate CC concurrence Sachs J considered academic commentators' views that the principle of equality requires that the LBGTIQ+ community must have full access to decision-making on questions affecting them to enable effective and equal law-making.[29] Sach J considered

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[21] The right to dignity indeed constitutes the "core" of the CC's "focus on the defined antidiscrimination principles" entrenched in section 9(3), (4) and (5) of the South African Constitution (*id* para 121 per Sachs J (A/5/397)).
[22] *Id* paras 111 and 120 (Sachs J) (A/5/383-384 and 395-396).
[23] *Id* para 113 (Sachs J) (A/5/386-387), referring to discrimination on the grounds of race, origin, sex, marital status, age and socio-economic circumstances. In a subsequent unanimous judgment, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* para 40, the CC confirmed the correctness of the approach adopted in Sachs J's minority judgment (A/6/450-451). *Minister of Home Affairs* confirmed the overlapping or intersecting discrimination on the ground of *inter alia* sexual orientation, hence the equality evaluation has to be conducted on the basis of a combination of the grounds concerned in a global and contextual manner. *Minister of Home Affairs supra* para 41 further confirms the importance of assessing *inter alia* the position of complainants in society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and its purpose; and any other relevant factor affecting the claimants and whether it has led to an impairment of their human dignity or any other comparable serious impairment (A/6/451-454).
[24] *Id* para 114 (Sachs J) (A/5/388).
[25] *Id* para 126 (Sachs J) (A/5/401). This accords with the CC's confirmation in *Harksen v Lane* 1998 (1) SA 300 (CC) para 47 (A/4/220-221) and *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC) para 31 (A/367-68) that dignity is the key criterion for determining whether differentiation constitutes discrimination on an undefined ground.
[26] *Id* para 125 (Sachs J) (A/5/401).
[27] *Id* para 129 per Sachs J): "[t]o penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality" (A/5/405).
[28] See Atrey *op cit* 189: "intersectionality explains a form of discrimination, and not its rationalisation" (A/26/2017).
[29] To this may be added caution expressed by Crenshaw, the innovator of the intersectionality principle, in an article subsequently cited with approval by the CC (*Mahlangu v Minister of Labour supra* para 85 (A/17/1319)) in a case dealing explicitly with this principle. Crenshaw "Mapping the margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) *Stanford Law Review* 1241 at 1250 cautions: "[w]omen of color are

it unnecessary to determine the issue in that case.[30] But subsequent CC caselaw on rationality (a precondition for lawful differentiation)[31] confirms that a failure to include affected groups in decision-making processes may render the result irrational.[32]

10. Question 4.2 to the parties asks *inter alia* whether the DSD Regulations have a sufficient legal basis. The SAHRC submits that the CC caselaw reflects that a rule-making process which fails to consider affected group's circumstances appropriately and fails to afford such group an adequate *audi alteram partem* is vulnerable to a legal challenge pursuant to intersectionality for failing to give effect to the context and systemic disadvantages peculiar to the group on which the measure impacts. Thus a regulatory regime resulting from such process may lack a sufficient legal basis.

(4) Fourth principle: Incumbent on courts to consider context

11. The CC's equality caselaw continues to acknowledge the particular vulnerability of African women – as victims of discrimination based on race, class, and gender – during and as a consequence of colonialism and apartheid.[33] It has held that courts are compelled to scrutinise *in every equality case* the situation of the complainant in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or compounds group disadvantage in real life contexts.[34]

12. Thus South Africa's "jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history."[35] Absent such

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differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged" (A/24/1744).

[30] *Id* para 133 (Sachs J) (A/5/408-409).

[31] *Harksen v Lane* 1998 (1) SA 300 (CC) para 45 (A/4/218). The test established in *Harksen* was confirmed by the CC in *Mahlangu supra* para 71 (A/71/1313-1314). *Mahlangu* is the judgment in which the CC explicitly confirmed the application of intersectionality in South African equality law. Hence *Harksen*'s precondition for lawful differentiation (namely rationality, which *Harksen* held however was *not* a sufficient condition) applies equally in this specific context.

[32] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 36 (A/12/997); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 72 (A/11/957-958).

[33] *Rahube v Rahube supra* paras 2 and 23-24 (A/15/1163-1164), confirming the need to recognise "patterns of systematic disadvantage" particularly in the context of gender and race (quoting *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 162 (A/8/687-688)).

[34] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 27 (A/7/519-520).

[35] *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) para 33 (A/9/756-757). The CC's judgment in *Hassam v Jacobs NO* received particularly favourable treatment by Atrey *op cit passim*. It is, for instance, cited as example of the transformative potential of intersectionality to achieve "a truly equal society" (*id* at 129 (A/26/1957)). See, too, *id* at 130-131: "The reality and the totality of this disadvantage [the 'exclusion of Muslim widows in polygynous marriages from intestate succession'] could only be appreciated because of the Court's careful discrimination analysis which is characteristic of intersectionality. Each strand of the framework found its way, succinctly but sufficiently, into the Court's reasoning, making a difference to the understanding of the nature of discrimination of this particular

analysis a key constitutional consideration – the recognition that "each person is of equal worth and must be treated accordingly" – is eclipsed.[36]

13. The SAHRC submits that this reflects the following general principle applicable to the determination of this case (particularly relevant to questions 1, 2, 3.1, 3.2 and 4.1 of the Court's questions to the parties): considering the context in which an equality case arises is a crucial analytical aspect of every case concerning an allegation of unfair discrimination.[37]

(5) Fifth principle: Universality and utility of intersectionality

14. More recently the CC reappraised its equality caselaw by interrogating the application of intersectionality.[38] It held that the intersectionality doctrine is indeed familiar,[39] and frequently applied – even if not by name – in South African equality caselaw.[40] International caselaw, including the caselaw of this Court,[41] and academic commentary from multiple jurisdictions were cited in support of the proposition that a phenomenon particularly prevalent in South Africa is pervasive throughout the world:[42] discrimination based on overlapping categories of identity (typically gender, sex and race)[43] can co-exist ("intersect") in the same individual, resulting in increased prejudice.[44]

15. In the SAHRC's submission, the recognition of intersectionality is necessary to redress a pervasive and pernicious form of compound prejudice. The intersectionality concept addresses ubiquitous problems, and therefore should not be peculiar to particular jurisdictions (even if its recognition or application is not necessarily explicit). Jurisdictions in the global South (and courts seized of discrimination cases involving individuals originating from the global South) are more regularly confronted with the enduring triple-yoke oppression based on race, gender and class wrought by apartheid, colonialism and other forms of suppression;[45] and these courts' experience

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case. *Hassam* is a case in point of breaking through the complexity of intersectional discrimination, in being able to diagnose and explain it *as it is* rather than transmogrifying it into a proxy category" (A/26/1958-1959).

[36] *Hassam v Jacobs NO supra* para 35 (A/9/758).

[37] Although earlier CC equality cases have been criticized for not always adopting an unqualified intersectional approach (see Atrey *op cit* at 142 (A/26/1970)), subsequent key cases reflect the CC's explicit adoption of intersectionality and confirm it as the correct approach to adopt in all cases concerning multiple grounds of discrimination.

[38] *Mahlangu v Minister of Labour supra* (A/17/1286-1364).

[39] *Id* para 76 (A/17/1315-1316).

[40] *Id* paras 77-82 (A/17/1316).

[41] *Id* para 83 (A/17/1318), citing *BS v Spain* no 47159/08, ECHR 2012-III (A/23/1717-1734).

[42] *Id* paras 85-89 (A/17/1319-1321).

[43] *Id* para 85 (A/17/1319). The broad range of factors which may cause discrimination in an intersectional manner includes race, sex, gender, sexuality, religion, disability, age, socio-economic status, place of residence, employment status, physical appearance (Atrey *op cit* 84 (A/26/1912)).

[44] *Id* para 86 (A/17/1319-1320).

[45] *Id* paras 63 and 96 (A/17/1310-1311 and 1323-1324).

is that intersectionality is "a useful analytical tool"[46] to apply to complex discrimination cases concerning "oppression based on race, sex, gender, class and other grounds".[47] The SAHRC submits that this is highly relevant to the determination of questions 1, 2, 3.1, 3.2 and 4.1 posed by the Court to the parties.

(6) Sixth principle: Intersectionality integrates equality and dignity

16. The CC's caselaw further reflects the intersecting effect of unfair discrimination and other fundamental rights vested in vulnerable individuals.[48] Specifically the right to dignity, which (as set out above) is key to equality, has also been identified in South African caselaw as a substantive right realised by adopting the multidimensional approach required by the intersectionality principle.[49] This applies particularly where a court is confronted with claims by individuals vulnerable to "[s]ocietal dynamics such as patriarchy, gender stereotyping, inflexible application of oppressive cultural practices" which "perpetuate the intersectional consequences of the challenged provisions operating on Black women".[50]

17. Black women's equal enjoyment of entrenched rights (including the right to dignity) is compromised by systemic impediments inherent in social structures.[51] This despite the pressing need to vindicate their right to dignity.[52] The impact on dignity militates strongly against the "possibility of the unfair discrimination being reasonable and justifiable".[53]

18. The SAHRC submits that this reflects the following general principle applicable to the determination of this case (particularly question 3.2 addressed by the Court to the parties): intersectionality assists in integrating Article 14 with other Convention rights (especially dignity inherent in Article 3) through which the right to equality is realised, and can correctly calibrate the compelling justification required to render a discriminatory provision Convention compliant,[54] thus requiring that a qualitatively more compelling justification be adduced.

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[46] *Id* para 102 (A/17/1325-1326).
[47] *Id* para 65 (A/17/1311).
[48] *Sithole v Sithole* 2021 (5) SA 34 (CC) para 2 (A/18/1368).
[49] *Id* paras 27 and 46, confirming that the right to dignity is foundational to many other rights, including equality (A/18/1379 and 1386).
[50] Id para 31 (A/18/1381-1382).
[51] *Id* para 36, confirming that it is a matter for judicial notice that the majority of Black women in South Africa lives in the rural areas and townships and are not fully apprised of their legal rights (A/18/1383).
[52] *Id* para 45 (A/18/1385-1386).
[53] *Id* para 45 (A/18/1385-1386).
[54] This is consistent with, and indeed a necessary corollary of, this Court's recognition (as regards which, see Atrey *op cit* at 181 and 189 (A/26/2009 and 2017)) that proportionality review for discrimination based on grounds of race and sex is stricter than in the case of other grounds.

(7) Seventh principle: Intersectionality excels in SOGIE settings

19. The CC's caselaw on intersectionality has culminated in a recent judgment upholding a case brought by the SAHRC before the South African Equality Court: *Qwelane v SAHRC*.[55] It supports various propositions advanced above,[56] and does so specifically in the context of Sexual Orientation, Gender Identity and Expression ("SOGIE") rights and discrimination.[57]

20. In *Qwelane* the CC confirmed the "continuing structural subordination and vulnerability relating to sexual orientation and gender identity", and held that conduct (in that case words) which might appear innocuous must be approached from the perspective of the different structural positions in a post-apartheid South Africa (and, the SAHRC would respectfully add, a post-colonial world) in the light of "systemic disadvantages and inequalities" and "the system of subordination of vulnerable and marginalised groups".[58]

21. The CC held that it is wrong to require an evidential link between the impugned action and societal prejudice against the LGBTIQ+ community.[59] Reactive and restrictive approaches to evidence and causation in the context of discrimination are "misplaced" because the law in this field must be "pre-emptive" in order to prevent the perpetuation of systemic violations of marginalised individuals' entitlement to non-discrimination on prohibited grounds.[60] Hence a causal link is not required,[61] and the onus is imposed on a defendant to prove that discrimination (on a listed ground) is fair.[62]

22. This is because the listed grounds "have the potential to demean persons by denying them their inherent humanity and dignity", the Constitutional Court explained, adding that "[t]here is often a complex relationship between these grounds", which "in some cases … relate to immutable biological attributes or characteristics" or "a combination of one or more of these

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[55] *Qwelane v South African Human Rights Commission* [2021] ZACC 22 (delivered on 30 July 2021) (A/19).
[56] E.g. the "intersectionality" or "confluence" of *inter alia* the rights to equality and dignity (*id* paras 49, 50 and 54 (A/19/1414 and 1416-1417)), and equality acting as "bulwark" against infringement of the right to dignity (*id* para 62 (A/19/1419-1420)). See similarly *id* para 130, holding that the listed grounds on which discrimination is expressly prohibited constitute a codification of instances in which dignity is presumed to be infringed (A/19/1448).
[57] The SAHRC's research confirms the subsistence of SOGIE-based discrimination, hate crimes, barriers to access to justice, and stereotyping and marginalisation impacting most severely on black, poor and rural LGBTIQ+ people by virtue of race, class, education level, geographical location, and economic status. See SAHRC *Thematic Discussion Paper: Discrimination and violence on the basis of SOGIE in SA* pp 1-9 (A/29/2091-2099); NANHRI & SAHRC *In-country meeting on SOGIE (29-30 November 2017)* p 9 (A/28/2062).
[58] *Qwelane supra* para 86 (A/19/1430).
[59] *Id* para 110 (A/19/1440-1441).
[60] *Id* para 110 (A/19/1440-1441).
[61] *Id* para 111 (A/19/1441).
[62] *Id* para 130 (A/19/1448).

features."[63] On this basis the CC held that the rights of the LGBTIQ+ community could not be protected without restricting the right of freedom to expression.[64]

23. Ensuring that the LGBTIQ+ community has equal protection against exclusion is imperative in the light of the apartheid history and the current prevalence of prejudice against gays, lesbians, transgender people and gender non-conforming persons in Africa, the CC held.[65] Hence the need to redress conduct or measures "contribut[ing] to an environment that serves to delegitimise" the LGBTIQ+ community's "right to be treated as equals".[66]

24. The SAHRC submits that this reflects the following general principles applicable to the determination of this case (particularly questions 3.2 and 4.2 addressed by the Court to the parties): intersectionality applies specifically in SOGIE scenarios; it permits and indeed requires a relaxation of strict approaches to matters of evidence and causation for purposes of establishing an infringement,[67] imposes the onus on a defendant to establish the fairness of discrimination,[68] and necessitates compelling justification of unfair discrimination.[69]

(8) Eighth principle: Arbitration and public policy considerations

25. Under the CC's caselaw the compelling justification required for infringements of public policy cannot be provided by a pro-arbitration policy. Public policy rests, the CC has confirmed,[70] on the values underlying the South African Constitution (i.e. dignity, equality and freedom; non-racialism and non-sexism; supremacy of the constitution and the rule of law; and democracy and openness).[71] Despite its recognition of the importance of affording ample appreciation to

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[63] *Id* para 132, hence "[t]he temptation to force them into neatly self-contained categories should be resisted" (A/19/1448-1449).
[64] *Id* para 145 (A/19/1453).
[65] *Id* para 168 (A/19/1461-1462).
[66] *Id* para 168 (A/19/1461-1462).
[67] Indeed, as Atrey *op cit* at 190 states (with reference to earlier caselaw), the CC's judgment exemplifies "making good use of qualitative evidence without necessarily demanding statistical proof." Atrey continues by identifying two difficulties with courts considering statistics as necessary proof of intersectional discrimination. The first is the dearth of available data. The second is that it is unrealistic to expect a claimant to access statistics (generally held by governments, not individuals) (A/26/2018).
[68] This, too, is consistent with this Court's approach, as Atrey *op cit* at 193 points out (A/26/2021).
[69] As Atrey *op cit* at 196 summarises the position (as adopted and applied also by the CC), a claimant is only required to prove a *prima facie* case of discrimination on a prohibited ground; a defendant must thereupon acquit itself of the burden to establish an adequate basis for the discrimination; thus the respondent bears a greater burden of proof at the second stage than the claimant bears at the first stage; the burden to justify discrimination is "not a light burden"; and it may indeed be the case that the presumption of unfairness applicable at the second stage of the discrimination analysis (preceding the justification analysis) results in the conclusion that there cannot be an adequate explanation for the discrimination in question (A/26/2024). See, again, in this regard *Sithole v Sithole supra* para 45, which reflects that Atrey's assessment is consistent with South African law (A/18/1385-1386).
[70] *King NO v De Jager* 2021 (4) SA 1 (CC) para 91 (A/16/1230), continuing to hold that a clause in a will is unenforceable for being contrary to public policy if it violates the value of equality (*id* para 96 (A/16/1231)).
[71] Section 1 of the Constitution (A/27/2053).

arbitration,[72] the CC has confirmed that public policy prevails.[73] Indeed, as it held, international law on arbitration itself recognises that public policy prevails over the enforcement of arbitral awards.[74]

26. The SAHRC submits that this reflects the following general principle of relevance to questions 4.3 and 5 addressed by the Court to the parties: the reduced scrutiny applied by domestic courts over arbitration tribunals' determination of issues impacting on fundamental rights *militates against* applying a broad margin of appreciation or loose limitations analysis.[75]

C. Conclusion

27. The SAHRC is indebted to the Court for the opportunity to participate in these proceedings as an intervener, and respectfully submits that – for the reasons set out above – the identified principles apply to the adjudication of this case. In particular, the SAHRC submits that the determination of the central questions raised in this case (namely whether the applicant has suffered a violation of her rights guaranteed by Articles 3, 8 and 14 of the Convention) requires a detailed consideration of the context in which the alleged violations arise in applying the intersectionality principle already recognised by this Court. The intersectionality principle has wide utility in discrimination cases and provides an appropriate analytical approach to integrating the prohibition on discrimination enshrined by Article 14 (which the SAHRC recognises does not have an independent sphere of operation) with other Convention rights (especially dignity inherent in Article 3) through which the right to equality is realised.

J.J. GAUNTLETT SC QC	Z. AL-RIKABI	E. MOCKFORD
F.B. PELSER	J. MACLEOD	
Counsel for the intervener	Huguenot Chambers, Cape Town Brick Court Chambers, London	October 2021

[72] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) paras 235-236 (A/10/884-885).
[73] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) paras 53, 55, 58 and 60 (A/13/1069, 1070, 1071 and 1073); *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews supra* para 220: "should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance" (A/10/875).
[74] *Id* para 61, citing the UNCITRAL Model Law on International Commercial Arbitration. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 codifies the same principle (Article V2(b)) (A/13/1073-1074).
[75] This is consistent with the Court of Justice for the European Union's judgment in *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-2741 para 57 , holding that despite the broad discretion afforded to EU Members States to adopt social policies, this "cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment for men and women" (A/21/1582).

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 10934/21

In the matter between:

SEMENYA Appellant

and

SWITZERLAND Respondent

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Intervener

SOUTH AFRICAN HUMAN RIGHTS COMMISSION'S REFERENCE MATERIAL

ITEM	DATE	DESCRIPTION OF DOCUMENTS	PAGE NO.
South African Case Law			
1.	1996	*Brink v Kitshoff NO* 1996 (4) SA 197 (CC)	1 – 33
2.	1997	*President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)	34 – 140
3.	1997	*Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC)	141 – 188
4.	1998	*Harksen v Lane* 1998 (1) SA 300 (CC)	189 – 278
5.	19999	*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)	279 – 413
6.	2000	*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)	414 – 503
7.	2004	*Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)	504 – 598
8.	2005	*Volks NO v Robinson* 2005 (5) BCLR 446 (CC)	599 – 738
9.	2009	*Hassam v Jacobs NO* 2009 (5) SA 572 (CC)	739 – 772

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 15/95

Annette Brink Applicant

and

Andre Kitshoff NO Respondent

Heard on: 9 November 1995

Judgment delivered on: May 1996

JUDGMENT

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[1] **CHASKALSON P:** This is another case in which difficulties have arisen in regard to the application of the provisions of section 102(1) of the Constitution.

[2] Section 102(1) which deals with the referral of constitutional issues to this Court by a provincial or local division of the Supreme Court, and sections 103(3) and (4) which deal with referrals of constitutional issues raised in other courts, are necessary to address problems of jurisdiction. A provincial or local division of the Supreme Court has jurisdiction under section 101 of the Constitution to determine certain constitutional issues.

In the absence of a consent to jurisdiction in terms of section 101(6) it has no jurisdiction to give a decision on the constitutionality of an Act of Parliament, to rule on disputes of a constitutional nature between the national government and any other organ of government, or to deal with disputes between organs of state of different provinces.

[3] No provision is made for proceedings to be initiated in the Constitutional Court, but section 100(2) empowers the Constitutional Court to make provision in its rules "for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction." Such provision has been made by rule 17 which permits direct access in "exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

[4] The procedures, which are prescribed by sections 102(1), (2), and (3) and sections 103(2), (3) and (4) of the Constitution, contemplate that constitutional issues within the exclusive jurisdiction of the Constitutional Court will be raised formally in proceedings before the Supreme Court or other courts, and will only be referred to the Constitutional Court for its decision in circumstances where it would be appropriate to do so. It is in the first instance the responsibility of the Supreme Court to decide whether or not the circumstances are appropriate.

[5] Thus, if the validity of any legislation is challenged in the Magistrates Court or other court which has no jurisdiction to deal with such challenge, the presiding officer must either act

in terms of section 103(2) and deal with the matter on the assumption that the legislation is valid, or if he or she is "of the opinion that it is in the interest of justice to do so",[1] postpone the proceedings in terms of section 103(3) to enable the party who has raised the matter to apply to the Supreme Court for relief in terms of section 103(4). The Supreme Court has the power in terms of section 103(4) to deal with the issue itself if it is within its jurisdiction or to refer it to the Constitutional Court if it is beyond its jurisdiction. To exercise the power to refer the issue to the Constitutional Court, the provincial or local division concerned must be of the opinion that a decision on the validity of the law will be material to the adjudication of the matter, that there is a reasonable prospect that the relevant law will be held to be invalid, and that it is in the interest of justice that the issue be decided. If a decision is taken to refer the issue to the Constitutional Court the provincial or local division concerned must make a finding on any evidence that may be relevant to the constitutional issue. This will be necessary only if oral evidence has to be heard and although that is not specifically stated, the provision clearly contemplates that in such event the evidence will be heard by the provincial or local division concerned.

[6] Sections 102(1), (2), and (3) prescribe the procedure to be followed in dealing with constitutional issues raised in proceedings before a provincial or local division. They provide:

> (1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be

[1] As to a magistrate's duties in this regard, see *Nel v Le Roux* CCT 30/95: judgment delivered on 4 April 1996.

> heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.
>
> (2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.
>
> (3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.

The Constitution contemplates that constitutional disputes will ordinarily be dealt with by the provincial or local division before the Constitutional Court is engaged; and this is so even if the only issue in the case is a constitutional issue within the exclusive jurisdiction of the Constitutional Court. This follows from the language of section 102(1) and (2) which necessarily implies that section 102(1) is applicable to cases in which the only issue is the one to be referred to the Constitutional Court, and section 102(17) which makes provision for appeals to the Constitutional Court against a decision of the Supreme Court refusing a referral where "the only issue raised is a constitutional issue within the exclusive jurisdiction of the Constitutional Court".

[7] The Constitution requires the Supreme Court to deal with constitutional issues raised in proceedings brought before it in terms of sections 102(1) or 103(4), if such issues are within its jurisdiction. Where the constitutional issues raised in proceedings before it, are within the jurisdiction of the provincial or local division, they will ordinarily be considered in conjunction with the other issues in the case, and any appeal will be dealt

with in accordance with the provisions of sections 102(4), (5), (6) and (7); such appeals will also be subject to the rules of the Supreme Court and the Constitutional Court.

[8] Where, however, a constitutional issue within the exclusive jurisdiction of the Constitutional Court is raised in a matter, the provincial or local division is empowered by section 102(1) to refer such issue to the Constitutional Court for its decision. It is not, however, obliged to do so. It is required by the section to have regard to two further matters upon which the exercising of the power is dependent. First, whether the issue is one which may be decisive for the case; and secondly, whether it would be in the interest of justice to refer the issue to the Constitutional Court. The referral should only be made if both these requirements have been satisfied.

[9] The importance of the second issue has been stressed in a number of decisions where it has been pointed out that it is not in the interest of justice to refer an issue which is based upon a contention that has no reasonable prospect of being upheld by the Constitutional Court. It has also been pointed out that it is not ordinarily in the interest of justice for cases to be heard piecemeal, and that as a general rule if it is possible to decide a case without deciding a constitutional issue this should be done.[2]

[10] The importance of the first issue is referred to by Didcott J in *Luitingh v Minister of*

[2] *S v Mhlungu & Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *S v Vermaas* 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC) at para 13; *Ynuico Ltd. v Minister of Trade and Industry and Others* 1995 (11) BCLR 1453 (T) at 1465B-E; *Bernstein and Others v Von Wielligh and Others* (CCT 23/95: judgment delivered on 27 March 1996), at para 2.

Defence,[3] where he held that the requirement that it "may be decisive" was satisfied "once the ruling given there may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled." This would include an issue which, if decided in favour of the party who has raised it, would put an end to or materially curtail the litigation. It would also include an issue such as the constitutionality of the provisions of section 217(1)(b)(ii) of the Criminal Procedure Act, 1977, dealing with the onus of proof in relation to the admissibility of a confession in a criminal trial, which arose in *S v Zuma*[4] and *S v Mhlungu*.[5] In *Zuma*'s case, which had been wrongly referred for other reasons, the decision of the entire case in fact depended on where the onus lay. In *Mhlungu*'s case a ruling would determine the way in which the voir dire was to be conducted, and was also necessary in fairness to the accused to enable them to decide whether or not to give evidence.

[11] Evidence that may be necessary for the determination of a constitutional issue should be placed before the Supreme Court at the time of the application for referral. Frequently, this can be done on affidavit. There may, however, be exceptional cases in which it is necessary for oral evidence to be led in respect of the constitutional issue, and the proviso to section 102(1) requires that in such cases the provincial or local division concerned shall hear the evidence and make findings thereon before referring the issue to the Constitutional Court. This requirement is clearly directed towards avoiding the delays and

[3](CCT 29/95): Judgment delivered on 4 April 1996, paras 9 and 10.

[4]1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA).

[5]1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

inconvenience that would be caused if such evidence had to be dealt with by a court of eleven judges. Rule 34 of the Rules of the Constitutional Court provides that a party may also make use of material that does not specifically appear on the record, provided that the facts are common cause or otherwise incontrovertible, or are of an official, scientific, technical, or statistical nature capable of easy verification. Frequently it will not be necessary for evidence to be placed before the Court for the purposes of the decision on the constitutional issue; but there will be occasions on which such evidence will be necessary, particularly when it is sought to justify a limitation of a right entrenched under Chapter Three of the Constitution.

[12] A litigant who wishes to rely on evidence that is not covered by rule 34, has a duty to ensure that such evidence is placed on record before asking for an issue to be referred to the Constitutional Court, and the referring judge should also be satisfied that any evidence necessary for the proper determination of the issue is on record before making the referral. It should be borne in mind in this regard, that an important part of any decision is the order to be made in terms of sections 98(5) or (6) of the Constitution. If either party wishes to rely on evidence beyond the scope of rule 34 to support its submissions concerning the terms of the order, the affidavits containing such evidence should be placed before the court at the referral phase and should not be tendered after the referral has been made.

[13] Although the language of sections 102(1), (2) and (3) differs from the language of sections 103(2), (3),and (4), they have in common the fact that the Supreme Court has the responsibility of controlling referrals to the Constitutional Court. This is an important

function which is necessary both to ensure that the hearing of cases is not disrupted by frivolous or unnecessary applications to refer issues to the Constitutional Court, and to ensure that if the determination of a constitutional issue may be decisive, it should only be referred after all the evidence necessary for such a decision has been placed on record.

[14] Where, as in the present case, a ruling as to the decisiveness of the constitutional issue depends in part on a point of law within the jurisdiction of the provincial or local division, the law point should be considered and decided by the provincial or local division concerned, and a referral should not be made unless that decision leads to the conclusion that the constitutional issue may indeed be decisive. These procedures ensure that litigation proceeds in an orderly fashion, that constitutional issues are only referred to the Constitutional Court when they are ripe for hearing, and that the Constitutional Court has the benefit of the reasons of the provincial or local division for the referral when it is called upon to deal with the matter. Applications for referral are not mere formalities and ought not to be treated as such by the parties seeking a referral, or by the courts to whom an application for a postponement under section 103(3) or a referral under section 103(4) or section 102(1) is made.

[15] In the present case the issue referred to this Court concerns the constitutionality of section 44 of the Insurance Act, 1944. It is an issue within the exclusive jurisdiction of the Constitutional Court and the requirement that there be a reasonable prospect of success was clearly satisfied. The consideration that presents a difficulty in the present case is whether the issue is one which may be decisive for the case. As appears from the

judgment of O'Regan J, the answer to that question depends upon whether the date on which the deeming provision takes effect is the date of the concursus creditorum or some earlier date. This is relevant because the deceased died before the Constitution was in force and if the vesting of the creditors' rights to the proceeds of the insurance policy took effect on or before that date it would not be subject to attack even if section 44 was invalidated by the Constitution when it came into force.[6] A ruling as to the constitutionality of section 44 could, however, be decisive for the case if the relevant date is the date of the concursus creditorum. A finding as to the relevant date was therefore necessary for the purpose of deciding whether or not the issue was a proper one for referral in terms of section 102(1). This Court has no jurisdiction to make such a finding, which was relevant not only for the purposes of the referral but also for the making of an order in terms of section 98(5) or (6) of the Constitution. The Transvaal Provincial Division should have been asked to make a finding on this issue. This was not done and as a result the referral has not been made in accordance with the requirements of section 102(1).[7]

[16] In the present case an application was made on the 23rd March 1995 to the Transvaal Provincial Division, before which the case was pending, for the issue of the constitutionality of section 44 of the Insurance Act to be referred to this Court, and that application was granted on the 28th March. The parties failed at the time to appreciate the importance of the date of the vesting of creditors' rights under section 44 of the Insurance

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[6] *Du Plessis v De Klerk* CCT 8/95: judgment delivered in May 1996. Whether there may be exceptional circumstances in which an order in terms of section 98(6) could render invalid anything done prior to 27 April 1994, a question expressly left open in *De Klerk*'s case (at para 20 per Kentridge AJ) needs no further consideration here. It is clear that the circumstances of the present case do not warrant such an order.

[7] *Luitingh v Minister of Defence* (CCT/29/95: judgment delivered on 4 April 1996)

Act, and it was for this reason that the provincial division was not asked to determine such date. This was before the judgments in *S v Mhlungu*, *S v Vermaas*, and *Du Plessis v De Klerk* had been given. Practitioners and Courts were not yet familiar with the provisions of the new Constitution or with the procedures to be followed in the referral of constitutional issues to this Court. It had also not yet been made clear by this Court that the Constitution will not ordinarily[8] be construed as interfering with vested rights, and as the judgments in *S v Mhlungu* and *Du Plessis v De Klerk* show, there was considerable confusion at the time of the application for referral in this case in regard to the applicability of the Constitution to issues that had arisen prior to the date on which it came into force.

[17] Although they have some features in common there are material differences between the present case and *Luitingh*'s case. *Luitingh*'s case was referred to this Court more than a month after judgment had been given in *Zuma*'s case and at a time when it had already been made clear that rule 17 "is not intended to be used to legitimate an incompetent reference."[9] One of the issues in *Luitingh*'s case was whether the Plaintiff's claim had been extinguished before the Constitution came into force; if it had been the constitutional issue would have been irrelevant. Despite the uncertainty that existed in regard to the "retrospectivity" of the Constitution, it had never been suggested, nor could it reasonably have been suggested, that one of the consequences of the coming into force of the Constitution was to revive extinguished debts. Finally, there was no pressing need to deal

[8]See the caveat in para 20 of the judgment of Kentridge AJ in *Du Plessis v De Klerk* supra.

[9] *Zuma*'s case (supra) at para. 11.

with the constitutional issue raised in *Luitingh*'s case, as the same issue had been argued in another case before this court, and in which the issue would be resolved.

[18] The parties in the present case desire that a decision be given on the constitutional issue. The issue as to the constitutionality of section 44 of the Insurance Act is one of importance on which we have heard full argument by parties with an interest in the outcome, and in respect of which we are in a position to give judgment. Although we do not have jurisdiction to determine the time of the vesting of creditors' rights under section 44 of the Insurance Act I am satisfied that there is a reasonable prospect that on the facts of the present case, the relevant date may be held to be the date of the concursus creditorum, which means that there is a reasonable prospect that the constitutional issue will prove to be decisive for the case. Having regard to this, to the uncertainty that existed at the time of the referral in regard both to the procedures to be followed and the reach of the Constitution, and to the fact that the public interest and the ends of justice and good government will be served by the delivery of a judgment on the constitutional issue by this Court, I consider that the matter is one in which we can exercise our power to grant direct access to the parties.[10] It should, however, be clearly understood that uncertainty as to the procedures to be followed or the reach of the Constitution can no longer be regarded as excuses for incorrect referrals, and that this Court has a discretion, even where exceptional circumstances have been established, to refuse to grant permission for a matter to be brought directly to it. It will not hesitate to exercise that discretion when it considers it appropriate to do so.

[10]See: section 100(2) of the Constitution and rule 17. See also *S v Zuma* (supra), para 11.

O'REGAN J

A CHASKALSON
PRESIDENT, CONSTITUTIONAL COURT

Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Chaskalson P

[19] **O'REGAN J**: The question referred to the court in this matter was whether section 44 of the Insurance Act, 27 of 1943 ('the Act'), is in conflict with the provisions of chapter 3 of the Constitution of the Republic of South Africa Act, 200 of 1993 ('the Constitution'), in so far as it discriminates against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies ceded to them or made in their favour by their husbands.

[20] Section 44 of the Act provides as follows:

> (1) If the estate of a man who has ceded or effected a life policy in terms of section *forty-two* or *forty-three* has been sequestrated as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration --
>
> (a) by means or in pursuance of a duly registered antenuptial contract, the preceding provisions of this subsection shall not apply in connection with the policy, money or other asset in question;
>
> (b) otherwise than by means or in pursuance of a duly registered antenuptial contract, only so much of the total value of all such policies, money and other assets as exceeds thirty thousand rand shall be deemed to belong to the said estate.
>
> (2) If the estate of a man who has ceded or effected a life policy as aforesaid, has not been sequestrated, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall, as against any creditor of that man, be deemed to be the property of the said man --
>
> (a) in so far as its value, together with the value of all other life policies ceded or effected as aforesaid and all moneys which have been paid or have become due under any such policy and the value of all other assets into which any such money was converted, exceeds the sum of thirty thousand rand, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy; or
>
> (b) entirely, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as aforesaid, and the date upon which the creditor

> concerned causes the property in question to be attached in execution of a judgment or order of a court of law.

[21] Section 44(3) of the Act is concerned with spouses married in community of property and protects life insurance policies owned by a wife from attachment in certain circumstances. It has no bearing on the facts of the case before us and this judgment is therefore concerned solely with subsections (1) and (2) of section 44.

[22] One effect of these provisions is that, where a life insurance policy has been ceded to a woman, or effected in her favour, by her husband more than two years before the sequestration of her husband's estate, she will receive a maximum of R30 000 from the policy. If it was ceded or taken out less than two years from the date of sequestration, she will receive no benefit from the policy at all. Similarly, once two years has elapsed since the policy was ceded to a wife, or effected in her favour, the policy or any money due thereunder, to the extent that it exceeds R30 000, will be deemed, as against the creditors of the husband, to form part of the husband's estate. Such proceeds may therefore be attached by judgment creditors of the husband in execution of a judgment against him. If less than two years has elapsed since the date of the cession or taking out of the policy and the date of attachment by a creditor of her husband, all the proceeds of the policy will be deemed to be part of the husband's estate. The Act contains no similar limitation upon the effect of a life insurance policy ceded or effected in favour of a husband by a wife.

[23] Counsel for Mr A Kitshoff NO, the respondent, pointed out that sections 44(1) and (2), and their predecessors, section 26(2) of the Insolvency Act, 32 of 1916, and section 28 of the Insurance Act, 37 of 1923, were enacted at a time when donations between

spouses during a marriage were prohibited. One of the effects of sections 44 (1) and (2) and their predecessors was therefore to provide some relief to married women in the context of the prevailing law governing matrimonial property. During the 1980s, however, the Legislature enacted legislation which altered substantially the proprietary consequences of marriage (the Matrimonial Property Act, 88 of 1984, and the Marriage and Matrimonial Property Law Amendment Act, 3 of 1988). Section 22 of the 1984 Act abolished the common law provision which had forbidden donations between spouses. Sections 44 (1) and (2) therefore no longer have the beneficial effect referred to by counsel. As a consequence of that change in the law, the effect of the provision, which had formerly been to provide some benefit to married women, was altered so that it, in effect, was prejudicial to them.

[24] The facts in the case referred to this court are as follows: a life insurance policy valued at approximately R2 million in respect of Mr P Brink was taken out during 1989. The policy reflected Mr Brink as the owner of the policy and in 1990 he ceded, or purported to cede, it to his wife, Mrs A Brink, who is the applicant before this court. On 9 April 1994 Mr Brink died. Mr A Kitshoff, the Respondent before this court, was appointed as executor of the estate and on 23 May 1994, in terms of section 34(1) of the Administration of Estates Act, 66 of 1965, ('the Estates Act'), he sent a notice to creditors informing them that the estate was insolvent. In terms of section 44 of the Act, the executor demanded that the assurer (Liberty Life Association of Africa) pay into the estate all but R30 000 of the proceeds of the life insurance policy. When the assurer refused to do so, the executor launched an application in the Transvaal Provincial

Division of the Supreme Court for an order compelling the assurer to pay over the proceeds. Mrs Brink, the assurer and the Master of the Supreme Court were cited as respondents in that application.

[25] Mrs Brink made a counter application seeking an order that the life insurance policy be rectified to reflect her, and not her husband, as the original owner of the policy. She also raised the question of the constitutionality of section 44 of the Act. On 28 March 1995 the parties applied to the Supreme Court for a consent order referring the question of the constitutionality of section 44 to this court in terms of section 102(1) of the Constitution. That order was granted.

[26] In this case, the insurance policy was taken out and ceded and the applicant's husband died before the Constitution came into force. The question of whether this Constitution can have application to events that occurred before it came into operation on the 27 April 1994 has been decided in *Du Plessis and others v De Klerk and others* CCT8/95, an unreported judgment of this court delivered in May 1996. In that case, Kentridge AJ, speaking for the court, held that the Constitution would not ordinarily be construed as interfering with rights which had vested before it came into force (at para 20).

[27] Although that judgment had not been handed down when this case was argued, Mr Bertelsmann, for the applicant, developed his argument on the assumption that the Constitution would only apply to the present case if the executor's claim to the

proceeds of the policy arose after the Constitution came into force. According to his argument, on a proper reading of section 44(1), an estate only becomes entitled to the proceeds of the policy once the estate has been sequestrated. He pointed out that the deceased estate had never been formally sequestrated. However, Mr Bertelsmann argued, relying upon *Miller NO v Smit* 1986 (1) SA 320 (C) at 326, that the estate would become entitled to the proceeds of the policy once a *concursus creditorum* had been initiated in terms of section 44(2), read with section 34 of the Estates Act. This could be brought about by the provisions of section 34 of the Estates Act without a formal sequestration order. In terms of this section, where an executor discovers that an estate is insolvent, he or she may send a notice to all creditors reporting on the insolvency of the estate. If a majority of the creditors do not require the executor to surrender the estate for sequestration in terms of the Insolvency Act, 24 of 1936, the executor may, within a period specified in the notice, which may not be less than fourteen days after sending it, proceed with an informal insolvency procedure governed by the provisions of section 34 of the Estates Act. At that stage, a *concursus creditorum* is deemed to have been initiated. In the present case, a section 34 notice was sent out on 23 May 1994 and Mr Bertelsmann argued in reliance on section 34 that a *concursus creditorum* came into existence fourteen days later and that it was only then that the estate could have acquired a right to the proceeds of the policy.

[28] The jurisdiction of this court is limited to the interpretation, protection and enforcement of the provisions of the Constitution (in terms of section 98(2) of the Constitution) and any other matter over which it is expressly given jurisdiction. Neither the question of

when an estate becomes entitled to the proceeds of a life insurance policy in terms of section 44, nor the question of when a *concursus creditorum* will be initiated, are constitutional questions. This court accordingly does not have jurisdiction over such matters.

[29] The first question to be considered is whether, in the circumstances, the reference of the constitutional issue to this Court is proper. That issue is discussed fully in the judgment of Chaskalson P with which I am in complete agreement. In short, section 102(1) of the Constitution provides three prerequisites for a valid referral: the issue referred must fall within the exclusive jurisdiction of the Constitutional Court, it must be shown that the issue 'may be decisive of the case' and the judge of the provincial or local division must consider it in the interest of justice for the issue to be referred. In *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (at para 59) Kentridge AJ held that it was implicit within the third requirement that there be reasonable prospects of success in regard to the issue referred. (See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 7.)

[30] On the construction of section 102(1) adopted by Chaskalson P, it is necessary for Mr Bertelsmann to show that the Constitution may have a decisive bearing on the outcome of the case. Whether it will or not in this case depends on whether Mr Bertelsmann's construction of section 44 of the Act and section 34 of the Estates Act is correct or not. This is a matter which falls outside our jurisdiction and within the jurisdiction of the Supreme Court and is a question which should have been answered before this referral

was made. Accordingly, the referral in this case is improper. However, for the reasons given by Chaskalson P (at paragraphs 16 - 18), I consider that this is an appropriate case in which to grant direct access in terms of section 100(2) of the Constitution read with rule 17.

[31] Sections 44 (1) and (2) of the Act are challenged on the ground that they constitute a breach of section 8 of the Constitution. Section 8 provides that:

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (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.
> (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.
> (b) ...
> (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.

[32] All the parties who appeared before us conceded that sections 44(1) and (2) constituted a breach of section 8 of the Constitution. The applicant and the Centre for Applied Legal Studies, which was admitted as *amicus curiae*, presented detailed and helpful argument as to the manner in which section 8 should be interpreted. This is the first case in which the court has been directly concerned with section 8, and in particular section 8(2), of the Constitution and some consideration of the approach to that section is appropriate.

[33] Equality has a very special place in the South African Constitution. The preamble

states that

> ... there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races ....

Furthermore, section 33(1) of the Constitution states that rights entrenched in chapter 3 may be limited to the extent only that it is 'justifiable in an open and democratic society based on freedom and equality'. It is not surprising that equality is a recurrent theme in the Constitution. As this court has said in other judgments, the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched. (*S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraphs 218, 262, 322*; Shabalala and others v Attorney-General, Transvaal and another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593, at paragraph 26.*)*

[34] Section 35(1) of the Constitution requires us to have regard to international law to interpret the rights it entrenches. The concepts of 'equality before the law' and 'discrimination' are widely used in international instruments. Article 7 of the Universal Declaration of Human Rights 1948 provides that:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 26 of the International Covenant on Civil and Political Rights 1966 provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In addition, there are other international conventions dealing with specific aspects of discrimination such as the International Convention on the Elimination of all Forms of Racial Discrimination 1966, the Convention on the Elimination of all Forms of Discrimination against Women 1980, the Convention against Discrimination in Education 1960 and the International Labour Organisation (ILO) Discrimination (Employment and Occupation) Convention 1958.

[35] As well as the international instruments, many countries have constitutional provisions protecting equality and prohibiting discrimination. One of the oldest of such provisions is the Fourteenth Amendment of the Constitution of the United States of America, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'. Although this provision contains no specific reference to discrimination, it is widely perceived to be a precursor to equality provisions in many modern constitutions. Similarly, the extensive jurisprudence developed by the United States Supreme Court has informed much of the jurisprudence on equality of other courts. A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose. (See Laurence H Tribe

American Constitutional Law 2nd ed chapter 16; Geoffrey R Stone, Louis M Seidman, Cass R Sunstein, Mark V Tushnet *Constitutional Law* 2nd ed chapter 5.)

[36] The Indian Constitution, too, protects equality and seeks to outlaw discrimination. Article 14 and 15(1) provide that:

> 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> 15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
> (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any social and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[37] In interpreting article 14, the Indian Supreme Court has required that any legislative classification or distinction be shown first to be founded on 'intelligible differentia' which have a rational relation to the object sought to be achieved by the impugned legislation. Article 15 is understood as an instance of the right to equality protected by article 14. (Basu *Shorter Constitution of India* 10th ed at 63; Seervai *The Constitution of India* 3rd ed, volume 1 at Chapter 9.)

[38] In Canada article 15 of the Charter on Rights and Freedoms provides that:

> (1) 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 mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *Andrews v Law Society of British Columbia* (1989) 36 CRR 193, the Supreme Court of Canada held that the primary purpose of section 15 was to prevent discrimination on the grounds listed in section 15(2) or on grounds analogous to those listed. (See P W Hogg *Constitutional Law of Canada* 3rd ed 1164 - 65.)

[39] This cursory consideration of the international conventions and the foreign jurisprudence makes it clear that the prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.

[40] As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of

apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.

[41] Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, section 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.

[42] 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).

[43] Sections 44 (1) and (2) of the Act treat married women and married men differently. This difference in treatment disadvantages married women and not married men. The discrimination in sections 44(1) and (2) is therefore based on two grounds: sex and marital status. Section 8(2) does not require that the discrimination be based on one ground only; it specifically states that it may be based on ' one or more' grounds. Nor is it a difficulty for the applicant that section 8(2) mentions only one of the grounds, sex. The list provided in section 8(2) is not exhaustive. The subsection states expressly that the list provided should not be used to derogate from the generality of the prohibition on discrimination. It is not necessary to consider whether the other ground of discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of section 8. It is sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds, namely, sex.

[44] Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in 'which there is equality between men and women' as well as equality between 'people of all races'.

The Constitution proposes the establishment of a Commission on Gender Equality which shall 'promote gender equality'. It is clear, therefore, that legal rules which discriminate against women, as do sections 44(1) and (2), are in breach of section 8(2), unless it can be shown that they fall within the terms of section 8(3). It was not argued, nor could it have been, that sections 44(1) and (2) could be saved on that ground. Once it is established that a legal rule or provision is in breach of section 8, the question remains as to whether that particular rule or provision may be justified in terms of section 33.

[45] Section 33 provides that:

> (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation --
>
> (a) shall be permissible only to the extent that it is --
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question,
>
> and provided further that any limitation to --
>
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
>
> (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,
>
> shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

[46] For sections 44 (1) and (2) to be held to be permissible limitations in terms of section 33, it must be shown that they are reasonable and justifiable in an open and democratic society based on freedom and equality, and that they do not negate the essential content of section 8. It is now well established that section 33 involves a proportionality exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused. It is to that exercise that I now turn.

[47] Sections 44 (1) and (2) appear to have been enacted with two purposes in mind: the first was to provide married women with a benefit which would otherwise have been denied to them because of the effect of the common law rule prohibiting donations between spouses. As discussed above, this beneficial purpose is no longer achieved because the common law rule was abolished in the mid-1980s. The provisions are now therefore disadvantageous to married women. The second apparent purpose of the section is to protect the interests of creditors of insolvent estates. This purpose is still achieved by the provisions. There is no question that protecting creditors is a valuable and important public purpose. There can be no dispute either that the close relationship between spouses may sometimes lead to collusion or fraud.

[48] However, I am not persuaded that the distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can be said to be reasonable or justifiable. No cogent reasons were advanced by the respondent as to why sections 44 (1) and (2) apply only to transactions in which husbands effect policies in favour of, or cede them to, their wives, and not to similar transactions by wives in favour of their husbands. There seems to be no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. Avoiding fraud or collusion does not suggest a reason as to why a distinction should be drawn between married men and married women.

[49] Nor could the respondent demonstrate that there were not other legislative provisions which could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights. The Insolvency Act, 24 of 1936, contains a series of provisions in terms of which transactions which took place prior to the insolvency may be impeached if it is shown, for example, that they were collusive, or resulted in undue preference being given to certain creditors (see sections 26, 29, 30 and 31 of the Insolvency Act). The Insolvency Act also contains specific provisions for the property of the spouse of an insolvent to vest in the Master and thereafter in the trustee (section 21). If these provisions are not considered sufficient, there seems to be no reason either why Parliament could not enact a provision similar to sections 44 (1) and (2) which does not discriminate against married women. Indeed, it appears from information placed before us by the Financial Services Board that draft legislation has been prepared which contains a provision similar to sections 44 (1) and (2), but which does not discriminate against married women.

[50] In the circumstances, it is clear that sections 44(1) and (2) result in a breach of section 8. The respondent has failed to show that there is any reasonable basis for the constitutional breach caused. The purposes sought to be achieved by the provisions do not require a distinction to be drawn between married women and married men. The discrimination occasioned by the provisions cannot be said to be reasonable or justifiable in the light of the purposes of the legislation. In my view, therefore, the respondent has failed to provide sufficient justification for the infringement caused by sections 44(1) and (2). In the circumstances, it is not necessary to consider whether

they constitute a negation of the essential content of the right to equality. From the above, it is clear that sections 44(1) and (2) are therefore inconsistent with the Constitution and this court must therefore hold them invalid.

[51] Section 98(5) of the Constitution requires this court to declare invalid any law found to be inconsistent with the Constitution. The court is granted a discretion to suspend that declaration of invalidity in terms of the proviso to section 98(5) if it considers it to be in the interests of justice and good government. The respondent could point to no compelling reason of good government for the court to exercise its discretion under section 98(5) and suspend the effect of the declaration of invalidity. In the absence of such a reason, there can be no grounds upon which the court would exercise that discretion.

[52] A further discretion is conferred upon this court by section 98(6). That subsection provides as follows:

> 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 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.

[53] Sections 44 (1) and (2) of the Act came into force before the Constitution commenced on the 27 April 1994, and therefore section 98(6)(a) is of application to it. If this court were to declare subsections (1) and (2) of section 44 invalid, the ordinary effect would be not to invalidate any reliance on those provisions since the Constitution came into

force.

[54] In *S v Bhulwana; S v Gwadiso* (1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC)), in considering the discretion conferred on the court in section 98(6)(a), we held that:

> 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 state 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. (at para 32)

[55] Although that was a criminal case and this case is not, the considerations relevant to an exercise of discretion in terms of section 98(6)(a) are similar. The court must consider whether there are any reasons to believe that not invalidating all acts done or permitted in terms of sections 44 (1) and (2) would be against the interests of justice or good government.

[56] Since the Constitution came into force, estates may have been wound up and finalised in terms of the Insolvency Act, 24 of 1936, or the Administration of Estates Act, 66 of 1965, in good faith in reliance on sections 44(1) and (2). It is also possible that the proceeds of life insurance policies contemplated by section 44(2), or assets into which such proceeds have been converted, have been attached and realised by judgment creditors in terms of the section. There are cogent reasons of good government against making an order which may render proceedings which, to all intents and purposes, have been concluded, subject to further challenge or investigation. Such a possibility is not far-fetched. At common law an unpaid creditor of a deceased person has an action

against heirs or legatees who have been paid more than they were entitled to out of the proceeds of the estate. (See *De Villiers v Bullbrand Fertilisers* Ltd 1941 TPD 131; *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N).) The position of unpaid creditors of insolvent companies is different to the position of an unpaid creditor of a deceased estate, although they may have a cause of action based on unjust enrichment. (See *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) at 333 and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).)

[57] On the other hand, if the order of invalidity were to be made applicable only to causes of action that arise after the date of the order, it would deny some married women the protection of the Constitution Generally speaking, the interests of justice require that the protection of the Constitution be effective from the date upon which it came into force.

[58] In the circumstances of the present case, I take the view that the interests of justice and good government can best be met by an order which will, on the one hand, avoid creating the possibility of litigation concerning estates which have been wound up or payments to judgment creditors which have been made, while, on the other hand, not deprive women of the rights conferred upon them by the Constitution. This would be achieved by an order which invalidates the deeming provisions of sections 44(1) and (2) with effect from 27 April 1994, but exempts from that order payments made as a result of the operation of deeming provisions before the date of this order.

[59] The question of costs was not an issue before this court. In making the referral in terms of section 102(1), the Supreme Court expressly reserved the question of costs for later adjudication by that court. The parties before us were equally at fault in relation to the incorrect reference. The decision to deal with the matter by way of our power to grant direct access to litigants is one which benefits both parties and which resolves an issue which may be of importance to their litigation. In the circumstances this is not a case in which it would be appropriate to make any order as to costs.

[60] The following order is accordingly made:

1. It is declared that subsections (1) and (2) of section 44 of the Insurance Act, 27 of 1943, are invalid.

2. In terms of section 98(6) (a) of the Constitution it is ordered that the declaration of invalidity made in paragraph 1 shall invalidate the deeming provisions of sections 44(1) and (2) of the Insurance Act with effect from 27 April 1994, except to the extent that the operation of such deeming provisions has resulted, before the date of this order, in the payment of any money or the delivery of any asset, which, but for such provisions, would not otherwise have formed part of the estate, to any creditor of the man, or any beneficiary of his estate.

3. The matter of *Brink v Kitshoff NO* is remitted to the Transvaal Provincial

Division to be dealt with in terms of this judgment.

C.M.E. O'REGAN
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J and Sachs J concur in the judgment of O’Regan J.

Case No	:	CCT 15/95
Counsel for the Applicant	:	E Bertelsmann SC H T Venter
Instructed by	:	Smits Uys & Van der Schyff Attorneys
Counsel for the Respondent	:	M Helberg SC A J Louw
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Amicus Curiae	:	Centre for Applied Legal Studies, University of the Witwatersrand
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Instructed by	:	Wits Law Clinic

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/96

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Appellant
THE MINISTER OF CORRECTIONAL SERVICES Second Appellant

versus

JOHN PHILLIP PETER HUGO Respondent

Heard on: 12 November 1996
Decided on: 18 April 1997

JUDGMENT

GOLDSTONE J:

[1] This matter comes before us on appeal against a judgment of Magid J in the Durban and Coast Local Division of the Supreme Court.[1] The applicant in the court below (now respondent) is a prisoner who, on 6 December, 1991, commenced serving an effective sentence of fifteen and a half years. Some nine years prior to his incarceration, the respondent married and a child was born of that marriage on 11 December 1982. The respondent's wife died in 1987.

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1 *Hugo v President of the Repubic of South Africa and Another* 1996 (4) SA 1012 (D).

[2] On 27 June 1994, acting pursuant to his powers under section 82(1)(k) of the interim Constitution,[2] the President (first appellant) and the two Executive Deputy Presidents signed a document styled Presidential Act No. 17 (the "Presidential Act"), in terms of which special remission of sentences was granted to certain categories of prisoners.[3] The category of direct relevance to these proceedings was "*all mothers in*

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2 Act 200 of 1993.

3 The Presidential Act provided, inter alia, the following:

> "In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to :
> - all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who has escaped and are still at large)
> - all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
> - all disabled prisoners in prison on 10 May 1994 certified as disabled by a district surgeon.

prison on 10 May 1994, with minor children under the age of twelve (12) years". It is common cause that the respondent would have qualified for remission, but for the fact that he was the father (and not the mother) of his son who was under the age of twelve years at the relevant date.

Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence :

- murder;
- culpable homicide;
- robbery with aggravating circumstances;
- assault with intent to do grievous bodily harm;
- child abuse;
- rape;
- any other crimes of a sexual nature; and
- trading in or cultivating dependance producing substances."

[3] In the application before Magid J, the respondent in an amended notice of motion[4] sought an order declaring the Presidential Act unconstitutional and directing the first appellant to correct it in accordance with the provisions of the interim Constitution. The respondent alleged that the Presidential Act was in violation of the provisions of section 8(1) and (2) of the interim Constitution in as much as it unfairly discriminated against him on the ground of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female.

[4] The application was upheld, the court finding that the Presidential Act discriminated against the respondent and his son on the ground of gender. This finding in turn raised the presumption of unfairness in section 8(4) of the interim Constitution, which presumption was found not to have been rebutted by the appellants.[5] The court ordered the first appellant to correct the Presidential Act in accordance with the provisions of the interim Constitution within six months from the date of its order.[6] It is the appeal from this decision, (leave having been granted in terms of Constitutional Court

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4 In the original Notice of Motion the respondent had initially sought an order for his release from imprisonment.

5 Supra n 1 at 1022D, 1023B.

6 Id at 1023F.

Rule 18) that forms the subject matter of this judgment. At the request of this Court, Mr M Pillemer appeared on behalf of the respondent. We are indebted to him for his assistance.

[5] This appeal requires us to consider the nature of the powers granted to the President by section 82(1)(k) of the interim Constitution.[7] Section 82(1) contains powers which historically are the non-statutory or prerogative powers which have traditionally inhered in the English monarch.[8] Similar powers have been and still are exercised (by heads of state or the executive in his or her name) in many countries, those in the

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7 Section 82(1) of the interim Constitution reads as follows:

> "(1) The President shall be competent to exercise and perform the following powers and functions, namely-
>
> (a) to assent to, sign and promulgate Bills duly passed by Parliament;
> (b) in the event of a procedural shortcoming in the legislative process, to refer a Bill passed by Parliament back for further consideration by Parliament;
> (c) to convene meetings of the Cabinet;
> (d) to refer disputes of a constitutional nature between parties represented in Parliament or between organs of state at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution;
> (e) to confer honours;
> (f) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
> (g) to appoint commissions of enquiry;
> (h) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law;
> (i) to negotiate and sign international agreements;
> (j) to proclaim referenda and plebiscites in terms of this Constitution or an Act of Parliament; and
> (k) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures."

8 *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 at para 116, where the Court noted that "[t]he power of the South African Head of State to pardon was originally derived from royal prerogatives." See further Baxter *Administrative Law* (Juta, Cape Town 1984) 396; Per Schreiner JA in *Sachs v Donges NO* 1950 (2) SA 265 (A) at 306-307.

Commonwealth and many outside it.[9] In South Africa, prior to 1993, some, but not all, of those powers had been codified in earlier constitutions. Those that remained non-statutory were dealt with by reference to the exercise of the prerogative by the English monarch. The Republic of South Africa Constitution Act 32 of 1961 provided in section 7(4) that:

> "The State President shall ... as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative."

[6] In the Republic of South Africa Constitution Act 110 of 1983, it was provided in section 6(4) that:

> "The State President shall ... as head of the State have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative."

The 1983 Constitution made specific mention of some of the powers now contained in section 82 of the interim Constitution. These included, inter alia, the power to confer

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9 See Art 60(2) of the German Basic Law (Germany); US Constitution art II sec 2 cl 2 (USA); Art 13.6 Bunreacht Na hÉireann (Ireland); section 8 Republic of Singapore Independence Act (Singapore) referred to in Lee et al *Constitutional Law in Malaysia and Singapore* (Butterworths, Singapore 1991) 173. See further Sebba "The Pardoning Power - a World Survey" 1977 Vol 68 No 1 *The Journal of Criminal Law & Criminology* 83.

honours, pardon and reprieve offenders, and to enter into and ratify international treaties.[10]

[10] Section 6(3) of Act 110 of 1983.

[7] This process has now been completed in the interim Constitution. There is no express reference to prerogative powers and those powers of the President which originated from the royal prerogatives are to be found in section 82(1). This approach has also been followed in The Constitution of the Republic of South Africa, 1996.[11]

[8] Two conclusions can be drawn from the foregoing. First, the powers of the President which are contained in section 82(1) of the interim Constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of state. Second, there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1).

[9] It is in this context that we must consider the central submission of the respondent, namely, that the power of pardon or reprieve granted to the President in section 82(1)(k) is subject to the provisions of Chapter 3 of the interim Constitution and, in particular, the equality provisions contained in section 8. In order to consider this submission it is necessary first to determine whether, in the exercise of his or her section 82(1)(k) powers, the President is subject at all to the provisions of the interim Constitution.

[10] The starting point is the supremacy clause in the interim Constitution. It is

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11 Section 84(2).

provided in section 4 that:

> "(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
>
> (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

In terms of section 75 of the interim Constitution:

> "The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution."

And, section 76 provides simply that:

> "The President shall be the Head of State."

In section 81(1) and (2) the responsibilities of the President are set out as follows:

> "(1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of state defend and uphold the Constitution as the supreme law of the land.
>
> (2) The President shall with dignity provide executive leadership in the interest of national unity in accordance with this Constitution and the law of the Republic."

There then follow the provisions of section 82(1) which, as stated earlier, provide for the President's competence to perform powers which historically fell within the prerogative powers of the English monarch. These are powers which now flow directly from the interim Constitution itself. Unlike the other powers of the President, they do not derive their authority from, and they are not dependent upon, legislative enactment.

[11] There are only three branches of government viz. legislative, executive and judicial. The powers of the President, other than those set out in section 82(1), are without question executive powers.[12] The question is whether those referred to in section 82(1) fall within a different category. In my opinion they do not. Whether the President is exercising constitutional powers as head of the executive (ie the Cabinet) or as head of state, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government.

[12] Textual support for the view that the powers exercised by the President under section 82(1) are executive powers is to be found in the heading to and contents of section 83(1) and (2). It is there provided as follows:

> "83. **Confirmation of executive acts of President.-**

[12] Section 75.

(1) Decisions of the President taken in terms of section 82 shall be expressed in writing under his or her signature.

(2) Any instrument signed by the President in the exercise or performance of a power or function referred to in section 82(3) shall be countersigned by a Minister."

For the purpose of elucidating a provision in a statute our courts have referred to the headings of sections in a statute.[13] A similar position has been adopted in England[14] and Canada.[15] In the case of headings which are part of a constitution which was the product of negotiations conducted by the drafters thereof, and those headings are part of the

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13 Headings have, in certain circumstances, been used by our courts as an aid to interpret the sections of an Act which follow them, even though headings are not voted on or passed by Parliament. In *Chotabhai v Union Government and Another* 1911 AD 13 at 24 Lord de Villiers CJ, referring to an English decision, adopted the literal traditional viewpoint that "the headings of different portions of a Statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading." In *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431 Innes CJ, adopting a purposive approach, held that: "[w]e are. . . fully entitled to refer to [the heading] . . . for the elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process. . . . Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overriden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case." See also Solomon JA at 437. This position has recently been further endorsed by the Appellate Division in *Chidi v Minister of Justice* 1992 (4) SA 110 (A) at 115. See further *Bhagwan's v Swanepoel* 1963 (4) SA 42 (E) at 43D; Du Plessis *Interpretation of Statutes* (Butterworths, Durban 1986) 126-7.

14 In *Inglis v Robertson and Baker* [1898] AC 616 (HL) at 630 Lord Herschell (in regard to the Factors Act of 1889) stated: "These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them." Lord Upjohn in *Director of Public Prosecutions v Schildkamp* [1971] AC 1 (HL) at 28 with special reference to cross-headings stated: "When the court construing the statute is reading it through to understand it, it must read the cross-headings as well as the body of the statute and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of each case, and I do not think it is possible to lay down any rules."

15 In Canada it is accepted that headings are part of statutes and thus relevant to the construction thereof. Headings situate a provision within the general structure of the statute: indicating its framework, its anatomy and is a key to the interpretation of the sections ranged under it. See further Côte *The interpretation of legislation in Canada* (Editions Y Blais, Cowansville 1984). In *The Queen v Saskatchewan Wheat Pool* (1981) 117 DLR (3rd) 70 at 75 it was held that headings serve an interpretive purpose where there is ambiguity.

constitution as drafted, there is at least as much to be said for their relevance as a tool of interpretation as there is in the case of ordinary legislation.[16] It follows, in my opinion, that the heading of section 83 can be referred to as support for the conclusion that the powers of the President under section 82(1) are executive powers. The President, as an executive organ of state, by reason of the supremacy clause, is subject to the provisions of the interim Constitution.

[13] As far as Chapter 3 of the interim Constitution is concerned, it is provided in section 7(1) that:

> "This Chapter shall bind all legislative and executive organs of state at all levels of government."

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16 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 13-19. See also Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (Juta, Cape Town 1994) at 97.

Originating as they do from an executive organ of state, acts of the President, under section 82(1), are subject to the provisions of Chapter 3 of the interim Constitution. As a result, the exercise by the President of his powers under section 82(1) may be subject to review by courts of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers would be subject to review.[17] This conclusion is consistent with the approach of this Court in the first Constitutional Certification judgment,[18] where it was said that:

> "The power of the South African Head of State to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in NT 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT itself. It is that Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable." (footnote omitted)[19]

It is also mirrored in section 98(2)(a) and (b) of the interim Constitution which provides that the Constitutional Court has jurisdiction -

> "over all matters relating to the interpretation, protection and enforcement of the provisions of [the] Constitution, including -

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17 The general rule at common law was that the court may not review the manner in which the prerogative was exercised. See Carpenter *Prerogative powers - an anachronism*? Vol XXII CILSA 1989 at 192.

18 Supra n 8 at para 116.

19 Section 84(2)(j) of the first constitutional text (NT) before the Constitutional Court for certification provided for the power to pardon or reprieve offenders and remit fines, penalties or forfeitures. See section 84(2)(j) of the1996 Constitution for the corresponding provision.

(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3; [and]

(b) any dispute over the constitutionality of any executive or administrative act or conduct . . . of any organ of state;

. . . ."

[14] The powers of the President under section 82(1) are expressed in wide and unqualified terms. Unlike most other presidential powers they can be exercised without the concurrence of the Cabinet. The President, in terms of section 82(1)(k), is subject only to a requirement that there be prior consultation with the Executive Deputy Presidents before the power is exercised.[20] The President is not, however, bound to follow the views of the Executive Deputy Presidents. As long as consultation has taken place his discretion is unfettered, in the sense that it is not expressly limited by the interim Constitution.

[15] In respect of most of the powers contained in section 82(1) it is not difficult to conceive of cases (extreme and unlikely as they may be) where some provision of the Bill of Rights might be contravened, and especially the equality provisions contained in section 8. One or another of the powers, for example, could be exercised, in a manner which excluded from consideration persons of a particular religion or ethnic group. As was stated by the Bavarian and Hessen Constitutional Courts,[21] the fact that the arbitrary

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20 Section 82(2)(e) read together with section 82(3) of the interim Constitution.

21 BayVerfGHE NF 18 140 (1965) at 147; HessStGH NJW 1974, 791 at 793.

exercise of the power to pardon may be a rarity is no ground for denying constitutional review.

[16] Thus far I have considered the issue before us with regard to the text of the interim Constitution. It is instructive also to have regard to developments in other relevant jurisdictions. Traditionally, the exercise of the prerogative powers of a monarch have not been subject to judicial scrutiny. However, over the past two or three decades there has been a movement, in certain circumstances, in favour of the recognition of such a review jurisdiction - and even in countries without a written constitution containing a bill of rights.

[17] In *Sachs v Donges NO*, Schreiner JA anticipated those developments. He said the following:[22]

> "Although in describing the category of prerogative powers the word "discretionary" is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute. It does not mean that the powers falling within the category form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done. There is no general rule that whatever has been done by the executive without statutory authority can be revoked by it at will. Each purported exercise of a prerogative power must be considered, when a case arises, on its own merits to see whether the power exists and whether the exercise is within the power; and this applies equally to the revocation of a previous act, done under a

22 Supra n 8 at 307.

prerogative power."[23]

[23] The South African cases in which the prerogative power of pardon or remission of sentence were considered, dealt with the right of an individual offender to due process in the consideration of its exercise. In *Smith v Minister of Justice and Another* 1991 (3) SA 336 (T), it was held that an offender has no legal right or expectation of being considered for pardon and that, by the same token, has no right to be heard before a decision is taken or to receive reasons after it has been refused. See also *Rapholo v State President and Others* 1993 (1) SA 680 (T), a case in which the court was considering a similar question with regard to amnesty. However, these decisions are not relevant to the objection raised in this appeal. The respondent is not claiming a common law review. He rests his case upon the alleged violation of the equality clause in the interim Constitution.

And, in Baxter[24] the following view is expressed:

> "The traditional view now shows signs of change. As the courts have developed more fully the principles by which discretionary powers may be reviewed, some judges have begun to regard some prerogative powers as an historical anachronism, as powers which might as easily have originated from statute, and as powers to which the normal principles of review should be applied by analogy. If this approach is accepted - and since the scope of review will always be affected by the question of justiciability - it is possible that the prerogative will gradually lose all its significance in administrative law." (footnote omitted).

[18] In England, where the prerogative powers were historically beyond the reach of the courts, the exercise of some prerogative powers has been subjected to judicial review. In 1984, in *Council of Civil Service Unions and Others v Minister for the Civil Service*,[25] a majority of the Law Lords held unambiguously that a decision-making power derived from a common law and not a statutory source is not "for that reason only" immune from judicial review; and that is so in respect of prerogative powers.[26] What determines whether the exercise of such a power is subject to the power of review is not its source but its subject-matter. After recognising the power of review, Lord Roskill stated:

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24 Supra n 8 at 392.

25 [1985] AC 374 (HL).

26 Per Lord Diplock at 410C-D, 411B-C; Per Lord Roskill at 417G-418B.

> "But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."[27]

Lord Scarman put it thus:

> "[I]f the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."[28]

In *R v Home Secretary, ex p Bentley*, Watkins LJ said the following:

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27 Id at 418A-C.

28 Id at 407B-C.

> "The *C.C.S.U.* [1985] A.C. 374 case made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.
>
> We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not.
>
> We do not think that we are precluded from reaching this conclusion by authority. Lord Roskill's passing reference to the prerogative of mercy in the *C.C.S.U.* case was obiter."[29]

That the reviewability of the exercise of prerogative power depends on the subject-matter was restated by the Privy Council in *Reckley v Minister of Public Safety and Immigration and Others NO (2),* where Lord Goff of Chieveley said that the *CCSU* case

> ". . . recognised that the exercise of a prerogative power was not ipso facto immune from judicial review; but it certainly did not go so far as to suggest that every exercise of such a power was amenable to that jurisdiction."[30]

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29 [1994] QB 349 (DC) at 363A-D.

30 [1996] 1 ALL ER 562 (PC) at 571.

[19] On the strength of these authorities it is safe to conclude that, in contemporary English law, the exercise of a prerogative power may be reviewed if, and to the extent that, the subject-matter thereof is amenable to judicial process.

[20] Other Commonwealth jurisdictions have adopted this English approach. In *Burt v Governor*-General, Cooke P said:

> "The prerogative of mercy is a prerogative power in the strictest sense of that term, for it is peculiar to the Crown and its exercise directly affects the rights of persons. On the other hand it would be inconsistent with the contemporary approach to say that, merely because it is a pure and strict prerogative power, its exercise or non-exercise must be immune from curial challenge. There is nothing heterodox in asserting, as counsel for the appellant do, that the rule of law requires that challenge shall be permitted in so far as issues arise of a kind with which the Courts are competent to deal."[31]

Burt's case established the reviewability of the exercise of a prerogative power on ordinary common law grounds.[32] Cooke P concluded, however, that cases such as that before him, in which a prisoner claimed he was entitled to a pardon on the grounds that he had been wrongly convicted, were subject to a fair practice in New Zealand and that the application for review should be dismissed. The approach of Cooke J in favour of reviewability of the executive power of pardon was statutorily confirmed in the New Zealand Bill of Rights Act, 1990, which controls the executive branch of government in

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31 [1992] 3 NZLR 672 (CA) at 678 lines 31-39.

32 Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, New Zealand

all its actions.[33]

1993) 588.

33 Id.

[21] In Australia the question was considered in *Minister for Arts Heritage and Environment and Others v Peko-Wallsend Ltd and Others*.[34] The issue was whether a decision of the Federal Cabinet in the exercise of a prerogative power could be reviewed by the courts. Bowen CJ said:

> "In my opinion, subject to the exclusion of non-justiciable matters, the courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative. The decision of the House of Lords in the *CCSU* case, *supra*, provides persuasive authority for this . . ."[35]

[22] The Canadian Courts have required that prerogative powers be exercised in conformity with the Charter of Rights and other constitutional norms and also subject to administrative law norms.[36]

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34 (1987) 75 ALR 218.

35 Id at 224 lines 6-11.

36 Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at para 1.8. See also *Operation Dismantle Inc. v The Queen* (1985) 13 CRR 287.

GOLDSTONE J

[23] What of non-Commonwealth countries? In Ireland the President is not answerable to the House of the Oireachtas (National Parliament) or to any court for the exercise of his or her powers and functions with regard to both formal and discretionary powers.[37] In *State (Walshe) v Murphy* Finlay P stated:

[37] Art 13.8.1 of the Irish Constitution. However this article cannot be raised in order to prevent judicial review of a function which, as Finley P stated in *State (Walshe) v Murphy* [1981] IR 275, "require[s] his [or her] intervention for its effectiveness in law, [but is] in fact the decision and act of the Executive."

> "The consequences of such a doctrine are alarming and appear to me to indicate its unsoundness as a proposition of constitutional law . . . . [It] would mean that the Executive would be in a position to act under the Constitution in respect of a number of matters contrary to the law and even contrary to the Constitution; and that, if such act required for its effectiveness the exercise of a function by the President, such illegal or unconstitutional conduct could not be reviewed by any court."[38]

[24] The US Constitution provides that the President

> " . . . shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[39]

This power of the President has been held by the Supreme Court to have as its origin the royal prerogative.[40] The nature of the power was considered by the Supreme Court as

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38 [1981] IR 275 at 283 as cited in Casey *Constitutional Law in Ireland* 2 ed (Sweet & Maxwell, London 1992) at 81.

39 US Constitution art II sec 2 cl 1. This includes the power to grant conditional pardons, commute sentences, remit fines and forfeitures and to grant amnesty by proclamation. See generally sections 10-13 in 59 *Am Jur* 2d at 12-15; Ammon L *Discretionary Justice: A legal and policy analysis on a governor's use of the clemency power in the cases of incarcerated battered women* 3 Journal of Law and Policy (1994) 1 at 28.

40 *Ex Parte Wells* 59 US (18 How) 307, 311 (1855).

early as 1833 in *United States v Wilson*.[41] Chief Justice Marshall, in an oft quoted passage, said:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

41 32 US (7 Pet) 150 (1833).

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate . . ."[42]

That definition of pardon as an act of grace was restated by the Supreme Court in 1915 in *Burdick v United States.*[43] However, in 1927, in *Biddle v Perovich*, Holmes J, speaking on behalf of a unanimous court, provided a more convincing basis for the exercise of the Presidential power than it being merely a private act of grace. He said:

> "A pardon in our days is not a private act of grace from an individual happening to possess power. *It is a part of the Constitutional scheme*. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[44] (My emphasis)

In more recent judgments, the United States Supreme Court has reinforced the notion that the President's power of pardon and reprieve, although derived from the Constitution,

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42 Id at 160.

43 236 US 79, 89 (1915). See also 59 *Am Jur* 2d sections 10-13, in particular n 29.

44 274 US 480, 486 (1927).

must be interpreted with regard to its English heritage. In *Schick v Reed*,[45] Burger CJ said:

[45] 419 US 256, 266 (1974).

> "A fair reading of the history of the English pardoning power, from which our Art. II, §2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution."[46]

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46 It should be noted that over the two centuries of United States Supreme Court jurisprudence there have been strong dissenting judgments holding that it was inappropriate to import into a constitutional state notions relating to the English monarch. See the dissent of McLean J in *Ex Parte Wells* supra n 40. In the passage at 321, his Republican fervour is apparent in his rhetorical question:

> "The President is the executive power in this country, as the Queen holds the executive authority in England. Are we to be instructed as to the extent of the executive power in this country, by looking into the exercise of the same power in England?"

Some 118 years later, a similar dissenting and no less emotional protest came from Marshall J (joined by Douglas J and Brennan J) in *Schick v Reed* id at 276:

> "The English annals offer dubious support to the Court. The majority opinion recounts in copious detail the historical evolution of the pardon power in England. *Ante*, at 260-262. See also *Ex parte Wells, 18 How. 307, 309-313 (1856).* The references to English statutes and cases are no more than dictum; as the Court itself admonishes, "the [pardon] power flows from the Constitution alone." *Ante*, at 266. Accordingly, the primary resource for analyzing the scope of Art. II is our own republican system of government."

See, further, Kalt "Pardon Me?: The Constitutional Case Against Presidential Self-Pardons" (1996) 106 No 3 *Yale Law Journal* 779 at 803.

On that approach, in effect, the Supreme Court has adopted a somewhat deferential approach to the exercise by the President of the power of pardon and reprieve. However, notwithstanding that deference, the United States courts have tested that power in relation to the nature of conditions attached to a pardon,[47] and in relation to the extent to which the exercise of the power affects the vested rights of third parties.[48]

[25] The German courts have also approached the power of pardon and reprieve as a prerogative power originating at the commencement of the German monarchy and taken over into the Weimar Constitution. Whether that power can be reviewed under the present constitution by the Federal Constitutional Court was an issue which led to one of the few tied decisions of that court. In BVerfGE 25, 352 (1969) four of the justices were of the opinion that the Basic Law (Comprehensive Judicial Review of all Acts of Public Authority) did not apply to acts of mercy. They relied on the historical origin of the power of mercy which had always been regarded as an institution outside the legal order (and even contradictory of it). They held, too, that it constitutes an exception to the separation of powers between the executive and the judiciary. Its exercise, they concluded, cannot be subject to judicial review. The other four justices held that the historical tradition could not live within the framework of the Basic Law and that the

47 Supra n 45 at 266. See also *Hoffa v Saxbe* 378 F. Supp. 1221 (1974).

48 See *Knote v United States* 95 US (5 Otto) 149, 154 (1877).

arbitrary exercise of public power was not exempt from the basic requirements of the constitution.

[26] In Israel, which has a non-executive President, in a judgment which antedated the *CCSU* case, the following was stated by Berinson J:

> "The President is a creature of statute and his powers are defined by law. Like everyone else in this country, he enjoys no rights or privileges which are not accorded to him by the laws of the State and every official act of his which exceeds the limits of the law is null and void."[49]

[27] The foregoing discussion indicates that there has been a distinct movement in modern constitutional states, (and, I include, for this purpose, England) in favour of recognising at least some power of review of what are or were prerogative powers of the head of state.

[28] The approach of the English courts whereby the jurisdiction of the courts to review the exercise of prerogative powers depends upon the subject-matter of the power is one that is not open to us. The interim Constitution obliges us to test impugned action by any organ of state against the discipline of the interim Constitution and, in particular, the Bill of Rights. That is a fundamental incidence of the constitutional state which is envisaged in the Preamble to the interim Constitution, namely:

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49 *Matana v Attorney-General* 14 PD 970 at 977.

> "... a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;..."

In my view, it would be contrary to that promise if the exercise of presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights. However, it may well be that, because of the nature of a section 82(1) power or the manner in which is it is exercised, the provisions of the interim Constitution, and, in particular, the Bill of Rights, provide no ground for an effective review of a presidential exercise of such a power. The result, in a particular case, may be the same as that in England, but the manner in which that result is reached in terms of the interim Constitution is a different one. On the English approach the courts, in certain cases, depending on the subject-matter of the prerogative power exercised, would be deprived of jurisdiction. Under the interim Constitution the jurisdiction would be there in all cases in which the presidential powers under section 82(1) are exercised.

[29] The way is now open to consider the review in the instant case, that is the exercise by the President of his power of pardon and reprieve of prisoners under section 82(1)(k) of the interim Constitution. I would emphasize that we are not required to consider the question of the reviewability of other powers which may be exercised by the President under section 82(1). In cases where the President pardons or reprieves a single prisoner it

is difficult, (save in an unlikely situation where a course of conduct gives rise to an inference of unconstitutional conduct), to conceive of a case where a constitutional attack could be mounted against such an exercise of the presidential power. Even the provisions of section 8 of the interim Constitution - the equality clause - would have only limited application. No prisoner has the right to be pardoned, to be reprieved or to have a sentence remitted.[50] The interim Constitution places such matters within the power of the President. This does not mean that if a president were to abuse this power vested in him or her under section 82(1)(k) a court would be powerless, for it is implicit in the interim Constitution that the President will exercise that power in good faith. If, for instance, a president were to abuse his or her powers by acting in bad faith I can see no reason why a court should not intervene to correct such action and to declare it to be unconstitutional. For example, a decision to grant a pardon in consideration for a bribe, could no doubt be set aside by a court. So, too, if a president were to misconstrue his or her powers I can see no objection to a court correcting such an error, though it could not exercise the discretion itself. This is what happened in *R v Home Secretary, ex p Bentley*[51] but even then the court declined to issue a mandamus or a declaration. It simply invited the Home

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50 In *de Freitas v Benny* [1976] AC 239 (PC) at 247 Lord Diplock in an appeal from the Court of Appeal of Trinidad and Tobago stated:

> "Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

51 Supra n 29.

Secretary to consider the case again in the light of the decision that he had misconstrued his powers. As it was put by Wilson J in *Operation Dismantle Inc. v The Queen*:

> "[T]he courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power."[52]

In that case, the Canadian Supreme Court had been requested to review and set aside a decision by the Government to allow the testing of United States cruise missiles in Canada. Wilson J concluded that:

> "[I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."[53]

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52 Supra n 36 at 309.

53 Id at 310.

[30] In the present case we are asked to decide whether rights of male prisoners have been violated by the manner in which the President exercised his power to pardon or reprieve prisoners in the impugned part of the Presidential Act. Here the President did not exercise his power of pardon or reprieve in a single case. He exercised it "wholesale" as it were - in general terms. That is the only way in which such a power can be exercised in a case such as the instant one, where the head of state wishes to confer a benefit upon groups of prisoners to mark an important event in the life of the nation. The relevant date chosen in the Presidential Act was 10 May 1994, the date on which the President was inaugurated. For the first time in its history, South Africa had a head of state and a head of the executive chosen as the result of a democratic constitutional process, and representing the whole nation.

[31] Where the power of pardon or reprieve is used in general terms and there is an "amnesty" accorded to a category or categories of prisoners, discrimination is inherent. The line has to be drawn somewhere, and there will always be people on one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit. For instance there may be no meaningful difference between prisoners whose birthday was shortly before the cut off date identified by the President, and who were eighteen when the decision took effect, and those whose birthday was shortly after the cut off date and were under eighteen at the

effective date. Indeed, there might well have been prisoners in the first category who, if assessed individually, might have been considered to be more deserving of a remission of sentence than persons in the latter category.

[32] The respondent argued that the Presidential Act was in conflict with section 8 of the interim Constitution in that by releasing all mothers whose children were under the age of twelve, it discriminated against fathers of children of a similar age. Section 8 of the interim Constitution provides as follows:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (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.
> (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.
> (b) . . .
> (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."

[33] The respondent argues that in releasing mothers of small children but not fathers, the President discriminated on the grounds of sex. The advantage that was afforded mothers was not afforded to fathers of small children and that failure is sufficient to

establish discrimination within the context of section 8(2) of the interim Constitution. The Presidential Act, in fact, discriminates on a combined basis, sex coupled with parenthood of children below the age of twelve. Only women who are parents of such children were released: women without children were not. In *Brink v Kitshoff NO*[54] this Court held that it is sufficient if the discrimination is substantially based on one of the listed grounds in section 8(2). Accordingly, it is clear that the Presidential Act prima facie discriminates on one of the grounds listed in section 8(2). As such, section 8(4) requires us to presume that the discrimination is unfair, until the contrary is proved.

[34] The appellants rely on an affidavit of the President to which is attached a supporting affidavit of Ms Helen Starke, the National Director of the South African National Council for Child and Family Welfare. Those affidavits were filed in a similar application which came before the Transvaal Provincial Division of the Supreme Court in *Kruger and Another v Minister of Correctional Services and Others*.[55] In the present proceedings, the earlier affidavit of the President was attached to the affidavit of Colonel Du Plessis, who represented both appellants in the present matter. In error, the supporting affidavit of Ms Starke was omitted. Without any admission as to its admissibility, the appellant consented to the inclusion in the appeal record of the affidavit

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54 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 43.

55 1995 (2) SA 803 (T).

of Ms Starke.

[35] In the court a quo, the respondent submitted that the affidavit of the President, together with its attachments, constituted hearsay evidence and was inadmissible. Magid J found for the appellant on the basis that the affidavit was admissible and therefore did not have to decide the point. In this Court, counsel for the respondent wisely did not press the argument contained in his heads of argument objecting to the admissibility of the President's affidavit. It appears as part of the record of proceedings against the President in the Transvaal Provincial Division and is referred to and incorporated in his affidavit by an official duly authorised to represent the President in these proceedings. There is no question that the affidavit filed of record is that of the President and that it is the affidavit of Ms Starke that is now part of it. In my opinion their contents are properly before us and do not constitute hearsay evidence. Hence, it is not necessary to consider the alternative argument advanced by counsel for the appellants that, even if hearsay, the affidavit is admissible by reason of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act.[56]

[36] In his affidavit, the President stated that in regard to the special remission of all mothers of minor children, he

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[56] Act 45 of 1988.

"was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. Having spent many years in prison myself, I am well aware of the hardship which flows from incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner.

7 Account was taken of the special role I believe that mothers play in the care and nurturing of younger children. In this regard I refer to the affidavit of HELEN STARKE . . . respectfully draw attention to the fact that the well-being of young children has been of particular concern to me and was an important factor in identifying two of the three categories in the Presidential Act.

. . . .

9 I have had an on-going concern about the general plight of young children in South Africa. There have been many occasions upon which I have expressed this concern publicly."

In her affidavit, Ms Starke stated in relation to the special remission of mothers of minor children:

"4 In my opinion, the identification of this special category for remission of sentence is rationally and reasonably explicable as being in the best interests of the children concerned. It is generally accepted that children bond with their mothers at a very early age and that mothers are the primary nurturers and care givers of young children.

. . .

5 Although it could be argued that fathers play a more significant role in the lives of older children, the primary bonding with the mother and the role of mothers as the primary nurturers and care givers extends well into childhood.

6 The reasons for this are partly historical and the role of the socialisation of women who are socialised to fulfil the role of primary nurturers and care givers of

> children, especially pre-adolescent children and are perceived by society as such (sic).
>
> . . . .
>
> 8 In my experience, there are only a minority of fathers who are actively involved in nurturing and caring for their children, particularly their pre-adolescent children. There are, of course, exceptions to this generalisation, but the de facto situation in South Africa today is that mothers are the major custodians and the primary nurturers and care givers of our nation's children."

[37] The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon the evidence of Ms Starke that mothers are, generally speaking, primarily responsible for the care of small children in our society. Although no statistical or survey evidence was produced to establish this fact, I see no reason to doubt the assertion that mothers, as a matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement, of course, is a generalisation. There will, doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned. However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be *fair* to discriminate between women and men on that basis.

[38] For all that it is a privilege and the source of enormous human satisfaction and

pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense.[57] The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship.[58] The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment.[59] The generalisation upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until

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57 As one woman put it in Barrett et al *Vukani Makhosikazi: South African Women Speak* (CIIR, London 1985) at 135: "Keeping a family, a home and a job going leaves most African women exhausted to the point of death."

58 One small study in the Cape Peninsula, for example, found a default rate of 85,5% in the payment of child support maintenance. See Burman and Berger "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa" (1988) 4 *SAJHR* 194 and 334 at 340.

59 See *Beijing Conference Report: 1994 Country Report on the Status of South African Women* at para 4.2.2.

responsibilities for child rearing are more equally shared.

[39] The fact, therefore, that the generalisation upon which the appellants rely is true, does not answer the question of whether the discrimination concerned is fair. Indeed, it will often be unfair for discrimination to be based on that particular generalisation. Women's responsibilities in the home for housekeeping and child rearing have historically been given as reasons for excluding them from other spheres of life. In a case note concerning *Incorporated Law Society v Wookey*,[60] which denied women the right to be admitted as attorneys, a commentator wrote:

> "A revolt against nature is involved in any proposal to allow women to enter into the legal profession. This idea is incompatible with the ideas and duties of Motherhood."[61]

To use the generalisation that women bear a greater proportion of the burdens of child rearing for justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them would clearly, therefore, be unfair.

[40] That, however, has not happened in this case. The President has afforded an opportunity to mothers, on the basis of the generalisation, that he has not afforded to

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60 1912 AD 623.

61 De Villiers "Women and the Legal Profession" (1918) 35 *SALJ* 289 at 290 as cited in Murray and Kaganas "Law and Women's Rights in South Africa: An Overview" (1994) *Acta Juridica* 1. See also Sachs and Wilson *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson, Oxford 1978).

fathers. In my view, the fact that the individuals who were discriminated against by a particular action, such as the one under consideration, were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair.

[41] The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada*[62] L'Heureux-Dubé J analysed the purpose of section 15 of the Canadian Charter (which entrenches the right to equality) as follows:

> "This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society: *Big M Drug Mart Ltd* [(1985) 13 CRR 64] at p.97 . . . (*per* Dickson J. (as he then was)). More than any other right in the *Charter*, s. 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that

62 (1995) 29 CRR (2d) 79 at 104-5.

> treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."
> (See also the judgment of McLachlin J in *Miron v Trudel* (1995) 29 CRR (2d) 189 at 205.)

It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that the impact of the discrimination on the people who were discriminated against was not unfair. In section 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. 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.[63]

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63 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.

[42] According to the affidavits filed, the President intended by the special remission of the prison sentences of mothers to further the best interests of children. There is no doubt of his good faith. However, the fact that the President, in good faith, did not intend to discriminate unfairly and had in mind the benefit of children is not sufficient, to establish that the impact of the discrimination upon fathers was not unfair.

[43] To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.

[44] The power to pardon duly convicted prisoners in terms of which the President acted is conferred upon him by the interim Constitution. The power of pardon is one which is recognised in many democratic countries.[64] In terms of the interim Constitution, the power is not subject to cabinet concurrence or to legislative control, but is conferred upon the President directly by the interim Constitution. Although the historical roots of the pardoning power may lie in the royal prerogative, it is clearly a power which the drafters of the interim Constitution considered appropriate within a constitutional democracy. To repeat the words of Holmes J:

64 Supra para 5. See Sebba, supra n 9.

GOLDSTONE J

> "When [a pardon is] granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[65]

The pardoning power in the interim Constitution serves a similar function. It is not a private act of grace in the sense that the pardoning power in a monarchy may be. It is a recognition in the interim Constitution that a power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon.

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65 Supra para 24.

[45] There are at least two situations in which the power to pardon may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences and second, it may be used to confer mercy upon individuals or groups of convicted prisoners when the President thinks it will be in the public benefit for that to happen.[66] In the first situation, it has been recognised in many courts that it can play an important role in enhancing justice within a legal system. As Cooke P said in *Burt v Governor-General*:

> "[I]t must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchial right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes."[67]

The pardoning power in the interim Constitution should provide such a safeguard.

[46] In addition, however, it will also provide an opportunity to the President to release groups of convicted prisoners where he or she considers it desirable in the public interest.

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66 See for a full discussion Kobil "The Quality of Mercy Strained: Wresting the Pardoning Power from the King" (1991) 69 *Texas Law Review* 569.

67 Supra n 31 at 681 lines 50-53.

This is such a case. Here the pardon was not to an individual to correct a miscarriage of justice, but to a group to confer an advantage upon them as an act of mercy at a time of great historical significance. In exercising the power, the President considered carefully the implications of the remission he proposed. In particular, he took into account the interests of the public and the administration of justice. As he stated in his affidavit:

> "5. The decision to grant special remission of the remainder of their sentences to the categories mentioned in the Presidential Act was not lightly taken. The power to grant special remission is, in my opinion, a grave one which requires careful consideration of many competing interests. In particular:
>
> 5.1 I believe that it is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentence is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute.
>
> 5.2 I believe further that it is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. I am conscious of the fact that the level of crime is a matter of concern to the public at large and that there may well be anxiety about the release of persons who have not completed their sentences."

The considerations mentioned here would well nigh have made it impossible for the President to release all fathers who were in prison as well as mothers. Male prisoners outnumber female prisoners almost fiftyfold.[68] A release of all fathers would have meant

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[68] The daily average prison population in 1994 was 108066 males and 2867 females. The female prison

that a very large number of men prisoners would have gained their release. As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers. In addition, the release of a large number of male prisoners in the current circumstances where crime has reached alarming levels would almost certainly have led to considerable public outcry. In the circumstances it must be accepted that it would have been very difficult, if not impossible, for the President to have released fathers on the same basis as mothers. Were he obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all.

[47] In this case, two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage: an early release from prison; and fathers have been denied that advantage. The President released three groups of prisoners as an act of mercy. The three groups - disabled prisoners, young people and mothers of young children - are all groups who are particularly vulnerable in our society, and in the case particularly of the disabled and mothers of young children, groups who have been the victims of discrimination in the past. The release of mothers will in many cases have been of real benefit to children which was the primary purpose of their release.

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population was thus 2,58% of the total prison population. (Report of the Department of Correctional Services.)

The impact of the remission on those prisoners was to give them an advantage. As mentioned, the occasion the President chose for this act of mercy was 10 May 1994, the date of his inauguration as the first democratically elected President of this country. It is true that fathers of young children in prison were not afforded early release from prison. But although that does, without doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement. Furthermore, the Presidential Act does not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. In his affidavit, the President made clear that fathers of young children could still apply in the ordinary way for remission of their sentences in the light of their particular circumstances. The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers, was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair. The respondent, therefore, has no justified complaint under section 8(2) of the interim Constitution.

[48] Magid J came to the conclusion that the President did not discharge the burden of

proving that the discrimination was not unfair. In effect, he came to that conclusion on the basis that the axe wielded by the President was too blunt. His criticism was that:

> "The President did not suggest that he drew a distinction between mothers of children in normal families both of whose parents are alive and "single parent" families. So children whose mothers were imprisoned but who were being cared for by their fathers (and possibly other close members of their families) were preferred to children who might have been left without any care at all by the incarceration of their "single parent" fathers."[69]

However, in my opinion, for reasons which have already been set out above, if the President decides to approach the issue of pardon or reprieve not in individual cases, but by reference to a category of offender, then it may be well nigh impossible to do so other than by the "blunt axe" method. In the legislative or administrative context other methods would usually be available and over or under inclusive classifications would be less likely to be held fair. I do not agree with Magid J, therefore, that on this account the President failed to discharge the burden placed upon him by the provisions of section 8(4) of the interim Constitution to establish that the discrimination was not unfair.

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69 Supra n 1 at 1023A.

[49] In *Kruger and Another v Minister of Correctional Services and Others*,[70] a similar case to the present one, Van Schalkwyk J dismissed the application. He did so, broadly speaking, on the basis that the President, in making the order, did so in the exercise of a prerogative power, and that in the absence of mala fides, the courts were powerless to intervene. The learned Judge erred, in my opinion, in not finding that in the exercise of his or her powers, the president under the interim Constitution is obliged to adhere to all of the terms of that Constitution including the provisions of the Bill of Rights. He also failed to recognise that in the approach he adopted the President, in his order, created a category of prisoners which had the effect of discriminating against another category of prisoners.

[50] On the basis on which this judgment proceeds it is unnecessary to consider, as does Mokgoro J, whether the Presidential Act constituted a " law of general application" for the purposes of s 33(1) of the interim Constitution, and I would prefer to express no view in that regard.

[51] It remains to consider the dissenting judgment of Didcott J. It is based upon the approach adopted by this Court in *JT Publishing (Pty) Ltd v Minister of Safety and Security and Others*.[71] In that case this Court considered the circumstances in which

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70 Supra n 55.

71 1996 (12) BCLR 1599 (CC).

courts should grant declaratory orders in constitutional cases. Didcott J referred to the fact that declaratory orders are discretionary and went on to say:

> "A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."[72]

Didcott J concluded that there was no reason why this Court should not adhere to a rule that "sounds so sensible". He stated further:

> "We should no doubt regard it, like most general rules, as one that is subject in special circumstances to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication."[73]

But the circumstances of the *JT Publishing* case differ *toto caelo* from those now before us. That was a case where the relief asked for on appeal was to declare legislation invalid and to place Parliament on terms to amend it. By the time judgment was delivered in this Court, the Act was about to be repealed and replaced. The question before the Court therefore had absolutely no relevance to the future and in the face of its imminent repeal the applicants could not have been granted any effective relief, not even a declaratory order. As stated by Didcott J who delivered the unanimous opinion of the Court:

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72 Id at para 15.

73 Id at para 15.

> "Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under their rapidly waning authority."[74]

The same cannot be said in this case. Here the Court is being asked to hold on the constitutionality of presidential powers exercised under section 82(1)(k). These constitutional powers, in their exercise by the President, could have benefited the applicant. The President, conceivably could have decided to include fathers with children under the age of twelve years. Had it been unconstitutional to exclude such fathers, the applicant would at the least have been entitled to a declaratory order in the terms suggested in the judgment of Kriegler J. It follows that the decision in the *JT Publishing* case is distinguishable.

[52] In the result, however, it has been established that the President has exercised his discretion fairly and in a manner that was consistent with the interim Constitution. The court a quo therefore should have dismissed the application.

[53] The appeal is allowed and the order of the court a quo, save as to costs, is set aside

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74 Id at para 16.

and replaced by an order in the following terms:

> The provisions of the Presidential Act No. 17 of 27 June, 1994 relating to the remission of sentences of mothers in prison on 10 May, 1994, with children under the age of twelve years, are declared to be not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993.

Chaskalson P, Mahomed DP, Ackermann, Langa, Madala, and Sachs JJ concur in the judgment of Goldstone J.

DIDCOTT J:

[54] This case is covered and governed, I believe, by that part of our recent decision in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*[1] where we held that constitutional questions fell within the field of the judicial discretion which controlled the grant of declaratory orders, and laid down as a general policy the rule that the discretion ought not to be exercised in favour of answering any such question once it was or had become, in the circumstances of the case, "merely abstract, academic or

[1] 1996 (12) BCLR 1599 (CC).

hypothetical".[2]

[2] Para 15 at 1608D-F.

[55] The issue put to us in that litigation, an issue questioning the constitutionality of some statutory provisions which catered for censorship, had ceased to be a live one by the time when we decided the matter owing to the repeal in the meantime of the legislation containing them and its replacement by a substantially different scheme. No good purpose could have been served at that stage by our granting the declaration of invalidity which was sought. The question itself had become "wholly academic", as the judgment described it,[3] "exciting no interest but an historical one". And neither of the applicants for the declaration stood any longer to gain the slightest benefit or advantage from it.[4] No wrong done to either on the strength of the impugned provisions could still be righted. The danger had passed that anything which needed to be stopped might occur under their authority. Nor did any room remain for the consequential order requested in the event of the declaration, an order directing Parliament to rectify the defects thus found, since those were on the scrapheap already, together with the provisions themselves. The applicants, who asserted a devotion to freedom of expression felt in the interests of their commercial activities, would no doubt have liked nevertheless to obtain the declaration in case it turned out to be useful in some future attack launched by them

3 Para 17 at 1609H.

4 Para 16 at 1609G.

on the fresh legislation. But that consideration did not even enter the reckoning.

[56] Here we see a comparable state of affairs, where events have likewise overtaken the issue raised. Unlike the legislation assailed in the earlier case, the presidential decree challenged in this one has not been repealed but still stands formally. That is a difference more apparent, however, than real. The decree was neither intended nor designed to continue operating indefinitely, or indeed for a moment longer than the limited time needed to give effect to the releases from prison for which it provided. It dealt with those once and for all, in short, having no residual force. Its energy had already been exhausted when the proceedings in the Court below were heard and decided. The decree was signed and issued some sixteen months before the first occasion and almost twenty months prior to the second one. It is scarcely speculative to assume that all the releases had been accomplished within those periods. To suggest otherwise would surely be fanciful. Nor is it conceivable that the mothers released from gaol will have to return there if we confirm Magid J's declaration of invalidity, even on the supposition that they can lawfully be rearrested then.

[57] That leaves the fathers who remain in prison. The respondent did not purport to litigate in the interests of their group or to take up the cudgels for any father but himself. His own release from custody was what he wanted. Yet the order for that which he claimed initially, but abandoned later, was never on the cards. No Court could have

granted it without usurping a power entrusted solely to the first appellant and substituting its own discretion for his. The only personal advantage that the respondent might then have hoped to gain was an order requiring the first appellant to reconsider the decision taken by him on the remission of sentences, an order in other words with much the same effect as that of the consequential one granted by Magid J. The advantage was, however, illusory. For an apparently insuperable obstacle confronted the respondent. His son was not younger than twelve years when the litigation started in the Court below. The boy had reached that age already and, by the time of Magid J's judgment, his age was thirteen years. So a revised decision favouring fathers as well as mothers would not have resulted in the respondent's release from gaol unless it had been altered elsewhere too, by providing either for its retrospective operation from the date of the original decision or for an increase in the age of the children to whom it referred that was sufficient to cover his case. There is no reason to believe in the likelihood of such an alteration when the age specified in the decree had never been called into question. Indeed, that sounds most unlikely once account is taken of the store which was set all along by the interests of children younger than twelve years but no older. The upshot is that, like the applicants in the *J T Publishing* case, the respondent in this matter could derive no apparent benefit or advantage from the declaration which he sought and obtained in the Court below. The issue raised by him had also become by then "wholly academic, . . . exciting no interest but an historical one".

[58] Nor is a ruling on that issue required from us for the future guidance of anybody. The decree was a unique measure, taken to celebrate the inauguration of our first democratically elected President. Its repetition on any similarly auspicious occasion which may arise some day seems improbable, in the same form at any rate. It is certainly less likely than censorship to be repeated. And, should that nevertheless happen, any defects recurring then will in all probability provoke objections which can be considered and met when they arise.

[59] Factual differences between the present case and the one of *J T Publishing* can easily be found. None of them is significant or material, however, in my opinion. In principle, as I see them, the two matters are indistinguishable from each other.

[60] I have not overlooked the qualification to the rule dealing with declaratory orders which the *J T Publishing* judgment expressed when it added:[5]

> "We should no doubt regard it, like most general rules, as one that is subject in special circumstances to exceptions, in our field those necessitated now and then by factors which are fundamental to a proper constitutional adjudication."

But no such factor occurs to me now. The doors of the Courts, it is often said, should always be kept open to those with constitutional complaints. That does not mean,

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5 Para 15 at 1608G-1609A.

however, that the Courts are compelled to investigate every such complaint, no matter how pointless or inappropriate it may be in the circumstances to do so. Nor does it matter for the purposes of the rule that the issue on which a decision is sought happens to be one of constitutional importance. That is invariably the case. But the cart must not be put before the horse.

[61] I accordingly decline to enter, let alone take either side in, the debate that is being conducted within our ranks about the validity of the differentiation between fathers and mothers which marked the decree. I do so from no pusillanimous reluctance to become entangled in the controversy, but because of my conviction that we are bound by the discipline of the *J T Publishing* judgment not to embark on the enquiry and to hold that Magid J should likewise have abstained from doing so.

[62] For the reasons given by me, and for those alone, I concur in the part of the order proposed by Goldstone J that will allow the appeal and set aside both the declaration of invalidity and the consequential correction which Magid J ordered. I dissent, on the other hand, from the proposal to substitute a declaration of validity for the one of invalidity.

KRIEGLER J:

KRIEGLER J

[63] This is a very hard case indeed.[1] For that reason this dissent essays reluctantly, the more so because the lucidity of my colleague Goldstone J's judgment on behalf of the majority - and its commendable conclusion - render their view so attractive. They hold that: (a) a presidential pardon granted under the clemency powers afforded by s 82(1)(k) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution", its provisions being referred to without further identification) is subject to judicial review for its consistency with the requirements of the Bill of Rights;[2] (b) Presidential Act 17 of 1994 ("the Act"), which conferred clemency on 440 mothers of young children, passes such scrutiny; and therefore, (c) the court below erred in granting an order for its correction.

[64] My dissent is narrowly based as I agree with conclusions (a) and (c). Nonetheless my disagreement with conclusion (b), and with the reasoning underpinning it, is profound and emphatic. In my view the pardon, although issued in good faith, for ostensibly rational reasons and manifestly to the advantage of some members of a traditionally disadvantaged class, is (i) inconsistent with the prohibition against gender or sex discrimination contained in s 8(2); (ii) has not been shown to be fair; and (iii) is therefore

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1 I call it a hard case because, by anyone's lights, it seems mean spirited in the extreme to scrutinise closely the validity of an act of clemency by the newly inaugurated President aimed at enabling a few hundred women prisoners, sentenced for less reprehensible crimes, to care for their young children.

2 In the course of arriving at that conclusion Goldstone J, in paragraph 49, overrules the judgment of Van Schalkwyk J in *Kruger and Another v Minister of Correctional Services and Others* 1995 (2) SA 803 (T). From what I say in paragraph 65 below it should be clear that I wholeheartedly agree that the decision in *Kruger's* case understated the scope of judicial review under the Constitution.

invalid. I nevertheless agree that the appeal should succeed and that the order granted in the court below must be set aside and replaced by another. In what follows I hope to explain the route that brings me to that destination.

[65] With regard to the finding of judicial reviewability of the exercise by the President of his s 82(1)(k) powers I have little to add to the analysis by my colleague Goldstone J in paragraphs 5 to 29 of his judgment. Although I would prefer not to characterise the relevant power as executive, administrative or presidential/prerogative, it does not really matter. Nor does it make any difference whether the power is rightly seen as a residual element of the royal prerogative, or as falling in a special category of discretionary powers of the head of state exercisable otherwise than on the advice of the cabinet, or as executive/administrative acts by the head of the executive branch of government. On a fair reading of ss 4, 75, 76 and 81 (especially subsection (1)) in the context of the Constitution as a whole, the exercise by the President of the s 82(1)(k) powers is governed by the prohibition against discrimination contained in s 8(2). I therefore do not think one has to categorise those powers as "executive", thus bringing them within the ambit of s 7(1), in order to subject them to Chapter 3 review.[3] Ultimately the President,

[3] Nor, incidentally, does it make any difference, in my opinion, whether one asks whether the President's actions under s 82(1)(k) are reviewable "at common law" or under s 8. If the President acts in a manner inconsistent with the Constitution, eg without reference to the Executive Deputy Presidents or in conflict with the obligation not to discriminate unfairly, he/she both exceeds the relevant powers, bringing the ultra vires doctrine into play, and also

as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands.

[66] With regard to the second question, namely the constitutional validity of the Act, I can also be relatively brief. That is because my dissent does not relate so much to the principles involved, nor to the proper approach to a constitutional challenge based on alleged unfair discrimination. On the contrary, I endorse the general observations in the majority judgment regarding gender discrimination. I also acknowledge that this is not only a hard case but an awkward one for the development of our equality jurisprudence, one in which its application to reality is slippery. My dissent is confined to the latter exercise. In the result my conclusion is that the President not only transgressed the provisions of s 8(2) in distinguishing between classes of parents on the basis of their gender (on which the majority seem to agree with me) but also that the presumption of unfairness attaching to that distinction has not been rebutted. That is the point at which our paths diverge.

[67] The facts appear from the judgment of my colleague Goldstone J; I need highlight only those that are pertinent to my particular approach. On 30 June 1995 the respondent commenced motion proceedings in the Durban and Coast Local Division of the Supreme

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triggers the nullification provision of s 4(1).

Court expressly aimed at procuring his release from prison. He attacked the constitutionality of the Act as being in violation of his rights under ss 8(1) and (2) and asked for a corresponding declaratory order under s 7(4)(a) coupled with a mandatory order for his release. Ultimately he sought only the declaratory order and a direction that the Act be corrected "in accordance with the provisions of the Constitution". The court granted the order as prayed, save that the President was given six months in which to effect the correction.

[68] There was no factual dispute raised on the papers and the case was determined on the basis of the averments made in the affidavits filed on behalf of the President.[4] In exercising the clemency power vested in him by s 82(1)(k), the President decided to do so, not on the basis of an evaluation of the merits of specific cases, but by generic classification. One of the generic lines he drew to distinguish between those upon whom the gift of clemency was to be bestowed and those not, was admittedly sex/gender based. Female parents of sub-twelve year old children were to go free but male parents not.

[69] The President decided to grant the special remission to particular categories of prisoners only after "careful consideration of many competing interests". In particular the President stated in his affidavit:

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[4] I agree with Goldstone J, in paragraph 35 of the majority judgment, that the affidavits of the President and Ms Starke are properly before us.

> "5.1 I believe that it is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentence is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute.
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> 5.2 I believe further that it is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. I am conscious of the fact that the level of crime is a matter of concern to the public at large and that there may well be anxiety about the release of persons who have not completed their sentences.
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> 5.3 In granting the special remission to the various categories of prisoners mentioned in the Presidential Act, it was important to have regard to the role of the law enforcement agencies who are responsible for combating crime and the effect which the grant of remission may have on their work."

[70] The President "was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided." He took account "of the special role" he believes "that mothers play in the care and nurturing of younger children" and annexed an affidavit by the National Director of the South African National Council for Child and Family Welfare, who expressed the view that identification of mothers of children under the age of twelve years for remission of sentence was "rationally and reasonably explicable as being in the best interests of the children concerned." She added that "the primary bonding with the mother and the role of mothers as the primary nurturers and care givers extends well into childhood. The reasons for this are partly historical and the role of the socialisation of women who are

socialised to fulfil the role of primary nurturers and care givers of children, especially pre-adolescent children and are perceived by society as such."

[71] The President also makes plain that he acted "[a]fter taking into account the many competing and sometimes irreconcilable interests . . . honestly, in good faith and after careful deliberation." He adds that "[t]he exercise of the power of pardon or remission, is by its very nature, highly complex . . . that it would be unfortunate if unnecessary restraints were placed upon the exercise of such power because this may inhibit its exercise. It is an area in which difficult choices have to be made . . . ." Nevertheless the affidavit invites correction if it be found that the President erred in the exercise of the power in question.

[72] Accepting without hesitation or qualification that the President acted in the manner and spirit - and for the commendable motives - he describes, I believe that in determining whether or not the presumed unfairness of the Act which automatically flows from the breach of the prohibition against discrimination contained in s 8(2) has been adequately rebutted, one cannot ascribe to the President the weighing of factors he himself does not mention. Thus, in my view, it is not open to us to make our own enquiries about the prison population and then to conclude that "a very large number of men prisoners would have gained their release".[5] We have not been told and have no data to found an opinion

[5] As the majority judgment does in paragraph 46.

as to how many men would or could have qualified for release if the Act had treated the sexes equally. There is even less room for a finding that the numbers would have caused public disquiet. The President said nothing of the kind on the papers; no argument to such effect was advanced on his behalf at the hearing and counsel were not asked by the Court to address the subject. It is, of course, wholly illogical to rely on current perceptions of the level of crime in drawing inferences about reaction in mid-1994 had substantially more prisoners qualified for release. We also do not know anything about the administrative bother that may or may not have been involved in weighing the family circumstances of individual prisoners, or of applying some other method of advancing the cause of young children deprived of parental care without drawing the distinction simply along the gender line. Nor does it behove us hypothetically to second guess the President as to what he would or would not have decided had he been advised that the distinction along sex/gender lines was constitutionally suspect.

[73] A point that should also be stressed is that the question is not whether we find that the objective of the Act was praiseworthy or its likely effect beneficial to some. Both are common cause on the papers. The crisp question is whether the Act, regardless of its impressive provenance and charitable appearance, complies with the demands of s 8(2). The criteria are prescribed by the Constitution; so too their application to a given piece of legislation or a specific executive act. The immediate focus is on s 8(2), read with and fortified by s 8(4); but the wider context is also important. Discrimination founded on

gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2); in ss 119 and 120, especially 119(3), providing for the creation of a Commission on Gender Equality; and the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mind set and statutory drafting style (sanctified by s 6(a) of the Interpretation Act No 33 of 1957) which used the masculine gender only.

[74] The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.

[75] The importance of equality is demonstrated by the Constitution's insistence that discrimination on a specified s 8(2) basis be presumed unfair until the contrary is established. The insistence on such rebuttal is not new to this Court. A burden of

"justification" was placed on the President by s 8(4) read with s 8(2). The latter states that

> "[n]o 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."

Section 8(4) then continues,

> "[*p*]*rima 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."

Although s 8(2) expressly makes the possible grounds for discrimination open ended, both provisions give special treatment to the listed grounds of distinction. In the context of s 8(2) they render a distinction couched in their terms automatically questionable, and s 8(4) reinforces this by presuming that discrimination on a listed ground is unfair. Discrimination on the basis of a s 8(2) category must be regarded as unfair unless and until a persuasive rebuttal is established to vindicate it. For it is conduct that, on the face of it, is out of step with the fundamental values of our new constitutional order. This is particularly the case where discrimination on the basis of race, sex or gender is concerned. Although the Constitution does not establish levels of scrutiny in the manner of the American Constitution, it is nevertheless worth noting that race and sex/gender are

given special mention in the Preamble[6] and head the list of s 8(2) categories. The drafters of the Constitution could hardly have established a presumption of unfairness in s 8(4) only to have the burden of rebuttal under the section discharged with relative ease.

[76] Therefore, in terms of s 8(4), read both textually and contextually, unless and "until the contrary is established", a distinction drawn on the basis of gender or sex, such as the one here, must be found to be unfair. If no rebuttal is apparent, that is the end of the matter - the presumption of unfairness, which entails unconstitutionality under s 8(2), stands.[7] Where some rebuttal is proffered, one must examine it to see whether it indeed

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6 The first paragraph of the Preamble expresses the need to

> ". . . create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is *equality between men and women and people of all races* so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . . ." (emphasis added)

7 My colleague Mokgoro J has concluded that although the Act is in conflict with s 8, it is a "law of general application" within the meaning of s 33(1) and is saved by its provisions. I cannot agree with the second of those propositions and the third therefore does not arise. The exercise by the President of the powers afforded by s 82(1)(k) - even in the general manner he chose in this instance - does not make "law", nor can it be said to be "of

"establishes" (ie proves) the fairness of the distinction.

[77] What kinds of facts are likely to discharge the burden of rebuttal imposed on the President by s 8(4)? I would make three observations here. First, the fact that discrimination is unintended or in good faith does not render it fair. Once the subject action or legislation is found to create adverse effects on a discriminatory basis, there is no further requirement, eg of bad faith or malice. My second observation is that the "rebutting" factors can seldom, if ever, in themselves be discriminatory or otherwise objectionable. True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster. Third, factors that would or could justify interference with the right to equality in a section 33(1) analysis, are to be distinguished from those relevant to

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general application". The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.

the enquiry under section 8(4). The one is concerned with justification, possibly notwithstanding unfairness; the other is concerned with fairness and with nothing else. I turn from these general comments to the case at hand.

[78] In my respectful view, the majority errs on all three counts. First, my colleagues base their finding of fairness in part on the good faith of the President. Second, the Act is upheld despite the fact that it relies on a generalisation regarding parental roles which is the result of disadvantage and discrimination. Third, in invoking factors such as public reactions to the release of many prisoners and administrative efficiency, the majority applies a section 33(1) analysis at the point of looking for a rebuttal of unfairness.

[79] In attempting to discharge their burden under s 8(4), the appellants rely on the two affidavits I have mentioned. With regard to the discrimination between the parents of young children, their effect is limited. The emphasis, as I've indicated above, is the President's concern for children, coupled with his belief that mothers have, and are generally perceived to have, a special role in the care and nurturing of younger children. The second affidavit is directed to the latter and purports to provide empirical confirmation for the President's belief. No other purpose or rationale is provided for the decision to accord the benefit of liberty to mothers and not to fathers.

[80] One can accept for the sake of argument that the President's belief is empirically

confirmed. The question then is whether the fact that in South Africa mothers are the primary care givers can establish fairness under s 8(4). In this regard I agree with the majority judgment that the fact that women generally "bear an unequal share of the burden of child rearing" cannot render it ordinarily "fair to discriminate between women and men on that basis". What I cannot endorse, is the majority's conclusion that although the discrimination inherent in the Act was based on that very stereotyping,[8] it is nevertheless vindicated. In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind.[9] Indeed I find it startling that the appellants could have placed this fact before the Court in order to establish that their conduct does not constitute unfair discrimination. I would have thought that this is precisely the kind of motive that the respondent might have attempted to divine in the appellant's conduct in order to

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8 The word "stereotype" appears to have its ordinary meaning in the judgments of the United States Supreme Court. One possible definition, in *Mississippi University for Women v Hogan* 458 US 718, 725 (1982), is "fixed notions concerning the roles and abilities of males and females". The Canadian Supreme Court is slightly clearer on the meaning of "stereotype". The enumerated and analogous grounds set out in the Charter's s 15(1) serve as indicators of discrimination because "distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics." *Miron v Trudel* (1995) 29 CRR (2d) 189 at 200.

9 So this court argued in *Brink v Kitschoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42.

condemn it. It hardly has justificatory power. One of the ways in which one accords equal dignity and respect to persons[10] is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.

[10] See the telling passage in the judgment in *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5 quoted in paragraph 41 of the majority judgment.

[81] Is it relevant that an inherently objectionable generalisation has been used in this case for the benefit of a particular group of women prisoners? The majority judgment regards this as an important - if not a decisive - factor in its reasoning.[11] My first response is a narrow one. It is merely to say that the President has nowhere mentioned that it was his purpose to benefit women generally or the released mothers in particular. There is no suggestion of compensation for wrongs of the past or an attempt to make good for past discrimination against *women*. On the contrary, the whole thrust of the President's affidavit, and the raison d'etre for the main supporting affidavit, is the interest of *children*. The third category of prisoners released under the Act was not women in their own right but solely in their capacity as perceived child minders.

[82] For the purposes of my next response I am prepared to accept without deciding, that in very narrow circumstances a generalisation - although reflecting a discriminatory reality - could be vindicated if its ultimate implications were equalising.[12] But I would suggest that at least two criteria would have to be satisfied for this to be the case. First, there would have to be a strong indication that the advantages flowing from the

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11 See paragraph 47.

12 The United States Supreme Court allows generalisations to justify sex-based distinctions in very narrow circumstances. See *Schlesinger v Ballard* 419 US 498 (1975) and *Califano v Webster* 430 US 313 (1977). For an important judgment where such a generalisation fails, see *Mississippi University for Women v Hogan* 458 US 718 (1982).

perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages. Second, the context would have to be one in which discriminatory benefits were apposite.

[83] I illustrate what I mean by examining how these criteria are to be applied in the instant case. In terms of the first criterion, the benefits in this case are to a small group of women - the 440 released from prison - and the detriment is to all South African women who must continue to labour under the social view that their place is in the home. In addition, men must continue to accept that they can have only a secondary/surrogate role in the care of their children. The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women qua women in the President's conduct, merely a favour to perceived child minders. On the other hand there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes that limit the access of women to the workplace and other sources of opportunity. There is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts. I cannot agree that because a few hundred women had the advantage of being released from prison early, the Constitution permits continuation of these major societal disadvantages.

[84] The second criterion, it will be recalled, requires some connection between the discriminatory action and the advantage to the previously disadvantaged. On that basis the limited and parochial benefits flowing from the Act are dubious. From the fact that women have suffered discrimination *generally*, it cannot be argued that they deserve compensatory benefits in *any* context. I suggest that the relevant context in this case is a penal one, for the effect of the Presidential Act is felt by prisoners. It has not been suggested that women have suffered systematic discrimination in a penal context.[13] The point here is that there is an advantage unrelated to any compensable past disadvantage.

13 Indeed, having regard to my personal observations over some 45 years, I would have regarded allegations to that effect with some scepticism.

KRIEGLER J

[85] I must emphasise that I am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair.[14] There is no question that gender or sex discrimination can be shown to be fair. All I am contending is that the evidence must be persuasive. In cases such as these the United States Supreme Court requires "exceedingly persuasive justification"[15] - a rigorous test in the context of their equality provision, which makes no express mention of discrimination and contains no deemed unfairness. We should do no less. In the present case the presumption of unfairness has not been disturbed. The justification that has been tendered is manifestly inadequate. There is no warrant to strain to uphold the presidential action in question. Clearly the Act was issued in good faith, after mature reflection, after consideration of the multifarious pros and cons, and for manifestly laudable humanitarian motives. None of those factors, however, cuts any ice. On the contrary, the President's *ipse dixit* establishes that the decision was founded on what has come to be known as gender stereotyping. And the Constitution enjoins all organs of state - here the President - to be careful not to perpetuate the distinctions of the past based on gender type-casting. In effect the Act put the stamp of approval of the head of state on a perception of parental roles that has been proscribed. Mothers are no longer the "natural" or "primary" minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism

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14 I reiterate that it is in not necessary to express any view in this case on the possible interaction between rebuttal of a presumption of unfairness under s 8(4) and justification under s 33(1).

15 See *United States v Virginia* 1996 US LEXIS 4259 at *28 (Supreme Court of the United States June 26, 1996) (citing *Mississippi University for Women v Hogan* 458 US 718, 724 (1982)).

or privilege may maintain. Constitutionally the starting point is that parents are parents.

[86] **I accept that my finding that the President has discriminated unfairly may not answer legitimate concerns that my conclusion may be seen as discouraging benefits directed at persons within historically disadvantaged classes. A clear disclaimer is salutary. I am not suggesting that the executive or legislature should never recognize gender or sex distinctions. Gender/sex based distinctions can, and on occasion should, be made. The caveat is simply that such distinctions must be shown not to discriminate unfairly under the Constitution - or they must be justifiable under section 33(1). Neither the legislature nor executive need feel hamstrung by my finding in this case.**

[87] That leaves only the question of the appropriate order to be made. It can be answered quite simply. I have come to the same conclusion on the reviewability and constitutionality of the Act as did the learned judge in the court below. Nevertheless, even on that finding, the order was overbroad. There was nothing wrong with those parts of the Act that were not tainted by gender or sex discrimination, eg the release of certain prisoners younger than 18 years of age. The Act is constitutionally objectionable only to the extent that it discriminated on the basis of gender/sex between male and female prisoners who, as at 10 May 1994, had children under the age of twelve years. In my view the learned judge should also not have put the President on terms to rectify the Act.

Once there was no longer any prayer for the respondent's release and there was no prayer relating to the women who had (long since) been released,[16] rectification of the order would have served no useful purpose. On the other hand, the Act *had* constituted a breach of section 8(2) and a declaratory order to that effect under section 7(4)(a) and (b)(i) was therefore appropriate, even though it entailed no direct or discernible consequential relief for the respondent. A breach of the Constitution had occurred and a judicial declaration to that effect was appropriate. Costs were not awarded in the court below and were not mentioned before us. No more need be said on the topic.

[88] In the result I would order as follows:

1. The appeal is upheld;
2. The order in the court below is set aside and in its stead it is declared that Presidential Act 17 issued on 17 June 1994 constituted a breach of section 8(2) of the Constitution of the Republic of South Africa, No 200 of 1993, to the extent that it discriminated between male and female prisoners who, on 10 May 1994, had children under the age of twelve years.

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16 The order was granted on 16 February 1996, some thirty months after the Act had been issued.

KRIEGLER J

MOKGORO J:

[89] I have read the judgments of my colleagues, and I concur in the order proposed by Goldstone J. I agree that Presidential Act No. 17 of 1994 ("the Presidential Act") is reviewable by this Court, for the reasons given by him. I differ with my colleagues, however, with respect to the precise legal route taken in arriving at the order. I hold that the Presidential Act constitutes "unfair discrimination" contrary to section 8(2) of the interim Constitution ("the Constitution"), but that the unfair discrimination is justified under section 33(1) of the Constitution.

[90] Section 8 of the Constitution provides as follows:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (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.
> (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.
> (b) . . .
> (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."

[91] The facts in this case have been set out in full in the judgment of Goldstone J. In brief, women prisoners with children under the age of 12 were granted remission of their sentences by the President, whereas their male counterparts were not. By reason of section 8(4) of the Constitution, such discrimination is presumed to be unfair discrimination, "until the contrary is established". In my view, that presumption has not been rebutted in this case.

[92] I agree with Goldstone J that the prohibition against unfair discrimination is of crucial importance in our constitutional scheme:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[1]

I further agree with the test proposed by him as to whether discrimination is "unfair":

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1 Para 41.

MOKGORO J

"To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."[2]

[2] Para 43.

MOKGORO J

I disagree, however, on the application of these principles to the facts of this case. I have no doubt that the President acted in good faith, and I am sure much deliberation went into the Presidential Act.[3] The President stated that he took particular account of the need to maintain the integrity of the judicial system and the administration of justice.[4] He also considered the concerns of the public about the release of convicted prisoners.[5] The release of mothers of young children was motivated primarily by a concern for children.[6] No fathers were released, despite an acknowledgment by the government that "a minority of fathers . . . are actively involved in nurturing and caring for their children".[7] In my view, denying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men's aptitude at child rearing, is an infringement upon their equality and dignity.[8] The Presidential Act does not recognize the equal worth of fathers who are actively involved in nurturing and caring for their young children, treating them as less capable parents on the mere basis that they are fathers and not mothers.

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3 See affidavit of Nelson Mandela at para 5. I agree with my colleagues that the affidavits of the President and Ms Starke are admissible.

4 Id.

5 Id.

6 Id at para 6.

7 See affidavit of Ms Starke at paras 5 and 8.

8 *Egan v Canada* (1995) 29 CRR 79 at 104-5.

MOKGORO J

[93] Section 8 of our Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children. As recognized by this Court in *Fraser v Children's Court, Pretoria North and Others*,[9] fathers have a meaningful contribution to make in child rearing, and I am concerned that this Court may be perceived as retreating from the valuable principles laid down in that case. It is important that those principles be adhered to, so that they may

9 1997 (2) BCLR 153 (CC).

begin to benefit all mothers, fathers and their children.[10]

[10] I am optimistic that changes can occur even in traditional African societies, where gender roles are particularly entrenched. There is an inherent flexibility in African customs and traditions, potentially making them responsive to changes in lifestyles. To date, however, that flexibility has been counterbalanced by the conservatism of customary law. The Constitution, however, prompts us to take an affirmative responsibility in correcting this skewed parental role division.

[94] I am unpersuaded by the emphasis in the majority judgment on the vulnerable position of mothers of young children in South Africa. While such mothers may generally be disadvantaged in society, there is no evidence that they are disadvantaged in the penal system in particular. I do not insist that there be a rigid link between the nature of disadvantage suffered by a group, and measures taken to alleviate that disadvantage. There should, however, be *some* correlation between the two. That correlation does not appear to exist here.[11] I therefore hold the Presidential Act to be unfair discrimination, which falls to be justified in accordance with section 33(1) of the Constitution.

[95] Section 33(1) provides in relevant part:

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

[11] I do not think, for example, that the President could have released only black mothers even though, on the whole, they are a more vulnerable group than white mothers.

MOKGORO J

[96] A precondition to the applicability of section 33(1) is that the limitation of a right occur "by law of general application". Although the Presidential Act is not conventional legislation, in my view, it satisfies that precondition. The phrase "by law of general application" has not been interpreted in detail by this Court, but a broad view was taken of "law" by Kentridge AJ in *Du Plessis and Others v De Klerk and Another*.[12] In holding that the words "all law in force" in section 7(2) of the Constitution encapsulate common law as well as statute law, in part because the broad term "reg" is used in the Afrikaans text, Kentridge AJ noted:

> "The term 'reg' is used in other parts of chapter 3 as the equivalent of 'law', for example in s 8 ('equality before the law') and s 33(1) ('law of general application'). Express references to the common law in such sections as s 33(2) and s 35(3) reinforce the conclusion that the law referred to in s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law. Nor can I find any warrant in the language alone for distinguishing between the common law of delict, contract, or any other branch of private law, on the one hand, and public common law, such as the general principles of administrative law, the law relating to acts of State or to State privilege, on the other."[13]

Kriegler J added that

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12 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

13 Id at para 44 (internal footnote omitted).

"s 33(1) . . . draws no distinction between different categories of law of general application . . . . [I]t is irrelevant whether such rule is statutory, regulatory, horizontal or vertical, and it matters not whether it is founded on the XII Tables of Roman law, a Placaet of Holland or a tribal custom."[14]

[14] Id at para 136.

MOKGORO J

[97] Section 2 of the Interpretation Act 33 of 1957 ("the Interpretation Act"), defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law", and presumptively applies to the interpretation of every such "law. . . in force" and of "all by-laws, rules, regulations or orders made under the authority of any such law".[15] Delegated legislation must be published:

> "When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister . . . , such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*."[16]

The Interpretation Act does not specifically address the prerogative powers possessed by the President under prior constitutions.

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15 Section 1 of the Interpretation Act.

16 Section 16 of the Interpretation Act.

[98] Guidance as to the meaning and purpose of "law of general application" can also be obtained from decisions of the European Court of Human Rights and the Canadian Supreme Court, both of which have considered the phrase "prescribed by law" in the context of limitation of rights. The judgment of the European Court of Human Rights in *The Sunday Times v The United Kingdom*[17] concerned an injunction issued in accordance with the common law of contempt, which infringed a newspaper's freedom of speech. Article 10 of the European Convention of Human Rights provides, so far as is material:

> "2. [Freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law* and are necessary in a democratic society . . . ." (Emphasis added).

[99] In that case, the question arose whether a common law limitation fell within the term "prescribed by law", so as to be a permissible limitation on the right to freedom of expression.[18] The court ruled as follows:

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the

17 (1979) 2 EHRR 245.

18 Id at paras 46-53.

circumstances, the consequences which a given action may entail."[19]

On the facts, the court held that the common law rule fulfilled the requirements of both accessibility and precision.[20]

[100] The views of the Canadian Supreme Court are also of assistance. Like the South African Constitution, the Canadian Charter of Rights and Freedoms (the "Canadian Charter") contains a general limitations clause, which provides that:

19 Id at para 49.

20 Id at para 53.

> "The Canadian Charter . . . guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society." (Emphasis added).[21]

That Court has consistently held rules emanating from statute, regulation and common law to be "prescribed by law".[22] The Canadian Supreme Court is divided, however, on whether rules emanating from directives or guidelines, issued by government departments or agencies but falling outside the category of officially published delegated legislation, are "prescribed by law".[23]

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21 Section 1, Canadian Charter.

22 See for example *R v Therens* (1985) 18 DLR (4th) 655 at 680; see generally Hogg *Constitutional Law of Canada* 3 ed Vol 2 (Carswell, Ontario 1992), at 35-12.

23 See Hogg, id at 35-12 at n 54.

[101] The decision in *Committee for Commonwealth of Canada v Canada*[24] illustrates that division. The case concerned internal government directives alleged to infringe freedom of speech. Lamer CJC considered that the limitations clause could not apply because the directives were not "law".[25] He explained that the government's internal directives and policies differ from statutes and regulations in that they are not generally published, and therefore are unknown to the public.[26] Lamer CJC added that the directives were binding only on government officials, and could be cancelled at will.[27] The views of Lamer CJC echo the following concerns of Wilson J in *McKinney v University of Guelph*:[28]

> "[The limitations clause] serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective."

McLachlin J, on the other hand, took a much broader view of the meaning of "law" in *Committee for Commonwealth v Canada.* She considered that the "prescribed by law"

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24 (1991) 77 DLR (4th) 385.

25 Id at 401.

26 Id.

27 Id.

28 (1991) 76 DLR (4th) 545 at 604

requirement was to eliminate from the limitations clause purview conduct which is purely arbitrary. She cautioned that:

> "From a practical point of view, it would be wrong to limit the application of [the limitations clause] to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under [the limitations clause]. In my view, such a technical approach does not accord with the spirit of the Charter and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary."[29]

[102] It can be seen then that several concerns underlie the interpretation of "prescribed by law". The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals.[30] In my view, those rule of law concerns are adequately

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29 Supra n 24 at 461.

30 It should be noted that those concerns also underlie the theoretical distinction between "legislative" and "non-legislative" acts in administrative law. See Baxter *Administrative Law* (Juta, Cape Town 1984) at 349-51.

met by the Presidential Act.[31] The remaining question about the Presidential Act concerns its origin as executive rule making rather than as legislation, which I shall now address.

[31] I note that the Presidential Act was not published in the Gazette, as is generally required for delegated legislation. I agree with McLachlin J in *Committee for Commonwealth of Canada v Canada*, however, that formal publication requirements are not dispositive for the purposes of section 33(1). As regards the "general application" requirement, I consider the Presidential Act is distinguishable from the impugned legislation in *Matinkinca and Another v Council of State, Ciskei and Another* (1994) (1) BCLR 17 (Ck). It was held in that case (at 41) that a decree indemnifying Ciskei security forces and demonstrators for the Bisho Stadium massacre was not a law of general application. That decree applied as a retroactive release to the security forces and demonstrators involved in one specific incident. By contrast, the Presidential Act applies to all prisoners in South Africa, whenever they were convicted and wherever they were held.

MOKGORO J

[103] The origin of the Presidential Act in executive rule making rather than in a formal legislative process is not fatal to the application of section 33(1). As noted by Wilson J, supra, there are safeguards attaching to the legislative process, because legislation is the subject of a detailed and rigorous procedure, upon which many people have an opportunity to comment and vote. However, there are numerous instances of delegated legislation drafted by the executive, which legislation would undoubtedly be accepted as "law".[32] The difference between the Presidential Act, and standard instances of executive rule making, in the form of delegated legislation, is the absence of a parent statute in the former case. In standard cases of executive rule making therefore, at least the parent statute has undergone the rigours of the legislative process. That difference cannot in my view justify different treatment for the Presidential Act, which represents an exercise of public power derived directly from the Constitution. The legitimacy which attaches to delegated legislation by reason of the parent statute must attach with equal force to rules representing a direct exercise of power granted by the Constitution. The Constitution, after all, was a vigorously negotiated document.

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32 See generally Baxter, supra n 30 at ch 9.

[104] I consider it undesirable to take a technical approach to the interpretation of "law of general application". As noted by McLachlin J, supra, a technical approach unduly reduces the types of rules and conduct which can justify limitations. That exclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3, and when such rights are regarded as breached. In other words, courts which wish to uphold action or rules as justified, but are unable to do so because of a narrow definition of "law of general application", may strain the interpretation of other sections of the Constitution in order to find the conduct did not infringe the right in question.[33] Further, the "law of general application" requirement is merely a precondition to the applicability of section 33(1). If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself. To conclude, the Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals. In my view, that is sufficient to fall within "law of general application" for the purposes of section 33(1).

[105] I shall now turn to the other requirements of section 33(1), namely whether the limitation is reasonable and justifiable in an open and democratic society. The President has explained in his affidavit that the reason for releasing mothers was a concern for the plight of children.

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[33] See Woolman in Chaskalson et al *Constitutional Law of South Africa* (Juta & Co Ltd, Kenwyn 1996) at 12-19, n 1.

> "6. With regard to the grant of special remission to all mothers with minor dependent children under the age of 12 years, I was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. Having spent many years in prison myself, I am well aware of the hardship which flows from incarceration. I am also well aware that imprisonment inevitably has harsh consequences for the family of the prisoner.
>
> . . . .
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> 8. Shortly before the signing of the Presidential Act I stated the following in a speech . . . :
>
> 'Our policies must turn into reality the principle that every child deserves to have a decent home and be brought up in the loving care of a family. The terrible legacy of street children has to be attended to with urgency. A collective effort has to be launched by the government, civil society and the private sector to ensure that every child is looked after, has sufficient nutrition and health care.'"

There can be no doubt that the aim of ensuring young children are looked after is legitimate.[34] The real controversy arises as to whether the Act is a proportionate response in light of the unfair discrimination suffered by fathers.

[106] Despite my reservations at its gender stereotyping, I conclude that the Presidential Act is justified. First, although fathers have not benefitted from the group pardon, they

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[34] This Court has affirmed the importance of children's rights. In *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC), we declared unconstitutional section 294 of the Criminal Procedure Act 51 of 1977 which authorised whipping for juveniles.

are still entitled to apply for remission on an individual basis. Second, I agree with Goldstone J that politically, it would have been virtually impossible to release all men and women with children under twelve, because of the sheer numbers involved. Further, there would have been great administrative inconvenience in engaging in a case-by-case evaluation for each mother and father as to whether they were the primary care giver for their child. Thus the basic question put to us is whether only the women should have been released, or no one released. In other words, the issue was whether some children with parents in prison be united with their parent, or no children be united with their parents. I consider the aim of easing the plight of South African children to be extremely important, and that every possible opportunity should be taken to further that aim. The temporary denial of parenthood to fathers is therefore justifiable with reference to the interests of the children whose mothers were released. Accordingly, I hold the Presidential Act to be justified in accordance with the requirements of section 33(1).

O'REGAN J:

[107] I have had the opportunity of reading the judgments of Goldstone J and Kriegler J. I concur fully in the judgment of Goldstone J. I have nothing to add to his analysis of the reviewability of the President's power to pardon prisoners in terms of section 82(1)(k) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim

Constitution"). However, I wish to add a few remarks concerning the question of whether the President discriminated unfairly when he exercised this power to remit the sentences of mothers of young children but not fathers of young children.

[108] The Respondent's argument was that in releasing mothers, but not fathers, the President discriminated on the grounds of sex. There can be no doubt that in not affording fathers the opportunity of a special remission of sentence, the President did discriminate against fathers on the basis of their sex. Section 8 of the interim Constitution provides:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (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.
> (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.
> (b) . . .
> (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."

The denial of an opportunity such as a special remission of sentence is sufficient in my view to constitute discrimination as contemplated by section 8(2). Having produced

prima facie proof of discrimination on the grounds of sex, the Respondent argued (relying on section 8(4) of the interim Constitution) that that was sufficient proof of unfair discrimination in breach of section 8(2) unless the contrary was established.

[109] According to his affidavit, the President released mothers of young children because he was concerned for the welfare of children. In his view, mothers play a "special role . . . in the care and nurturing of young children". Both Goldstone J and Kriegler J have observed that the reason given by the President for the release of mothers was based on a stereotype or generalisation concerning the special role that mothers play in our society in relation to the care and rearing of children. Although the evidence upon which the President based his assertion was perfunctory, I, like Goldstone J and Kriegler J, see no reason to doubt that as a matter of fact in South African society, mothers not only bear a considerably greater proportion of the burdens of child rearing than fathers, but also that mothers, as a general rule, do have a special role in relation to the nurturing and care of children. There are, of course, some fathers who share fully in the responsibilities of child rearing.

[110] The responsibility borne by mothers for the care of children is a major cause of inequality in our society. Being responsible for the rearing of children is a great privilege, but also a great strain. Many women rear children single-handedly with no help, financial or otherwise, from the fathers of the children. The need to support

children financially is one of the reasons for women seeking work outside the home. However the responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.

[111] Kriegler J finds that the President's reliance on the generalisation constituted unfair discrimination, even though the discrimination was directed against fathers not mothers. He holds that only when two strict requirements are met will reliance upon such a generalisation constitute fair discrimination: where it is strongly indicated that the advantages conferred by reliance upon the generalisation outweigh the disadvantages and secondly where there is a connection between the discriminatory action and the advantage to the previously disadvantaged (at para 82). In my view, his approach is too restrictive. Even where discrimination in a particular case arises from reliance upon a stereotype or generalisation, the focus of the section 8(2) determination must remain whether the impact of the discrimination was unfair.

[112] To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. There are at least two factors relevant to the

determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. 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. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of section 33 of the interim Constitution.

[113] In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case. With respect, therefore, I cannot agree with Kriegler J that it is a "profound and troubling" disadvantage for women when the

President says that mothers play a special role in nurturing children. The profound disadvantage lies not in the President's statement, but in the social fact of the role played by mothers in child rearing and, more particularly, in the inequality which results from it. Putting an end to that inequality is a major challenge for our society. There can be no doubt that where reliance upon the generalisation results in greater disadvantages for mothers, it would almost without question constitute unfair discrimination. On the other hand, were we to establish the rigid rule proposed by Kriegler J that reliance upon that generalisation even to afford some advantage to mothers would, except in very narrow circumstances, be unfair, we may well make the task of achieving the equality desired by the Constitution more difficult. On the facts of this case, I conclude that the President's reliance upon the fact of women's greater share of child rearing responsibilities in order to afford an advantage to some women has not caused any significant harm to other women.

[114] The harmful impact of the discrimination in this case was not experienced by mothers, but by fathers. However in my view, that impact was far from severe. Fathers were denied an opportunity of special remission of sentence. There is no doubt that an early release from jail is beneficial. But in assessing the impact of the discrimination, it must be remembered that their imprisonment resulted, not from the President's act in denying them remission, but from their having been convicted of criminal offences. In addition, they still have the right to apply for special remission of sentence in the light of

their own circumstances. The effect of the discriminatory act was, therefore, in my view not to cause substantial harm. That harm would have been far more significant in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood.

[115] In considering the factors relevant to a determination of unfairness, it appears that the discrimination in this case caused no significant harm to mothers and no severe harm to the interests of fathers. A further relevant factor in this case is the nature of the presidential power. In that regard, I have nothing to add to the analysis contained in the judgment of Goldstone J (at paras 44-46). That power, when exercised to confer a pardon upon groups, is resistant to individualised application. It may well have been impossible for the President to exercise it in this case in a more individualised way. In the light of all these factors, therefore, I come to the conclusion that the discrimination caused by the President remitting the sentences of mothers of young children but not the sentences of fathers of young children was not unfair.

Chaskalson P, Mahomed DP, Ackermann, Goldstone, Langa, Madala, and Sachs JJ concur in the judgment of O'Regan J.

For the appellants:	GJ Marcus and AG Jeffrey instructed by the State Attorney (Kwazulu-Natal)
For the respondent:	Mr M Pillemer instructed by Shepstone & Wylie

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 4/96

WILLEM M PRINSLOO Applicant

versus

GERHARDUS STEPHANUS VAN DER LINDE First Respondent

THE MINISTER OF FORESTRY AND WATER AFFAIRS Second Respondent

Heard on: 7 November 1996

Decided on: 18 April 1997

JUDGMENT

ACKERMANN J, O'REGAN J AND SACHS J:

[1] Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna. The Forest Act 122 of 1984 (the "Act") has as one of its principal objects the prevention and control of such fires. A major method of achieving this is to create various fire control areas where schemes of compulsory fire control are established, with special emphasis on the clearing and maintenance of fire belts between neighbouring properties.[1] Landowners in areas outside of such fire control areas are, on the other hand, encouraged but not required to embark on similar fire

[1] Part VI of the Act deals with these issues.

control measures.[2] A number of provisions prescribe criminal penalties for landowners in fire control areas who fail to fulfil their statutory obligations.[3] In addition, an offence is created in respect of persons who are wilfully or negligently responsible for fires "in the open air",[4] while it is an offence for any landowner in any area to fail to take such steps as are under the circumstances reasonably necessary to prevent the spread of fires.[5]

[2] One provision in the Act dealing expressly with responsibility for a fire on land outside of a fire control area is section 84. It reads as follows:

> **"84. Presumption of negligence.** - When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved."

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2 Section 24.

3 Sections 75(7) and (8).

4 Section 75(2)(b).

5 Section 75(8)(f).

It is the constitutionality of this provision which is under consideration in the present matter.

THE REFERRAL

[3] The present matter comes before us by way of a referral made in terms of section 102(1) of the Constitution of the Republic of South Africa, 1993 (the "interim Constitution")[6] by Van der Walt DJP in the Transvaal Provincial Division of the Supreme Court (as it was then called). Action had been instituted in that division by the first respondent (as plaintiff) as a result of damage allegedly caused to his farmlands by the spread of a fire from the neighbouring land of the applicant (defendant in those proceedings).[7] It was common

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6 Which provides the following:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision . . ."

7 When the matter was referred to this Court, the Minister of Water Affairs and Forestry, acting in terms of section 102(10) of the interim Constitution, intervened as second respondent, in order to defend the validity of section 84 of the Act.

cause in this Court that the fire occurred on land situated outside a fire control area.

[4] As this Court has held on a number of occasions, a court should only exercise its power under section 102(1) after it is satisfied: first, that the issue falls within the exclusive jurisdiction of the Constitutional Court; secondly, that it may be decisive for the case; and, thirdly, that it would be in the interest of justice for the referral to take place.[8]

[8] *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 8; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 2; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at paras 4-6.

[5] Dealing with the second requirement, Didcott J in *Luitingh v Minister of Defence* held that the requirement was satisfied "once the ruling given there may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled".[9] In *Brink v Kitshoff NO,* Chaskalson P commented that this would include an issue which, if decided in favour of the party who raised it, would put an end to or materially curtail the litigation.[10] It would also include an issue such as the onus of proof in relation to the admissibility of a confession in a criminal trial, which arose in *S v Zuma and Others*[11] and *S v Mhlungu and Others*.[12] In *Zuma*'s case the decision of the entire case in fact depended on where the onus lay. In *Mhlungu*'s case a ruling would determine the way in which the voir dire was to be conducted, and was also necessary in fairness to the accused to enable them to decide whether or not to give evidence.

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9 Id at para 9.

10 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 10.

11 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA).

12 Supra n 8.

[6] Van der Walt DJP issued an order granting the application. His reasons appear from an annexure to the order in the following terms:

> "1.3 Dit is van wesenlike belang dat die geskilpunt of die vermoede van skuld geskep soos in Artikel 84 ongrondwetlik is al dan nie, en daarop staat gemaak kan word al dan nie, beslis word voordat die verhoor tussen die Applikant en eerste Respondent 'n aanvang neem, omdat dit sal bepaal watter getuies die gedingspartye (indien enige) gaan roep as getuies om die party wat die bewyslas dra hom daarvan te laat kwyt, en wie die beginlas om met die verhoor op die meriete te begin dra.
>
> 1.4 Hierdie is nie 'n geval waar die vraag of Artikel 84 grondwetlik bestaanbaar is al dan nie eers uitgemaak kan word nadat getuienis oor die ander geskilpunte tussen die partye aangehoor is en feitebevidings [sic] daaroor gemaak is wat tersake kan wees nie, omdat die vraag na wie die bewyslas en beginlas dra, van deurslaggewende belang is vir hoe die saak deur die partye in die hof aangevoer moet word."[13]

[13] As contained in annexure "B" to the referral judgement entitled: "Formulering Van Geskilpunt En Redes Vir Verwysing".

[7] In the case of *Stevens v Stevens*,[14] Wright J came to the opposite conclusion in an action which was also brought under the Act. His opinion that a referral of the constitutionality of section 84 of the Act was, at that stage, not in the interest of justice was based on the probability that either of the parties would be able, without the assistance of the presumption, to either prove or disprove the negligence of the defendant. It is neither necessary nor desirable to attempt to resolve the apparent conflict between the conclusions of Van der Walt DJP and Wright J because every case must be decided on its own particular facts and circumstances and what is essentially a judgment on the peculiar facts and pleadings before a judge requested to refer a matter in terms of section 102(1) cannot be elevated to a rule of law which is capable of automatic application to the referral of all other cases brought under the Act.

[8] Van der Walt DJP clearly formed the view, as is evident from the above reasons, that the ruling on the constitutionality of section 84 of the Act might have a crucial bearing on a significant aspect of the way in which the parties would conduct their cases. This brings it within the formulation of the requirement in *Luitingh* quoted above. It cannot confidently be stated that Van der Walt DJP was wrong in the judgment he formed in this regard and accordingly it cannot be concluded that this particular referral requirement was not met. That Van der Walt DJP must have considered it in the interest of justice to refer the matter at that stage follows inevitably from the reasons furnished regarding the crucial importance of deciding the incidence of onus at the commencement of the proceedings. The learned judge did not

[14] 1996 (3) BCLR 384 (O) at 390E-G.

furnish explicit reasons why he considered that there was a reasonable prospect of the section being declared unconstitutional, but at the time that the referral was made there was little guidance on the construction of section 8, which is a matter of some complexity. Under these circumstances it is fair to infer that, at the time and in the context of the referral, Van der Walt DJP must have considered that there was such a reasonable prospect. In any event no useful purpose would be served in the circumstances of this particular case by considering how the applicant's prospects of success on the constitutional challenge looked at the time of the referral. Full argument has been heard on the challenge and the Court is in a position to deal with that definitely and finally. In our view the referral should be accepted and the merits of the constitutional challenge to section 84 considered.

[9] The issues in the referral were formulated as follows:

> "2. Die geskilpunt tussen die partye is meer in die besonder die vraag of die vermoede van skuld wat geskep word deur Artikel 84 van die Boswet nie in botsing is met die fundamentele regte vervat in Hoofstuk 3 van die Grondwet nie, en meer in die besonder:
>
> 2.1 Die reg op gelykheid voor die reg en op gelyke beskerming deur die reg soos vervat in artikel 8(1) van die Grondwet;
>
> 2.2 Die verbod op diskriminasie soos vervat in artikel 8(2) van die Grondwet;
>
> 2.3 Die reg om onskuldig geag te word totdat skuld bewys word soos vervat word [in] Artikel 25(3)(c) van die Grondwet."

Whether there is a constitutional right to a fair civil trial and, if so, whether an onus provision such as that provided for in section 84 might infringe such right, are issues with

which we are not concerned in this case and on which we need express no view. Counsel for the applicant expressly renounced reliance on any such argument.

PRESUMPTION OF INNOCENCE: SECTION 25(3)(c)

[10] In his written and oral argument, counsel for the applicant focused primarily on the third point, namely an alleged violation of the right to be presumed innocent, as contained in section 25(3)(c) of the interim Constitution. The obvious difficulty he had to overcome was that the applicant was a defendant in a civil trial and not an accused in a criminal trial. In order to circumvent this problem, he argued that the test to be adopted was an objective one, which did not depend upon the subjective situation of the applicant, but rather on the objective reach of the provision. Thus, if the impugned section, objectively speaking, was unconstitutional, it would be of no force and effect for civil as well as criminal trials. The word "action", he contended, was ambiguous and had to be read in its context, particularly in relation to the fact that the Afrikaans text used the word "geding", which corresponded to the wide English term "proceedings".[15] Furthermore, criminal prosecutions in fact frequently took place and section 84 of the Act was used to establish guilt.[16] It followed that the word "action" was wide enough to include criminal as well as civil proceedings, with the result that it infringed the rights of accused persons as protected by section 25(3)(c). Once it was invalid because of its application to criminal trials, he concluded, it lost all its force and effect and accordingly could not be invoked in civil

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[15] The English text is the signed copy.

[16] Other than this assertion, no evidence was placed before the Court to support this contention.

proceedings.

[11] In our opinion, counsel was wrong both in relation to his approach to interpretation and in respect of the consequences of the construction he urged upon us. We shall make the following assumptions (most of them very questionable) in his favour (without deciding the correctness of any of them): That standing of a civil claimant to challenge a "reverse onus" in a civil trial provides standing to challenge the constitutionality of a statutory reverse onus provision relating to criminal trials, even when that claimant is not in jeopardy of prosecution;[17] that the word "action" in section 84 is wide enough to encompass criminal proceedings; that there is sufficient material before this Court to enable us to determine whether a reverse onus in a criminal trial would be unconstitutional; and that in fact such a reverse onus in a criminal trial would be unconstitutional.

[12] Even on these assumptions, there is one insuperable obstacle to counsel's argument, and that is the approach to interpretation enjoined upon us by section 35(2) of the interim Constitution, which reads as follows:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

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17 See the majority judgment in *Ferreira v Levin* supra n 8 at paras 165-6.

[13] Its terms are peremptory. Our task is not to find the one "correct" interpretation of a statutory provision, but, given more than one reasonably possible construction, to prefer one which is consistent with the interim Constitution. In this respect, ambiguity does not help the applicant. On the contrary, any ambiguity must be resolved by favouring the construction which keeps the provision constitutionally alive, provided the construction is reasonable. In keeping with this approach, we have no difficulty in deciding that even if the word "action" was capable of including criminal proceedings, and even if such inclusion resulted in an unconstitutional invasion of a right to a fair criminal trial, it was also reasonably capable of a more restricted meaning which excluded criminal trials and thereby avoided unconstitutionality. It follows that in terms of section 35(2) the latter interpretation would be preferred. Even if all the assumptions made in paragraph 11 above were correct, a proposition which is open to doubt, the attack based on section 25(3)(c) would still fail.

[14] In addition, even a finding in favour of the applicant's argument concerning section 25(3)(c) would not enable him to get around a further obstacle. The very kind of situation contended for by counsel, namely that section 25(3)(c) rendered section 84 unconstitutional in part, appears to have been contemplated by the interim Constitution, and answered in quite a different way to that for which he contends. Section 98(5) of the interim Constitution provides as follows:

> "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 . . ." (our emphasis)

Thus, even if this Court were to hold that section 84 necessarily included criminal as well as civil proceedings, and that the presumption in relation to criminal trials was unconstitutional, it would have to declare in any order that it made that the provisions of the section were inconsistent only to the extent that they applied to criminal proceedings.[18] The applicant can therefore not succeed in the attack based on section 25(3)(c) of the interim Constitution.

THE EQUALITY ISSUES: SECTION 8

[15] While the attack based on section 8 was not strongly pressed by counsel for the applicant, it must nevertheless be given due consideration. For present purposes the relevant provisions of Section 8 of the interim Constitution read as follows:

> "**Equality.**
>
> **8.** (1) Every person shall have the right to equality before the law and to equal protection of the law.
>
> (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.
>
> (3)(*a*) This section shall not preclude measures designed to achieve the

[18] *Ferreira v Levin* supra n 8 at para 131; *Bernstein v Bester NNO* supra n 8 at para 49.

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.

(*b*) . . .

(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."

[16] In his written argument, counsel pointed to the differentiation between defendants in veld fire cases and those in other delictual matters. According to him, this differentiation had no rational basis, because the apparent object that the legislature sought to achieve by reversing the general rule regarding the incidence of onus that whoever avers must prove, could have been, and, indeed, already was, accomplished by means of common law aids to proof. He referred in particular to the concept of res ipsa loquitur[19] and the practice of triers of fact to require less evidence to establish a prima facie case if the facts in issue are peculiarly within the knowledge of the opposing party.[20] A second differentiation which was raised by first respondent, relates to the fact that the presumption of negligence applies only in respect of fires in non-controlled areas, and not to those spreading in controlled areas, which at first blush appears to be incongruous. The challenge to constitutionality in both cases would be based either on a breach of the right to equality as guaranteed in section 8(1) or on a violation of the prohibition of

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19 Hoffmann and Zeffertt *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 551.

20 *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4. See also Hoffmann and Zeffert id at 512.

discrimination contained in section 8(2). To determine whether either challenge in terms of section 8 is correct, it is necessary to consider first the proper approach to be taken to sections 8(1) and (2).

[17] If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. As Hogg puts it:

> "What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishments on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of the property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone."[21]

[21] Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) at para 52.6(b).

The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory "in the constitutional sense".[22]

[18] Even a cursory summary of international experience indicates that there are no universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached. The varying emphases given in different countries depend on a combination of the texts to be interpreted, modes of doctrinal articulation, historical backgrounds and evolving standards. Questions of institutional function and competence might play a role when reviewing, for example, legislation of a social and economic character.[23]

[19] In relation to the text and context of the interim Constitution, it would therefore seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, might create more problems than it solved. At the same time, we must be mindful of section 35(1) which states:

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22 A phrase used by Didcott J in *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 19.

23 Nowak and Rotunda *Constitutional Law* 5 ed (West Publishing Co., St. Paul, Minnesota 1995) at 362.

"**Interpretation.**

35. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality . . ."

[20] Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage. While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity. All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.

[21] In *Brink v Kitshoff NO*, a general review was conducted of the approaches adopted in

Canada, the United States of America, India and in international conventions and covenants.[24] That review concluded:

> ". . . that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality."[25]

The Court emphasised that section 8 is the product of our own particular history, that perhaps more so than in the case of other provisions in Chapter 3 the interpretation of section 8 must be based on its own language and that our history was particularly relevant to the concept of equality.[26]

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24 Supra n 10 at paras 34-9.

25 Id at para 39 per O'Regan J, a judgment concurred in by all the members of the Court.

26 Id at para 40. The preamble to the interim Constitution underlines the need for this approach.

[22] When section 8 is read as a whole it appears that the concept of equality is referred to in different ways. In section 8(1) it is described positively as a "right to equality before the law" and as a "right . . . to equal protection of the law". In section 8(2) it is formulated negatively: "No person shall be unfairly discriminated against, directly or indirectly. . .". It may be neither desirable nor feasible to divide the various subsections or descriptions into watertight compartments. Nonetheless, it would appear that the right to "equality before the law" is concerned more particularly with entitling "everybody, at the very least, to equal treatment by our courts of law".[27] It makes clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered. This right, or this aspect of the right guaranteed, does not apply to the present case.

[23] The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination. This needs some elaboration. We deal with the former first.

[24] It must be accepted that, in order to govern a modern country efficiently and to harmonise

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[27] Supra n 22 at para 18 per Didcott J for the Court.

the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. What this further element is will be considered later.

[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences"[28] that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good,[29] as well as to enhance the coherence and integrity of

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[28] Sunstein "Naked Preferences and the Constitution" 84 *Columbia Law Review* 1689 (1984).

[29] See Tribe *American Constitutional Law* (Foundation Press Inc., Mineola 1988) at 1451.

legislation.[30] In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority . . . to a culture of justification".[31]

[26] Accordingly, before it can be said that mere differentiation infringes section 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe section 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present.

[27] It is to section 8(2) that one must look in order to determine what this further element is. For reasons which will subsequently emerge it is unnecessary to consider the precise ambit or limits of this subsection. It is, however, clearly a section which deals not with all differentiation

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30 Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (Kluwer, Deventer 1990) at 539.

31 Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SA Journal of Human Rights* 31 at 32, cited in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 156 n 1.

or even all discrimination but only with unfair discrimination. It does so by distinguishing between two forms of unfair discrimination and dealing with them differently.

[28] The first form relates to certain specifically enumerated grounds ("specified grounds") on the basis whereof no person may unfairly be discriminated against. The specified grounds are race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. When there is prima facie proof of discrimination on these grounds it is presumed, in terms of subsection (4), that unfair discrimination has been sufficiently proved, until the contrary is established. These are not the only grounds which would constitute unfair discrimination. The words "without derogating from the generality of this provision", which introduce the specified grounds, make it clear that the specified grounds are not exhaustive. The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.

[29] The question arises as to what grounds of discrimination this second form includes. A purely literal reading and application of the phrase "without derogating from the generality of this provision" would lead to the conclusion that discrimination on any ground whatsoever is proscribed, provided it is unfair. Such a reading would provide no guidance as to what unfair meant in regard to this second form of discrimination. It would provide very little, if any, guidance in deciding when a differentiation which passed the rational relationship threshold constituted unfair discrimination. It also seems unlikely that the content of the concept unfair discrimination would be left to unguided judicial judgment. We are of the view, however, that

when read in its full historical and evolutionary context and in the light of the purpose of section 8 as a whole, and section 8(2) in particular, the second form of unfair discrimination cannot be given such an extremely wide and unstructured meaning.

[30] Proper weight must be given to the use of the word "discrimination" in subsection (2). The drafters of section 8 did not, for example, follow the model of the Fourteenth Amendment to the Constitution of the United States which, in paragraph 1 thereof, refers only to the denial of "the equal protection of the laws." Section 8(1) certainly positively enacts the encompassing and important right to "equality before the law and to equal protection of the law", but section 8 does not stop there. It goes further and in section 8(2) proscribes "unfair discrimination" in the two forms we have mentioned.

[31] The proscribed activity is not stated to be "unfair differentiation" but is stated to be "unfair discrimination". Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.[32] Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the

[32] See *S v Makwanyane* id at paras 262 and 328-30.

grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

[32] In Dworkin's words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.[33] We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[34]

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33 *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass 1977) at 227.

34 Case No CCT 11/96, in which judgment is being delivered simultaneously with this judgment, at para 41.

and in which the following passage from *Egan v Canada*[35] was quoted with approval:

[35] (1995) 29 CRR (2d) 79 at 104-5, internal footnotes omitted.

> "This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society . . . More than any other right in the *Charter*, s.15 gives effect to this notion . . . Equality, as that concept is enshrined as a fundamental human right within s.15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."[36]

[33] Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well. It is not necessary to say more than this in the present case, for reasons which emerge later in this judgment.[37]

[34] Since the adoption of the interim Constitution, the provisions of section 8 have been referred to in a number of reported Supreme Court judgments. In some the reference has been somewhat in passing; in others provisions have been held to be merely regulatory while in certain instances they have been held to constitute a clear breach of the section 8(2) prohibition

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[36] Supra n 34 at para 41.

[37] See para 41 infra.

against unfair discrimination. The question whether, and to what extent, the protection of section 8 may be invoked by juristic persons has also been considered. None of these cases has been concerned with the constitutionality of a statutory onus provision in civil cases. Nor has an attempt been made in any of them to conduct a comprehensive analysis of the proper interpretation of section 8 and in particular the relationship between section 8(1) and 8(2). It therefore does not seem necessary for us to consider or comment on any of them individually.

[35] Turning now to the case before us, it is necessary in the first place to enquire whether the necessary rational relationship exists between the purpose sought to be achieved by section 84 of the Act and the means sought to achieve it. The objectives of the Act as set out in the long title, are "[t]o provide for . . . the prevention and combating of veld, forest and mountain fires; . . . and matters connected therewith." In essence, applicant contended that section 84 lacked rationality because it did not use the least onerous means of achieving its objectives. This approach, however, is based on two misconceptions. First, the applicant is prematurely importing a criterion for justification into a test to be applied at the infringement enquiry (definitional or threshold) stage. The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry. Second, underlying the argument is an assumption that somehow there should be a "presumption of innocence" in civil matters as weighty and untouchable as that in criminal cases, so that a reverse onus in a civil matter should be as vulnerable to impeachment as one in a criminal trial.

[36] In regard to the first misconception, a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way. In any civil case, one of the parties will have to bear the onus on each of the factual matters material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the onus concerning negligence. As long as the imposition of the onus is not arbitrary, there will be no breach of section 8(1). In rare circumstances, it may be that the allocation of onus will impair other constitutional rights and a challenge will then arise. That is not the case here.

[37] In regard to the second misconception, an onus in a civil case cannot be equated with the overall onus of proof in criminal cases. In *Mabaso v Felix*[38] the Appellate Division described the fundamental difference between the incidence of the onus of proof in civil and criminal cases in the context of assault as follows:

[38] 1981 (3) SA 865 (A).

> "In its anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law . . . considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct."[39]

[38] There is indeed nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established "golden thread" like the presumption of innocence that runs through criminal trials.[40] As Davis AJA, quoting Wigmore, put it:

> ". . . all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness.'"[41]

As long as the rules relating to the onus are rationally based, therefore, no constitutional challenge in terms of section 8 will arise.

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39 Id at 872G-H.

40 *S v Zuma* supra n 11 at para 33 quoting *Woolmington v Director of Public Prosecutions* (1935) AC 462 (HL) at 481.

41 *Pillay v Krishna and Another* 1946 AD 946 at 954.

[39] The purpose of the Act is to prevent veld fires. There can be no doubt that the State has a legitimate and strong interest in preventing veld, forest and mountain fires. It has chosen to fulfil its responsibility by means of the scheme set out in the opening paragraph of this judgment. In fire control areas there is compulsory participation in schemes to prevent fires spreading, involving shared information, planning and execution.[42] Specific statutory duties are imposed with prescribed penalties for disobedience.[43]

[40] In non-controlled areas, on the other hand, there are opportunities for joint management on a voluntary basis only, with no obligation, and no necessity for shared management and pooled knowledge.[44] Persons are left in the dark as to what steps their neighbours have taken to avert fires. The causes of the fire and its spread will often be peculiarly within the knowledge of the neighbour. The specific duties imposed on landowners in fire control areas are accordingly counterbalanced by the general inducement contained in section 84 for those responsible for land in non-controlled areas to be specially vigilant lest they find themselves saddled with

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42 Sections 18 to 23.

43 Sections 75(7) and (8).

44 See section 24.

responsibility for damage caused by fire spreading from their land. The purpose of section 23 of Act 72 of 1968, the predecessor of the present section 84, was identified by Fannin J as follows:

> "It was argued on behalf of the plaintiff that the presumption was created in recognition of the peculiar difficulties faced by a person who suffers damage as a result of a fire whose origin he may be wholly unable to establish, and of the fact that, in most cases, if not all, a person from whose land a fire spreads will be in a much better position to show how and where the fire originated, whether it was lit by himself or by anyone for whose acts he is in law responsible and the manner in which the fire was dealt with, if at all, by him or by his servants or agents. This, I think, is undoubtedly correct. Furthermore, a person who has suffered as a result of a fire which has come from another's land will often not be in a position to embark upon any investigation as to the origin or cause of the fire, and will certainly have no right to enter upon that land to conduct any such investigation. That such difficulties in relation to fires have long been recognised appears from a perusal of *Voet*, 9.2.20, which however relates to fires in buildings."[45]

In our view, there can be no doubt that a rational relationship is demonstrated between the purpose sought to be achieved by section 84 and the means chosen.

[41] This does not end the matter, because despite the existence of the aforementioned rational relationship between means and purpose, the particular differentiation might still constitute unfair discrimination under the second form of unfair discrimination mentioned in section 8(2). The regulation effected by section 84 in the present case differentiates between owners and occupiers of land in fire control areas and those who own or occupy land outside such areas.

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[45] *Quathlamba (Pty.) Ltd. v Minister of Forestry* 1972 (2) SA 783 (N) at 788B-D.

Such differentiation cannot, by any stretch of the imagination, be seen as impairing the dignity of the owner or occupier of land outside the fire control area. There is likewise no basis for concluding that the differentiation in some other invidious way adversely affects such owner or occupier in a comparably serious manner. It is clearly a regulatory matter to be adjudged according to whether or not there is a rational relationship between the differentiation enacted by section 84 and the purpose sought to be achieved by the Act. We have decided that such a relationship exists. Accordingly, no breach of section 8(1) or (2) has been established.

CONCLUSION

[42] In the result the applicant has not established that section 84 of the Act is in any way inconsistent with the provisions of section 8(1) or (2) or section 25(3)(c) of the interim Constitution. The case should accordingly be referred back to the Transvaal Provincial Division of the High Court. No order for costs was asked for, indeed counsel specifically agreed that none should be made, and there is no reason to make one.

[43] *ORDER*

1. It is declared that the provisions of section 84 of the Forestry Act 122 of 1984 are not inconsistent with the interim Constitution.
2. The case is referred back to the Transvaal Provincial Division of the High Court to be dealt with in the light of this judgment.

Chaskalson P, Mahomed DP, Goldstone, Kriegler, Langa, Madala, Mokgoro JJ concur in

the judgment of Ackermann, O'Regan and Sachs JJ.

DIDCOTT J:

[44] The point that has been put to us for our ruling on it in these civil proceedings concerns section 84 of the Forest Act (122 of 1984), which decrees that:

> "When in any action by virtue of the provisions of this Act or the common law the question of negligence in respect of a veld, forest or mountain fire which occurred on land situated outside a fire control area arises, negligence is presumed, until the contrary is proved."

The section has been invoked in the present litigation, an action awaiting trial before the Transvaal Provincial Division of the Supreme Court, or of the High Court as it is now called, where damages are claimed at common law for the burning by a veld fire of the plaintiff's orchards and pasturage. The fire occurred outside a fire control area. It started on, or ran at all events across, land owned and controlled by the defendant. It then spread to the plaintiff's adjoining farm. The defendant is blamed for the destruction that it wrought there. He or his servants, acting in the course of their employment by him, are said to have caused that by their negligence. The effect of the section in all those circumstances, if it survives our adjudication on it, will be to load him with the burden of disproving such negligence when the action goes to trial. He contends that the section fell foul of the interim Constitution (Act 200 of 1993), however, which was in force when the proceedings began and continues to govern them.[1] Whether the section was so

hit is what we must now decide.

[45] The main ground on which the defendant bases his contention is the store that he sets by section 25(3)(c) of the interim Constitution. No part of that touched civil matters. It dealt only with criminal prosecutions. The right to a fair trial was guaranteed by subsection (3), but explicitly and solely to persons accused of crimes. Paragraph (c) then proclaimed the presumption of innocence and the privilege of silence as particular features of that general right, and therefore as those enjoyable under it by such persons alone.[2] Counsel who represented the defendant maintained that subsection (3)(c) was nevertheless pertinent to the present proceedings. His argument went like this. Section 84 covered all matters indiscriminately, embracing civil and criminal ones alike. It was constitutionally objectionable in its application to criminal cases, since there it provided for a reverse onus of the kind which, on the very strength of subsection (3)(c), we had condemned in comparable situations posed on several earlier occasions, holding that the reversal violated the presumption of innocence. The defect tainted the entire section. It was consequently invalid as a whole, and thus in a civil as well as a criminal setting.

[46] The statute creates a host of crimes and a wide variety also. Negligence is specified as an element of merely one which has caught my eye, that emerging from section 75(2)(b)(iii). But it may well become a material factor elsewhere too. The additional offences that I have in mind are any requiring *mens rea* for their commission where *culpa* serves that purpose. Room of one size or another could accordingly have been found for the accommodation within section 84 of criminal prosecutions.

[47] Whether the space was filled is a different matter. That sounds doubtful, to say the least. Section 84 speaks of "any action", not of "any proceedings" as its statutory predecessors did in section 23 of the Forest Act (72 of 1968) and section 26 of the Forest and Veld Conservation Act (13 of 1941). The word "action", when used with reference to forms of legal procedure, denotes in common parlance the civil type. One does not normally describe a criminal prosecution as an "action", and we were told of no other legislation which had attached that label to any. Nor have I managed to find a single reported case where section 84 has been brought to bear on criminal proceedings. The current statute seems itself, I mention in parenthesis, to recognise the distinction in terminology. For section 83(1), which enacts its own separate presumption, applies that specifically to every "prosecution for an offence". The defendant's counsel drew our attention to the word "geding", which appeared in the Afrikaans text of section 84 as the counterpart to "action" and tended to have broader connotations. The English text was the one signed. But that is not a conclusive consideration. The Afrikaans version remains relevant, even so, to the interpretation of the section. Yet it takes the matter no further. The reason is a helpful rule of statutory construction catering for the situation that we have here, where the one text happens to be couched in terms which are wider than but encompass those of the other. The texts must then be reconciled, ordinarily at any rate and especially when they impose fresh burdens, by attributing to the legislation the narrower meaning, since that is the denominator common to both.[3] It follows that, if the English version envisages nothing but a civil "action", the rule requires "geding" to be read in the same way so that the two words may match each other.

[48] Let us suppose, however, that "action" like "geding" is a word quite capable in such a context of identifying either a civil one alone or any legal proceedings, including the criminal sort, and furthermore that their interpretation in that second and wider sense, if chosen, would result in the incompatibility of section 84 with section 25(3)(c). Another rule of statutory construction would then come into play and eliminate the choice, a special rule which section 35(2) of the interim Constitution dictated when, with regard to the Chapter containing section 25(3)(c), it stipulated that:

> "No law which limits any of the rights entrenched in this Chapter shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

So that rule too would enjoin us, on the supposition which I have made, to avoid a clash between section 84 and section 25(3)(c) by putting on both words the interpretation that restricted their ambit to civil cases only.

[49] Nor, in any event, would the defendant's case have prospered from the success of his counsel in persuading us that section 84 did cover criminal prosecutions and collided with section 25(3)(c) by doing so. A declaration of nullity that dealt solely with the application of section 84 to those particular proceedings would then have been the maximum that he could obtain. For section 98(5) of the interim Constitution empowered us to go no further in condemning any law than its invalidation "to the extent of its inconsistency" with a constitutional

command.[4] The defendant's lack of any apparent interest in the grant of relief so circumscribed would have disqualified him, what is more, from gaining even that.

[50] We need not decide in the end, I believe, whether section 84 purports to affect criminal trials and, if it does, whether section 25(3)(c) forbade that. I say so because, in my opinion, the reliance placed on that section has no merit on any footing and the main argument advanced on behalf of the defendant must therefore be rejected.

[51] An alternative objection which the defendant has taken to section 84 then enters the picture. He protests that its regulation of the civil actions to which it applies, when viewed on their own, was repugnant to section 8 of the interim Constitution. That section entrenched the right of every person to enjoy "equality before the law", to be afforded the "equal protection of the law", and not to be "unfairly discriminated against, directly or indirectly".[5] The discrimination and inequality now asserted is said to lie in the differentiation between defendants engaged in actions that are governed by section 84 and those involved in all other delictual cases casting no onus of proof on them, to the disadvantage and detriment of the former category.

[52] Complaints about discrimination and inequality have been heard frequently in the attacks launched here on statutory provisions since we began our work two years ago. We have found it unnecessary to deal with the point on some occasions, either because jurisdictional or procedural obstacles to its consideration were insuperable or because separate constitutional challenges succeeded. On others we have disposed of it. The complaint failed in *S v Rens.*[6] It was upheld

in *S v Ntuli,*[7] in *Brink v Kitshoff NO*[8] and in *Fraser v Children's Court, Pretoria North, and Others.*[9] Not even then, however, have we yet developed a complete and coherent jurisprudence on the subject of equality. Sooner or later, no doubt, we shall have to enunciate one. But so complex, so subtle and so delicate a task ought not to be undertaken in a case inappropriate for it. We may otherwise overlook nuances and implications of the principle to which our thoughts are not immediately attuned. I do not regard the present case as a suitable opportunity for any such general endeavour. It suffices for our purposes there, I consider, to say no more than this. Mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense. The law differentiates between categories of people on innumerable scores which sound unobjectionable and may often be unavoidable. A few examples that spring to mind straight away are their levels of income at which the rate of the tax assessed on that is fixed, their ages when or the length of their employment before pensions become payable to them, and the criteria for their entitlement to the benefits of social welfare. What surely counts at least in those and all other instances of differentiation is always how rational in its basis, nature, scope and objectives the particular one appears to be, and sometimes how fair it also looks in those respects. It follows that I cannot imagine our denunciation of any differentiation which we evaluated as both fair and rational.

[53] In appraising the differentiation assailed by the defendant we had better try at first to get some clarity in our minds on what section 84 means when, alluding to the set of circumstances which puts into operation the presumption and its accompanying switch in the onus of proof, it describes that as the one where "the question of negligence . . . arises". The same vague phrase appeared in both section 26 of the 1941 statute and section 23 of the 1968 successor to that, and

its scarcely informative use became a topic of judicial discussion in those days. Watermeyer J had this to say about section 26 in *Van Wyk v Hermanus Municipality*:[10]

> "It may well be, but I express no opinion on the point, that the wide meaning of the section has to be cut down in some way so as to make it operate only where there is some *nexus* between the fire and the person alleged to have been negligent, but if so there was in my opinion a sufficiently close *nexus* shown in the present case arising from the fact that the defendant was the owner, and in control, of the land upon which the fire burned, and that its servants were in attendance and attempted to extinguish it."

That passage struck Fannin J in *Quathlamba (Pty) Ltd v Minister of Forestry*[11] as "a useful start to the search for the answers to the questions . . . posed". Referring to section 23, the one in force by that time, his judgment then commented and elaborated on the ideas which Watermeyer J had voiced by continuing thus:[12]

> "The section does not provide that whenever negligence is alleged in any proceedings, negligence shall be presumed. The use of the word 'arises' instead of the verb 'is alleged' does, I think, provide some justification for the suggestion made by Watermeyer J, for it can hardly be said that any question of negligence in respect of a fire will really arise if there is no connection or *nexus* shown to have existed between the fire and the person sought to be fixed with responsibility for it. But it may be argued with some force, I think, that to require only some *nexus* is not enough, for unless the *nexus* between the fire and the person alleged to have been negligent is such as to be at the least consistent with negligence, the plaintiff will have taken the matter no further than if he had merely alleged negligence and done no more. I would prefer, therefore, to suggest that 'the question of negligence' in respect of veld or forest fires can be said properly 'to arise' in any proceedings only where-
>
> (a) negligence is alleged against a party to such proceedings; and
>
> (b) the party making such allegation has established a *nexus* or connection, between the fire and the party against whom the allegation is made, which is consistent

with such negligence.

Thus where, as here, negligence is alleged against a defendant in civil proceedings and the fire is shown to have spread from the defendant's property, the presumption created by the section comes into operation against the defendant."

The case went on appeal under the name of *Minister of Forestry v Quathlamba (Pty) Ltd*.[13] Ogilvie Thompson CJ, whose judgment was the sole one delivered then, did not react in so many words to the manner in which Fannin J had approached and treated the problem. What he in turn said instead follows:[14]

"Manifestly the presumption created by the section cannot be invoked merely by averring negligence, without anything more. The contesting submissions of the parties centre around what additional averment or proof is required of a plaintiff to entitle him to call the presumption in aid. More specifically, the real enquiry is whether or not the terms of the section embrace the duty of care. For defendant it was argued that, inasmuch as negligence is the breach of a legal duty, no 'question of negligence arises' unless and until the particular duty of care which a plaintiff claims to have been breached is first established. Counsel for the plaintiff, on the other hand, submitted that both the duty of care and the breach thereof fall within the ambit of the section . . . . I do not find it necessary for the decision of this appeal to pursue counsel's above-mentioned conflicting submissions. For . . . the circumstances that the fire . . . was not shown to have been started by any servant of the defendant, or indeed by any human agency, does not in my opinion by itself relieve the defendant of responsibility for the damage sustained by plaintiff. Consequently, the latter's averments of negligence in relation to the fire which caused it damage, coupled with proof that the fire . . . emanated from (and also originated upon) landed property owned and controlled by defendant, sufficed, in my judgment, to bring the case within the ambit of section 23. The effect of this was that the onus thereafter rested upon defendant to show either that in the particular circumstances harm to plaintiff was not, and could not reasonably have been, foreseen or, alternatively, that, notwithstanding the exercise by him of such care as the circumstances reasonably required, defendant could not prevent the fire from extending beyond the boundaries of

> its (*sic*) property and occasioning harm to plaintiff."

The somewhat different ways in which the two *Quathlamba* judgments had handled section 23 were considered in three subsequent cases. Leon J expressed the opinion in *Titlestad v Minister of Water Affairs*[15] that the judgment of Fannin J had been "substantially upheld" by Ogilvie Thompson CJ "with regard to the proper interpretation of section 23". So did Kannemeyer JP in *Louw and Others v Long*.[16] Nestadt JA, on the other hand, took this contrary view in *Steenberg v De Kaap Timber (Pty) Ltd*:[17]

> "Ogilvie Thompson CJ affirmed the principle that the presumption cannot be invoked merely by averring negligence. The learned Chief Justice did not, however, adopt the approach of Fannin J. It was simply held that the additional element required could be satisfied by proof that the fire originated upon land owned and controlled by the defendant."

[54] I am not sure about the correct classification of the enquiry into when and how "the question of negligence . . . arises", whether the ascertainment of that depends at its heart on the interpretation of those words or, as Ogilvie Thompson CJ seems to have considered, on their judicial application in each case to its own particular facts. Neither *Quathlamba* judgment, one then notices, went beyond the facts of that matter by indicating what circumstances, apart from the defendant's ownership and control of the land from which the fire had come, would or might augment the bare allegation of negligence sufficiently to trigger the presumption and its consequence. Nor am I aware of any judicial pronouncement since then which has shed further or fresh light on the difficulties encountered elsewhere in determining how the question of negligence could rightly be thought in the past to arise for the purposes of sections 26 and 23 and

can truly be said to do so now for those of section 84. That problem is obviously not posed by the present case, seen in isolation. For here the defendant did own and control the land from which the fire spread to the plaintiff's farm, with the result that both *Quathlamba* judgments hit him. We are concerned in this investigation, however, not with the application of the presumption to any individual matter, but in principle with its general operation. Questions potentially relevant to our deliberations at that level are whether, if the necessary process is one of interpretation, section 35(2)[18] requires us to construe section 84 restrictively on the aspect of it scrutinised now and whether, if that is not the true area of enquiry, the circumstances setting the presumption in motion can and must be defined more narrowly than they were by either Ogilvie Thompson CJ or Fannin J. But those questions do not present themselves at this stage. They will become pertinent to our decision only if and when we conclude eventually that, with the effect attributed in the *Quathlamba* case to its precursor, the section is unconstitutional on the grounds of the second objection to it which the defendant has lodged.

[55] Something must next be said generally about the onus of proof in civil actions, and especially about its location there, so that we may then proceed to focus within that field on the import of section 84. Wigmore wrote in his treatise on *Evidence*:[19]

> "The characteristic . . . of this burden of proof (in the sense of a risk of nonpersuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of nonpersuasion. By what considerations is this apportionment determined? Is there any single principle or rule which will solve all

> cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove . . . . It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential. Still another consideration has often been advanced as a special test for solving a limited class of cases, ie the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false . . . . But this consideration furnishes no universal working rule . . . . This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. *The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations* . . . . There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. *There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness*."

I have quoted at length from the book because the state of affairs existing in South Africa echoes exactly, in all its force and resonance, that description of the American one. Our common law likewise contains no comprehensive rule on the onus of proof in civil proceedings which is inflexibly free from exceptions. Here too the onus does not always lie upon the plaintiff asserting a claim but, on issues peculiar to the nature of the case, is sometimes borne by the defendant in his or her resistance to that. One thinks, for

instance, of the issues raised when self-defence is pleaded in answer to a claim for damages suffered as the result of an assault, when a contract admitted or proved is said in an action for its enforcement to have been cancelled or novated, when some special defence is presented as a means of escape from liability on a bill of exchange, and when a host of other situations arise in which confessions and avoidances are familiar. Hoffmann and Zeffertt have discussed the topic in their *South African Law of Evidence*,[20] furnishing further examples of an onus placed on the defendant in this country and commenting on the lack of any general theory or policy to account for that site of it which seems logical, coherent and consistent. It is therefore no surprise to see that the sentences in earlier editions of Wigmore's work which are matched by the parts of my excerpt from the current one appearing in italics have been reproduced or paraphrased with approval by judges of our Appellate Division, the first passage in *Mabaso v Felix*[21] and the second in *Pillay v Krishna and Another*[22] and *Nydoo en Andere v Vengtas*.[23]

[56] In our adversarial system of civil litigation one side or the other has to bear the onus of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones. Veld, forest and mountain fires are calamities with which our country is well acquainted, and their consequences are frequently disastrous. In enacting section 84 Parliament evidently believed that the defendants embroiled in the actions which it defined were shown by experience to be better placed than the plaintiffs suing them, by and large, for investigations into and the ascertainment

of the causes, origins and progress of such fires when they occurred beyond the strict supervision inside fire control areas that was planned. The position of the same defendants was apparently thought in addition to be distinguishable, on the whole, from that occupied by other defendants opposing delictual claims, the general run of those in the first place and the particular group in the second who were blamed for fires that had started on or emanated from land lying within fire control areas. For no comparably peculiar knowledge or sources of information about the detailed causation of the harmful incidents resulting in the litigation could realistically be imputed, as a rule, to so vast and amorphous a category of defendants as the first lot. That goes without saying, given the infinite variety of circumstances relevant to the suits brought against them. Nor, when it came to the second category of defendants, would a *prima facie* responsibility imposed upon them have been warranted in the conditions prevailing throughout the controlled areas, where fire protection schemes operated, where measures devised to prevent conflagrations and their spread were in force, and where compliance with those was both compulsory and verifiable. That is a situation quite unlike the sort encountered elsewhere in which individual landowners are largely left to take their own precautions and they alone know what has or has not been done in that connection. We may agree or disagree, as we prefer, with the generality of those beliefs or with the way in which effect was given to them. But the assessment was one falling well within the zone of an essentially legislative judgment. I can find no substance whatsoever in the suggestion that the reaction of Parliament to the scene which it saw was either unfair or irrational once that is viewed in the light of the *Quathlamba* decisions. It follows, in my opinion, that on this leg of the course the defendant has fallen at the first hurdle.

[57] Two questions which my judgment leaves open, and a couple of possibilities occurring to me that it does not dismiss, will be mentioned in conclusion. The first question concerns the relationship between our constitutional provisions proclaiming the right to equality before and the equal protection of the law on the one hand and prohibiting unfair discrimination on the other.[24] It is whether the prohibition forms a corollary to the right which amplifies that or an independent and self-contained provision.[25] The second question asks whether the criterion of rationality suits the right alone while the one of fairness fits only the prohibition, or whether both criteria are apt for each. Neither question needs to be decided for the time being, since the defendant's case must fail irrespective of the true answer to it. I have accordingly tried to express myself in a manner which avoids suggesting a definite stance taken yet on either point. The possibilities to which I have referred, merely hypothetical ones at present, are these. The right to equality and the prohibition against unfair discrimination may well have an impact on the civil onus of proof in the highly imaginary situation where a class of litigants is generally saddled with or freed from the burden on account of their personal identities, and with no regard to the exigencies of any particular litigation or to the equipment for such of those persons or institutions. A civil onus may also be vulnerable to attack outside the perimeters of that right and prohibition, and on grounds laid elsewhere by the bill of rights,[26] once its incidence impedes the enforcement or defence of any other right entrenched there. Neither possibility is elevated by this case, however, to a real one. To expatiate on either is therefore unnecessary now.

[58] In the result I concur in the grant of the order which Ackermann J, O'Regan J and Sachs J propose in their joint judgment, the final draft of which I have read since writing this one of mine. The two judgments differ sometimes in their approach to the issues canvassed, in their

emphasis and in the extent to which they elaborate on their reasoning, but not otherwise as far as I can see. The clearest difference is visible where I have felt able to reach a confident conclusion on the second part of the case without analysing in similar detail either the concepts of equality and non-discrimination or their constitutional interaction. I do not dissent, however, from the opinions which my colleagues have expressed on those points. And I had better add, since nothing has yet been said by me about the referral, that I share the view of that taken by them.

For the applicant :	Mr D Mills, instructed by Gildenhuys van der Merwe Inc.
For the first respondent :	No appearance.
For the second respondent:	Mr JP Vorster, instructed by the State Attorney, Pretoria.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 9/97

JEANETTE HARKSEN (BORN TZSCHUCKE)

Applicant

versus

MICHAEL JOHN LANE NO	First Respondent
EILEEN MARGARET FEY NO	Second Respondent
THE MASTER OF THE SUPREME COURT	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent

Heard on: 26 August 1997

Decided on: 7 October 1997

JUDGMENT

GOLDSTONE J:

Introduction

[1] In this case the constitutionality of certain provisions of the Insolvency Act 24 of 1936, as amended ("the Act"), comes before us by way of a referral from Farlam J in the Cape of Good Hope Provincial High Court[1] made in terms of section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution").

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1 *Harksen v Lane & Others* (C) Case No 16552/96, 25 March 1997, unreported.

[2] The referral came about in consequence of the sequestration of the estate of Mr Jürgen Harksen ("Mr Harksen"). The final sequestration order was granted in the Cape of Good Hope Provincial Division of the Supreme Court (as it then was) on 16 October 1995. The applicant in these proceedings, Mrs Jeanette Harksen ("Mrs Harksen"), was at that time married out of community of property to Mr Harksen. The first and second respondents are the trustees in the insolvent estate of Mr Harksen ("the trustees"). The third respondent is the Master of the Cape of Good Hope Provincial High Court ("the Master"). The fourth respondent is the Minister of Justice ("the Minister").

[3] There was no appearance in this Court on behalf of the trustees, the Master or the Minister. We were informed by the trustees that there were insufficient funds in the insolvent estate to allow them to brief counsel. They, as did the other respondents, informed the Court that they will abide its decision on the questions referred to it. Mr W Trengove SC and Mr D Spitz appeared on behalf of an amicus curiae, the Council of South African Banks. We are indebted to the amicus, and especially to its counsel, for the most helpful heads of argument they filed and oral submissions they made at the hearing of the referral.

[4] As indicated above, the sequestration of the insolvent estate of Mr Harksen commenced in October 1995, during the period of operation of the interim Constitution. Section 4(1) of the interim Constitution provided that:

> "This Constitution shall be the supreme law of the Republic and any law or act

> inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

Section 7(2) provided that:

> "This Chapter shall apply to all law in force . . . during the period of operation of this Constitution."

In accordance with these sections any provision of a law inconsistent with the bill of rights became invalid and of no force and effect upon the coming into operation of the interim Constitution.[2]

[5] The Constitution of the Republic of South Africa, 1996 ("the 1996 Constitution") came into force on 4 February 1997. Although the matter was referred to this Court on 25 March 1997, the application for the referral was launched on 18 December 1996, prior to the coming into operation of the l996 Constitution. It was therefore "pending" on the date on which the 1996 Constitution came into operation. Item 17 of schedule 6 to the 1996 Constitution provides that:

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2 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 28.

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

[6] In the present case it was accepted by counsel that there were no "interests of justice" which required the referral to be decided in accordance with the 1996 Constitution. I can find no ground for holding that such interests obtain in this case. It follows that the provisions and procedures of the interim Constitution apply to the matter referred and the constitutionality of the impugned sections must be decided with reference thereto.

The Relevant Provisions of the Act

[7] In this case the sections of the Act which are impugned are sections 21, 64 and 65. They are alleged to be inconsistent with certain provisions of the bill of rights to the extent that they impact on the property and affairs of a solvent spouse upon the sequestration of the estate of an insolvent spouse. At the outset, it is convenient to set out the relevant provisions of the Act.

[8] In terms of section 20(1) of the Act, the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his or her estate and to vest it in the Master until a trustee has been appointed. Thereafter the estate vests in the trustee. Section 21(1) of the Act provides:

> "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."

There then follow a number of provisions[3] which are designed to protect the legitimate interests of the solvent spouse.

[9] In terms of the section[4] "spouse" refers not only to a wife or husband in the legal sense but also to a wife or husband married according to any law or custom, as well as women and men living with each other as if they were married.

[10] Section 21(2) provides that once the solvent spouse proves that his or her property falls into one of the following categories, the trustee shall release it:

(a) property of the solvent spouse acquired before her or his marriage to the insolvent or before 1 October, 1926;

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3 See ss 21(2), (3), (4) and (10).

4 Section 21(13).

(b) property acquired by the solvent spouse under a marriage settlement;

(c) property acquired by the solvent spouse during the marriage by a title valid as against creditors of the insolvent;

(d) those policies of life insurance which are protected by the provisions of the Insurance Act 27 of 1943;

(e) property acquired with, or with the income or proceeds of, property referred to above.

[11] The category of property acquired by the solvent spouse during the marriage by a title valid against creditors of the insolvent was substantially widened by section 22 of the Matrimonial Property Act 88 of 1984. In terms thereof, donations between spouses, formerly invalid, were made legal and therefore enforceable. Some of the effects of that development on section 21 of the Act were considered by Kriegler J in *Snyman v Rheeder NO*.[5] At the outset, the learned Judge referred to a passage from the judgment of Greenberg JP in *Maudsley's Trustee v Maudsley*.[6] Part of that passage reads as follows:

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5 1989 (4) SA 496 (T) at 504H-506B.

6 1940 TPD 399 at 404.

GOLDSTONE J

"Apart from authority I see no reason why the words 'title valid as against creditors' should have any special meaning, and why they should not mean a title which under the provisions of the law are so valid. In other words, there is nothing in sec. 21(c) which creates any new ground of validity or invalidity and all that is effected by sec. 21 in relation to property which is claimed by the solvent spouse to fall under sec. 21(c) is that the *onus* is cast on the spouse to prove the validity whereas under the law before 1926 the *onus* rested on the trustee to prove the invalidity. One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title. If sec. 21 is regarded as merely shifting the *onus* on to the solvent spouse, it nevertheless affords some relief in the direction of preventing the evil to which I have referred. If one goes further and interprets sec. 21 as creating new substantive grounds for attacking the property of a spouse, this would amount to depriving such spouse of the benefits of the law of marriage out of community of property, and in my opinion very clear wording would be required to effect this object."

Kriegler J went on to say at 505H - 506B:

"Ek meen dat die geleerde Regterpresident se opmerkings besonder van pas is nou dat die regsverbod teen skenkings tussen egliede opgehef is. Daar moet versigtig omgegaan word met gewysdes wat gehandel het met die eertydse regsposisie. Die toets is nou subtieler aangesien die ware doel met 'n skenking nou ook ondersoek moet word.

Artikel 21(2)*(c)* vereis steeds bewys van 'n regsgeldige titel. Die gesonde verstand verg nog steeds dat sodanige bewys wel deeglike bewys moet wees vanweë die aanspraakmaker se eksklusiewe kennis van die tersaaklike gegewens asook vanweë die verstaanbare versoeking tot verdoeseling. Maar 'n skenking kan nou sodanige titel verleen. Daar moet beklemtoon word dat die vereiste van goeie trou nog steeds bly staan. Dit moet 'n ware skenking wees. 'n Skyntransaksie sal nog steeds nie aan die solvente eggenoot 'n regsgeldige titel verleen nie. Die vraag of 'n egte skenking nietemin deur die bepalings van art 26, 29, 30 of 31 van die Insolvensiewet getref kan word en of dit 'n aanspraak ingevolge art 21(2)*(c)* gebaseer op 'n skenking sou kon fnuik,

> hoef nie hier uitgemaak te word nie. Ook nie die moeiliker vraag of 'n skenking aangeveg kan word as 'n vervreemding sonder teenwaarde soos bedoel in art 26 van die Wet nie."

It is also unnecessary for the purpose of this judgment to consider these interesting questions referred to by Kriegler J which concern the relationship between section 21(2) and the provisions in the Act relating to dispositions by the insolvent which may be set aside under sections 26, 29, 30 and 31 of the Act.[7] What is now relevant is that since donations between spouses are no longer illegal the category of property which the solvent spouse may reclaim has been widened considerably.

[12] In terms of section 21(3), if the solvent spouse is in the Republic and the trustee is able to ascertain her or his address, the trustee may not, without the leave of the High Court, realize property which ostensibly belongs to the solvent spouse until the expiry of six weeks written notice to that spouse of his or her intention to do so. That notice must be published in the Government Gazette and a newspaper circulating in the district where the solvent spouse resides or carries on business. The notice must invite all separate creditors of that spouse to prove their claims in the insolvent estate. Section 21(5) makes provision for such creditors of the solvent spouse to share in the proceeds of such property in priority to the separate creditors of the insolvent estate. It should be

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[7] Those sections relate to dispositions not made for value (s 26); those having the effect of preferring one creditor above another which constitute voidable preferences (s 29); those intended to prefer one creditor above another which constitute undue preferences (s 30); and those made in collusion with another person and having the effect of prejudicing creditors or preferring one above another (s 31). Creditors also have their common law right to have transactions made in fraud of their rights set aside (the *actio Pauliana*).

emphasised that these provisions are intended, firstly, to protect the solvent spouse from a trustee alienating property in which that spouse has good title as against the creditors of the insolvent estate; and, secondly, to protect creditors of the solvent spouse who acted to their prejudice by dealing with the solvent spouse in respect of property ostensibly hers or his and in fact that of the insolvent spouse.

[13] Sections 21(4) and (10) make provision for judicial intervention to protect the property of the solvent spouse in certain circumstances. Section 21(4) reads thus:

> "The solvent spouse may apply to the court for an order releasing any property vested in the trustee of the insolvent estate under subsection (1) or for an order staying the sale of such property or, if it has already been sold, but the proceeds thereof not yet distributed among creditors, for an order declaring the applicant to be entitled to those proceeds; and the court may make such order on the application as it thinks just."

Section 21(10) makes provision for the High Court to order that property of the solvent spouse will not immediately vest in either the Master or the trustee if the solvent spouse is carrying on business as a trader, apart from the insolvent spouse, or if the solvent spouse is likely to suffer serious prejudice by reason of an immediate vesting. The court may make such an order for such period as it thinks fit only if it is satisfied that the solvent spouse is willing and able to make arrangements safeguarding the interest of the insolvent estate in such property. During that period the solvent spouse must prove her or his claim to the property. The trustee will then either release the property to the solvent spouse or, if it is not released, upon expiry of the period the property shall vest in the Master or the

trustee.

[14] Finally, as far as section 21 is concerned, subsection (12) provides that if the trustee in error releases any property alleged to belong to the solvent spouse, he or she shall not be debarred from subsequently proving that it belongs to the insolvent estate and recovering it.

[15] In terms of section 16(1), the registrar of the court which grants a final order of sequestration shall cause a copy of the order to be served by the deputy sheriff on the solvent spouse, who, in terms of section 16(3), is obliged within seven days to lodge a statement of his or her affairs with the Master.[8]

[16] I turn now to consider the provisions of sections 64 and 65 of the Act. In terms of section 64(1), the insolvent must attend the first and second meetings of the creditors of the insolvent estate unless he or she has previously obtained written permission from the presiding officer to be absent. Such permission may be granted after consultation with the trustee.

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8 Section 19 of the Act obliges the deputy sheriff to attach and seal the movable property of the insolvent estate immediately upon receiving a copy of the provisional sequestration order and to take into her or his possession all books and records of the insolvent. It would appear to me that these provisions do not apply to the property of the solvent spouse. Section 21(1) empowers the Master or trustee, and not a deputy sheriff, to deal with the property of the solvent spouse in accordance with the vesting of that property in them. Whereas the deputy sheriff is obliged to make an inventory of the insolvent's property on its attachment, the solvent spouse is only obliged to submit the inventory of his or her property within seven days of the notice referred to in s 16(1).

[17] Section 64(2) grants the presiding officer the authority to summon any person who is known or upon reasonable ground believed to be or to have been:

(a) in possession of any property which belonged to the insolvent, the insolvent's estate *or to the spouse of the insolvent* before or after the sequestration of his or her estate; or

(b) indebted to the estate.

[18] This includes the summoning of persons (including the insolvent's spouse) who in the opinion of the presiding officer may be able to give any material information concerning the business, affairs or property of the insolvent *or the insolvent's spouse*. This may pertain to the period before and after sequestration of the insolvent's estate.

[19] At such a meeting the presiding officer, the trustee and any creditor who has proved a claim against the estate, or the agent of any of them, may interrogate under oath any person so called concerning all matters relating to the property, business and affairs of the insolvent *and his or her spouse* in respect of the period before or after the sequestration of the estate. The presiding officer has the discretion to disallow questions which are either irrelevant or which may unnecessarily prolong proceedings.[9]

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9 Section 65(1).

[20] Section 65(2) goes on to provide that persons summoned to produce books or documents may invoke the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law.

[21] In terms of section 65(2A)(a), the presiding officer shall order that where a person testifying is obliged to answer questions which may incriminate him or her, or where he or she is to be tried on a criminal charge and the evidence may prejudice him or her at such trial, the proceedings take place *in camera*. Moreover, no information regarding such questions and answers may be published in any manner whatsoever, nor may such answers be admissible in subsequent criminal proceedings, except where the criminal charges involve perjury.

[22] Section 66(2) of the Act empowers the presiding officer to commit to prison a person summoned to appear under section 64 who fails to do so without a reasonable excuse. Section 66(3) empowers the presiding officer to commit to prison, inter alia, any person who:

> "[R]efuses to answer any question lawfully put to him under the said section [section 65] or does not answer the question fully and satisfactorily".[10]

[10] In *D M De Lange v F J Smuts NO and Others*, unreported judgment of Conradie J in the Cape of Good Hope Provincial High Court delivered on 29 August 1997, the provisions of s 66(3) of the Act were held to be unconstitutional and invalid. In terms of s 167(5) of the 1996 Constitution, the judgment has been referred to this Court for confirmation of the order of invalidity.

[23] Section 139(1) of the Act provides:

> "Any person shall be guilty of an offence and liable to a fine not exceeding R500 or to imprisonment without the option of a fine for a period not exceeding six months if he is guilty of an act or omission for which he has been or might have been lawfully committed to prison in terms of subsection (2) or (3) of section 66."

The legal effect and consequences of these provisions, to the extent that they are now relevant, will be considered below.

The Facts

[24] Pursuant to the statutory vesting of her property in the Master and then the trustees, the latter caused the property of Mrs Harksen to be attached. According to her statement of affairs, that property has a value of R6 120 352,50. None of it has been released by the trustees to Mrs Harksen and it would appear that no application for such release has been made by her.

[25] Mrs Harksen was summoned, under sections 64 and 65 of the Act, to subject herself to interrogation at the first meeting of the creditors in the insolvent estate of Mr Harksen, and to produce at the meeting:

> "all documentation relating to [her] financial affairs and the financial affairs of Jürgen Harksen."

For reasons not now pertinent, the magistrate who presided at the meeting of creditors set

aside the summons. However, on 9 December 1996, Farlam J set aside the ruling of the magistrate and directed Mrs Harksen to subject herself to the interrogation and to produce the documents referred to in the summons.[11] That order precipitated the present proceedings impugning the constitutionality of section 21 of the Act and those portions of sections 64 and 65 that provide for enquiries into the estate, business, affairs or property of the spouse of an insolvent person.

Necessity to Exhaust Non-Constitutional Remedies

[26] It was submitted on behalf of the amicus curiae that the referral was not appropriate because Mrs Harksen had not exhausted her non-constitutional remedies. In this regard we were referred to the judgment of this Court in *Motsepe v Commissioner for Inland Revenue*.[12] At para 21, Ackermann J said:

> "The referral may very well be defective for another reason. This Court has laid down the general principle that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed', and has applied this principle specifically to section 102(1) referrals and *obiter* to applications for direct access. On an objective assessment of the present case it was unnecessary to decide the constitutional issue because Mrs Motsepe could, by following

11 *Lane and Another NNO v Magistrate, Wynberg* 1997 (2) SA 869 (C).

12 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC). In that case, a taxpayer impugned the constitutionality of s 92 of the Income Tax Act 58 of 1962 which provides that it is incompetent for any person to question the correctness of a statement filed by the Commissioner for Inland Revenue under s 91(1)(b) of the Act where a taxpayer fails to pay tax due by her or him. That statement may be filed by the Commissioner in a court of competent jurisdiction and has the effect of a civil judgment (s 91(1)(b)). However, the statement does not preclude a taxpayer from lodging an objection and appeal against the assessment upon which the statement of the Commissioner is founded (ss 81, 83).

> the objection and appeal procedures provided for in the Act, have avoided the barriers imposed by ss 92 and 94 of the Act and the sequestration application could have been decided in the light of the outcome of such procedures." (Footnote omitted)

Neither in the *Motsepe* case nor in the decisions referred to by Ackermann J did this Court lay down any hard and fast rule to the effect that in no case should referrals be made to this Court where non-constitutional remedies have not been exhausted. In any event, the present case is distinguishable. In *Motsepe* there was no attack by the taxpayer upon the constitutionality of the objection and appeal procedures available, that is, the non-constitutional remedies. The only remedy open to Mrs Harksen for reversing the automatic vesting of her property in the trustees was to bring an application to court under section 21, one of the sections which she seeks to have declared unconstitutional. Furthermore she would have had to submit herself to interrogation under the other sections of the Act, which she now similarly seeks to impugn. This is therefore not a case in which there were in fact any non-constitutional remedies open to her. This objection to the referral is thus without merit.

The Constitutionality of the Impugned Sections of the Act

[27] It will be convenient to consider initially the attack made on the constitutionality of section 21 of the Act. Thereafter I shall consider the objections directed at sections 64 and 65.

Section 21 of the Act

[28] On behalf of Mrs Harksen, her counsel, in impugning the constitutionality of section 21 of the Act, relied upon the provisions of both section 8 ("the equality clause") and section 28 ("the property clause") of the interim Constitution. I propose to consider the property clause first.

The Property Clause

[29] Section 28 of the interim Constitution provides as follows:

> "(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
>
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
>
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

[30] The submission on behalf of Mrs Harksen was that the provisions of section 21(1) of the Act constitute an expropriation of the property of the solvent spouse without any provision for compensation as required by section 28(3). The starting point of the argument is that the vesting constitutes a transfer of ownership of the rights in the

property of the solvent spouse to the Master and, on appointment, to the trustee.[13] Reliance was placed upon the decision of the Appellate Division in *De Villiers NO v Delta Cables (Pty) Ltd.*[14] In that case Van Heerden JA discussed at some length whether the vesting of the property of the solvent spouse in the Master or a trustee, in terms of section 21(1) of the Act, had the effect of transferring ownership in that property to them. As appears from the judgment,[15] it was found not to be necessary finally to decide that question. However, Van Heerden JA, with the concurrence of the other four members of the court, expressed the firm view that full ownership in the solvent spouse's property did in fact pass to the trustee of the insolvent estate. For the purpose of this judgment I shall assume that to be the effect of section 21.

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13 The ordinary meaning of the word "vests" connotes the acquisition of ownership. See *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 175. Also, s 21(1) states that property of a solvent spouse so vests "as if it were property of the sequestrated estate".

14 1992 (1) SA 9 (A).

15 Id at 16H-I.

[31] The word "expropriate" is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.[16] Whilst expropriation constitutes a form of deprivation of property, section 28 makes a distinction between deprivation of rights in property, on the one hand (subsection (2)), and expropriation of rights in property, on the other (subsection (3)). Section 28(2) states that no deprivation of rights in property is permitted otherwise than in accordance with a law.[17] Section 28(3) sets out further requirements which need to be met for expropriation, namely, that the expropriation must be for a public purpose and against payment of compensation.

[32] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board*,[18] Trollip J said:

> "[T]he ordinary meaning of 'expropriate' is 'to dispossess of ownership, to deprive of

16 See *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) at 972D; *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS) at 232A-B.

17 It is not necessary now to consider or decide the meaning of "a law" as used in this context and its relationship to the other provisions of the bill of rights.

18 1964 (4) SA 510 (T) at 515A-C.

> property' (see e.g. *Minister of Defence v. Commercial Properties Ltd. and Others*, 1955 (3) S.A. 324 (N) at p. 327G); but in statutory provisions, like secs. 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like *Stellenbosch Divisional Council v. Shapiro*, 1953 (3) S.A. 418 (C) at pp. 422-3, 424; *S.A.R. & H. v. Registrar of Deeds*, 1919 N.P.D. 66; *Kent, N.O. v. S.A.R. & H.,* 1946 A.D. 398 at pp. 405-6; and *Minister van Waterwese v. Mostert and Others*, 1964 (2) S.A. 656 (A.D.) at pp. 666-7."

[33] The Zimbabwean Constitution also provides that property may not be compulsorily acquired, save under a law which requires the acquiring authority to pay fair compensation.[19] In *Hewlett v Minister of Finance and Another,*[20] Fieldsend CJ considered the meaning of "acquire" in those sections of the Constitution. He referred[21] to the following dictum of Innes CJ in *Transvaal Investment Co Ltd v Springs Municipality:*[22]

> ". . . juristically, the word 'acquire' connotes ownership; the ordinary legal meaning implies the acquisition of *dominium*. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the *dominium*; but the narrower meaning is the accurate and more obvious one."

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19 Sections 11(c) and 16(1) of the Constitution of Zimbabwe.

20 1982 (1) SA 490 (ZS).

21 Id at 502B-C.

22 1922 AD 337 at 341.

Fieldsend CJ continued:[23]

> "It is true, too, that 'compulsory acquisition' is used in both English and Roman-Dutch law to denote the expropriation of property by an authority - whether State, local or public utility - usually for some public purpose, most commonly in relation to land. It is, of course, common cause that property in s 16 is not limited to land.
>
> Cases relied upon by Mr *Kentridge* clearly establish that it is not every deprivation of a right which amounts to a compulsory acquisition of property, as for example regulation of a landlord's rights which in effect diminished his rights (*Thakur Jagannatha Baksa Singh v United Provinces* 1946 AC 327 (PC)), regulations which limited an owner's right to build above a certain height on his land (*Belfast Corporation v OD Cars Ltd* 1960 AC 490), and legislation allowing licensed pilots to provide pilotage only if they were employed by the port authority (*Government of Malaysia v Selangor Pilot Association (supra)).*
>
> It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the fundamental freedoms protected refer to the right not to be *deprived* of property without compensation whereas the sections giving actual protection provide that no property of any description shall be *compulsorily taken possession of* and no interest in or right [over] property of any description shall be *compulsorily acquired* except on certain conditions including compensation. This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed government could be made virtually impossible if every deprivation of property required compensation."

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23 Above n 20 at 502D-H.

In *Davies and Others v Minister of Lands, Agriculture and Water Development,*[24] Gubbay CJ cited the aforesaid passages with approval and held[25] that section 11(c) of the Zimbabwe Constitution does not afford protection against deprivation of property by the State "where the act of deprivation falls short of compulsory acquisition or expropriation."

[34] The Constitution of India originally had a property clause[26] which recognised the distinction between compulsory acquisition and requisition which was held to be a less intrusive form of deprivation of property. In *H.D. Vora v State of Maharashtra,*[27] it was said by Bhagwati J:

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24 1997 (1) SA 228 (ZS).

25 Id at 232D-E.

26 Article 31.

27 1984 AIR 866 (SC) at 869.

> "The two concepts [compulsory acquisition and requisition] . . . are totally distinct and independent. Acquisition means the acquiring of the entire title of the expropriated owner whatever the nature and extent of that title may be. The entire bundle of rights which was vested in the original holder passes on acquisition to the acquirer leaving nothing to the former . . . . The concept of acquisition has an air of permanence and finality in that there is transference of the title of the original holder to the acquiring authority. But the concept of requisition involves merely taking of 'domain or control over property without acquiring rights of ownership' and must by its very nature be of temporary duration."

(It is unnecessary to consider whether there is a difference between the concept of *requisition* used in the Indian provision and *deprivation* used in the interim Constitution.)

[35] While the legal effect of section 21(1) may be to "transfer" ownership of the property of the solvent spouse to the Master or trustee, in order to determine whether or not such a "transfer" constitutes an expropriation of that property for the purposes of the property clause, regard must be had to the broad context and purpose of section 21 as a whole. Apart from the question as to whether the transfer of the property of the solvent spouse is for a "public" purpose, to regard the vesting under section 21(1) as an expropriation, in my opinion, is to ignore the substance of the provision. The purpose and effect is clearly not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers. The purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled.[28] The fact that the onus of establishing his or

[28] In *Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N) at 510E-F, it was held that the vesting provision was

her ownership of the property is placed upon the solvent spouse should not in any way be confused with the purpose of the provision. In any vindicatory action the claimant has to establish ownership. The onus of proof had to be placed on either the Master or the trustee or on the solvent spouse. Having regard to which of those parties has access to the relevant facts, the onus was understandably and justifiably placed on the solvent spouse.

[36] Again, on the assumption that the effect of section 21 is to "transfer" ownership of the property of the solvent spouse to the Master or the trustee, the section does not contemplate or intend that such transfer should be permanent or for any purpose other than to enable the Master or the trustee to establish whether any such property is in fact that of the insolvent estate. Again, there is no intention to divest the solvent spouse permanently of what is rightfully hers or his or to prejudice the solvent spouse in relation to her or his property. Hence the provisions enabling the solvent spouse to seek the assistance of the court in order to obtain the release of that which is his or hers and to seek the protection of the court in the event of the trustee wishing to sell such property prior to

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designed to protect property which rightfully belonged to the insolvent estate from alienation by the solvent spouse, malicious damage or destruction by the solvent spouse or a third party, accidental damage or destruction, fraudulent abandonment by the solvent spouse and theft by third parties.

its release. So, too, the provision enabling the court to order the exclusion of property of the solvent spouse from the operation of a vesting order in the event that such spouse is a trader or is likely to suffer serious prejudice by reason of an immediate vesting. The whole thrust of section 21 is merely to ensure that property which properly belonged to the insolvent ends up in the estate. The statutory mechanism employed is temporarily to lay the hand of the law upon the property of both the insolvent spouse and the solvent spouse and to create a procedure for the release by the trustee or the court of that which in fact belongs to the solvent spouse.

[37] In all the circumstances which I have described, the provisions of section 21 do not have the purpose or effect of a compulsory acquisition or expropriation of the property of the solvent spouse whether by a public authority or at all. I am of the opinion therefore that there is no basis for regarding the effect of section 21 as an expropriation of the rights in the property of the solvent spouse.

[38] It follows that it is unnecessary to decide whether for the purposes of section 21 of the Act the Master or a trustee constitutes a public authority or whether the vesting is for a public purpose.

[39] If the provisions of section 21 do not amount to an expropriation then it follows that they do not contravene the provisions of section 28(3) of the interim Constitution.

Counsel for Mrs Harksen informed us during argument that they do not rely on the provisions of sections 28(1) or (2) of the interim Constitution. That carried with it the concession that if section 21 of the Act does not amount to an expropriation of the property of the solvent spouse then its constitutionality is not impugned at all by section 28. It follows that the attack on section 21 founded upon the property clause falls to be dismissed. Having reached this conclusion it is unnecessary to consider the application of the limitations clause in this context.

The Equality Clause

[40] It was further submitted on behalf of Mrs Harksen that the provisions of section 21 of the Act were in violation of the equality clause of the interim Constitution.[29] More particularly it was contended that the vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them; and that its effect is to impose severe burdens, obligations and disadvantages on them beyond those applicable to other

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29 Section 8 provides:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
> (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.
> (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.
> (b) . . .
> (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."

persons with whom the insolvent had dealings or close relationships or whose property is found in the possession of the insolvent. Moreover, to the extent that section 21(10) favours solvent spouses who are "traders", it discriminates against solvent spouses who are not "traders". It was submitted further that section 21(2), which entitles a solvent spouse to claim the return of what in fact belongs to him or her, does not save the provision. There may be a number of innocent reasons why the solvent spouse is not able to establish that the property belongs to him or her. Counsel for Mrs Harksen suggested that the provisions of section 21 constituted a violation of both sections 8(1) (a denial of equality before the law and equal protection of the law) and 8(2) (unfair discrimination).

[41] Attacks on legislation which are founded on the provisions of section 8 of the interim Constitution raise difficult questions of constitutional interpretation and require a careful analysis of the facts of each case and an equally careful application of those facts to the law. It was stated in the majority judgment in *Prinsloo v Van der Linde and Another*[30] that this Court:

> "should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises."

Without in any way departing from that cautious approach, it appears to me that it would

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30 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20.

be helpful now to take stock of this Court's equality jurisprudence. In this regard I shall draw particularly on our judgments in the *Prinsloo* case and in *President of the Republic of South Africa and Another v Hugo*.[31]

Section 8(1) Analysis

[42] Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).

Section 8(2) Analysis

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31 1997 (6) BCLR 708 (CC).

[43] Differentiation that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2). The foregoing is my understanding of the judgment in *Prinsloo*.[32] It was there stated in the majority judgment that:

> "If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. . . . The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'.
>
> . . . .
>
> Taking as comprehensive a view as possible of the way equality is treated in s 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination." (Footnotes omitted).

32 Above n 30 at paras 17 and 23.

GOLDSTONE J

In dealing with differentiation which does not involve unfair discrimination the Court stated:[33]

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. . . .
>
> It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. . . .
>
> Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe

33 Id at paras 24 - 26.

> s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element . . . is present." (Footnotes omitted)

[44] If the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.

[45] The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether, secondly, it amounts to "unfair discrimination". It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.[34]

What Constitutes Discrimination

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[34] See *Hugo* at n 31.

[46] Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a "specified ground"[35]). The second is differentiation on a ground not specified in subsection (2) but analogous to such ground (for convenience hereinafter called an "unspecified" ground) which we formulated as follows in *Prinsloo*:

> "The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.[36]
>
> . . . .

35 The expression "grounds specified" is used in subsection (4).

36 Above n 30 at para 28.

> Given the history of this country we are of the view that 'discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . . . [U]nfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. [37]
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> . . . .
>
> Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.[38]

There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

[47] The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. In the former case the enquiry is directed at determining whether the statutory provision amounts to differentiation on one

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37 Id at para 31.

38 Id at para 33. For purposes of the decision in *Prinsloo* it was not necessary to investigate further the concept of such other differentiation.

of the grounds specified in section 8(2). Similarly, in the latter case the enquiry is whether the differentiation in the provision is on an unspecified ground (as explained in para 46 above). If in either case the enquiry leads to a negative conclusion then section 8(2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is "unfair". In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established. In the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of section 8(2) has occurred.

[48] Before proceeding to the second stage of the enquiry, it is necessary to comment briefly on one aspect of the specified and unspecified grounds of differentiation which constitute discrimination. In the above quoted passage from *Prinsloo* it was pointed out that the pejorative meaning of "discrimination" related to the unequal treatment of people "based on attributes and characteristics attaching to them". For purposes of that case it was unnecessary to attempt any comprehensive description of what "attributes and characteristics" would comprise.

[49] It is also unnecessary for purposes of the present case, save that I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and

elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.

What Constitutes Unfair Discrimination

[50] The nature of the unfairness contemplated by the provisions of section 8 was considered in paras 41 and 43 of the majority judgment in the *Hugo* case[39]. The following was stated:

> "[41] The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and

39 Above n 30.

> respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.
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> . . . .
>
> [43] To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination."

In para 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. However, as L'Heureux-Dubé J acknowledged in *Egan v Canada,*[40] "Dignity [is] a notoriously elusive concept . . . it is clear that [it] cannot, by itself, bear the weight of s.15's task on its shoulders. It needs precision and elaboration." It is made clear in para 43 of *Hugo* that this stage of the enquiry focuses primarily on the experience of the "victim" of discrimination. In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.

[51] In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

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[40] (1995) 29 CRR (2d) 79 at 106.

(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;[41]

(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

41 Above n 31 at para 47.

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.

[52] If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2). One will then proceed upon the final leg of the enquiry as to whether the provision can be justified under section 33 of the interim Constitution, the limitations clause. This will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.

[53] 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:

(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:

(b)(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.

(b)(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).

The Enquiry in the Present Case

[54] I turn now to consider the constitutionality of section 21 of the Act in the light of the foregoing analysis.

1 *Differentiation*

[55] That section 21 differentiates between the solvent spouse of an insolvent and other persons who might have had dealings with the insolvent is patent. It becomes necessary, therefore, to consider the governmental purpose of the section, whether that purpose is a legitimate one and, if so, whether the differentiation does have a rational connection to that purpose.

[56] A similar provision appeared (without the extended definition of "spouse") in a 1926 amendment to the Insolvency Act 32 of 1916. Its successor is section 21 of the Act. In *De Villiers NO v Delta Cables (Pty) Ltd* [42] Van Heerden JA said:

> "The main object of s 21(1), read with s 21(2) and (4), is, no doubt, to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse."

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42 Above n 14 at 13I.

That the provision soon appeared to have a salutary effect appears from the observation of Greenberg JP in *Maudsley's Trustees v Maudsley* [43] to the effect that:

> "One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title."

43 1940 TPD 399 at 404.

As Professor Smith points out, where a trader so acted:[44]

> "[t]he onus was then on the trustee to prove that the transactions in question were in fact simulated ones, a particularly difficult task because the proprietary rights as between spouses are usually matters within their own peculiar knowledge and it might not be possible for a trustee to separate the property of one from that of the other."

[44] Smith *The Law of Insolvency* 3 ed (Butterworths, Durban 1988) at 108.

[57] Since the introduction of the section 21 provision in 1926, the position of women in our society has changed radically and for a number of years section 21 of the Act has served a much wider purpose than that referred to by Greenberg JP in the *Maudsley*[45] case. More and more women have become economically active and contribute out of their own income or investments to the property of a common household.[46] The consequence is that nowadays, in the case of honest spouses, who are married out of community of property, it is not infrequently a matter of complexity for the spouses themselves to determine which property in their possession belongs to each of them; or, indeed, which is held in co-ownership because both contributed to the purchase price. Having regard to the close identity of interests between many married couples,[47] they do not always make nice calculations and keep accurate records of their respective contributions to property they acquire. If it is difficult for them to do so, then so much more difficult and complex is it for a trustee who comes as a complete stranger to the financial affairs of the spouses. The provisions of section 21 thus assist a trustee in the important determination of which property in the possession of "spouses" belongs to the insolvent estate, not only in cases of collusion but also in the case of honest partners to a

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45 Above at para 56.

46 When, in 1926, the provision was inserted into the 1916 Act there can be no doubt that it was directed at property ostensibly owned by women married out of community of property. It could hardly have been otherwise as there were relatively few women at that time who had an independent income. Its purpose was not aimed at disadvantaging or prejudicing women as such. Its language was gender neutral and as more women began to have their own income its effect applied more frequently to husbands. Counsel for Mrs Harksen, correctly, in my view, did not suggest that section 21 resulted in gender discrimination.

47 In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 47 this Court recognised the existence of a close special relationship between spouses and acknowledged that it may sometimes lead

marriage or similar close relationship. This statutory mechanism is an appropriate and effective one.

[58] In his attack on the rationality of section 21(1), counsel for Mrs Harksen relied upon the statement of Berman AJ in *Enyati Resources Ltd and Another v Thorne NO and Another*[48] to the effect that:

> "The divesting of the property of the solvent spouse and the vesting thereof in the hands of the Master (and thereafter in the hands of the trustee) constitute a drastic and arbitrary invasion upon, and inroad into, the proprietary right of citizens . . . ."

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to collusion or fraud.

48 1984 (2) SA 551 (C) at 557H.

Whilst in no way wishing to minimise the inconvenience, potential prejudice and embarrassment that the provisions of section 21 of the Act may cause to a solvent spouse, and even accepting that those consequences may be described as "drastic", I cannot agree that they are arbitrary or without rationality. In my opinion, the legislature acted rationally in taking the view that the common law and the statutory remedies relating to impeachable transactions[49] were insufficient to enable the Master or a trustee to ensure that all the property of the insolvent spouse found its way into the insolvent estate. In particular, it must be acknowledged that remedies other than that provided by section 21 cast an onus on the Master or the trustee to establish ownership of property claimed from the solvent spouse. If a claim were to be contested, inevitable delays inherent in the legal system would result. Those delays, certainly in cases of collusion, could well be fatal to the recovery of property rightfully belonging to the insolvent estate. I am not overlooking the power of the High Court to grant relief by way of an interim interdict to protect the property or relief elsewhere provided in the Act. However, that relief would require some evidence from the Master or trustee which might not necessarily be available without a time consuming enquiry.

[59] In respect of the question of onus it was stated in *Prinsloo*:[50]

> "In any civil case, one of the parties will have to bear the *onus* on each of the factual

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49 See n 7 above.

50 Above n 30 at para 36.

> matters material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the *onus* concerning negligence. As long as the imposition of the *onus* is not arbitrary, there will be no breach of s 8(1). In rare circumstances, it may be that the allocation of *onus* will impair other constitutional rights and a challenge will then arise. That is not the case here."

As we have seen, section 21 has the effect of transferring an onus from the Master or a trustee to the solvent spouse. As was stated earlier,[51] there is a good reason for transferring such onus to the solvent spouse in the circumstances of an insolvency of the insolvent spouse. Often facts necessary for the determination of the question of ownership will be peculiarly within the knowledge of the solvent spouse. It is thus rational that the onus should be cast upon the solvent spouse. As Didcott J said in his separate concurring judgment in the *Prinsloo* case:[52]

> "In our adversarial system of civil litigation one side or the other has to bear the *onus* of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones."

[60] For reasons set out above there can be no doubt as to the existence of a rational connection between the differentiation created by section 21 of the Act and the legitimate governmental purpose behind its enactment. Moreover, in my opinion, reasonable procedures were introduced to safeguard the interests of the solvent spouse in his or her

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51 Above at para 57.

52 Above n 30 at para 56.

property. It follows that section 21 does not violate the provisions of section 8(1) of the interim Constitution.

2 *Discrimination*

[61] The next question is whether the differentiation between solvent spouses and other persons who had dealings with insolvents constitutes discrimination. The differentiation is not on one of the specified grounds. Whether it constitutes discrimination on one of the unspecified grounds is an objective enquiry. In my opinion, this enquiry yields an affirmative result. Other persons who had dealings with the insolvent or whose property is found in the possession of an insolvent are not affected in the same way. Their property does not become vested in the Master or the trustee and they are not burdened with the onus of proving what is their property before it is released to them. They are not prevented from disposing of their property unless and until they prove their ownership either to the satisfaction of a trustee or a court of competent jurisdiction. The differentiation does arise from their attributes or characteristics as solvent spouses, namely their usual close relationship with the insolvent spouse and the fact that they usually live together in a common household.[53] These attributes have the potential to demean persons in their inherent humanity and dignity. In this regard it might also be

53 I do not agree with the submission made on behalf of Mrs Harksen by her counsel that the effect of section 21 is to discriminate against a solvent spouse on the basis of personal intimacy.

mentioned that they have a relationship with the insolvent spouse similar to that of children or other persons who live under the same roof. The disadvantages of section 21 do not apply to the last mentioned categories. It follows that the provisions of section 21 of the Act do discriminate against the solvent spouse of an insolvent.

3 Unfair Discrimination

[62] The discrimination complained of by Mrs Harksen does not fall within the fourteen specified grounds contained in section 8(2). Mrs Harksen thus bears the onus of persuading us on a balance of probabilities that the discrimination is unfair and hence outlawed by section 8(2). In the determination as to whether that onus has been discharged we must have regard to the considerations referred to in para 51 above. I shall consider each in turn.

The Position of Complainant in Society

[63] The group here affected, namely solvent spouses, is not one which has suffered discrimination in the past and is not a vulnerable one. To adopt the words of O'Regan J in the *Hugo* case,[54] they are not a "vulnerable . . . group adversely affected by . . . discrimination".

54 Above n 31 at para 112.

The Nature of the Provision

[64] In this case the power was exercised by Parliament which has the right and duty to protect the public interest. In the Act, the legislature gave effect to that duty by protecting the rights of the creditors of insolvent estates. That is the purpose of section 21. That purpose is not inconsistent with the underlying values protected by section 8(2).

The Effect of the Discrimination on Solvent Spouses

[65] In the consideration of the effect of section 21 one must assume that Masters and trustees will act reasonably and honestly and not wish to claim for insolvent estates that which solvent spouses are able to establish belongs to them. One must also assume that in an appropriate case the courts will intervene where they do not so act.[55] It must also be borne in mind that the statutory vesting of the property of the solvent spouse does not have as a consequence that such property is necessarily removed from the possession of the solvent spouse. It is attached by the sheriff of the magistrate's court or by a deputy sheriff. They, as it were, place the hand of the law on the property and, of course, it may not be alienated or burdened by the solvent spouse prior to its release. Where the solvent spouse claims property as his or hers and fails to adduce evidence to establish that claim on a balance of probabilities then the insolvent estate is entitled to the property. The legal

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55 This would apply, for example, to applications made under ss 21(4) and (10) of the Act for the release of property claimed by the solvent spouse. See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC); and *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

presumption is that property was owned by the insolvent and not by the solvent spouse. The effect is hence that the solvent spouse has not been divested of what was her or his property. And one must remember that the facts in issue will be peculiarly within the knowledge of the spouses themselves.

[66] In the event that the solvent spouse has to resort to litigation, there is inconvenience and a degree of potential embarrassment to the extent that the litigation may become public. There is also inconvenience and a burden in that the solvent spouse will usually require legal assistance. Some solvent spouses may not have the funds to employ a lawyer and in that way suffer further potential prejudice. But that is an inevitable consequence of a dispute between a trustee of an insolvent estate and a solvent spouse as to ownership of property.

[67] In my judgment the cumulative effect of these criteria, and in particular the impact of the inconvenience or prejudice on solvent spouses in the context of the Act, and having regard to the underlying values protected by section 8(2), does not justify the conclusion that section 21 of the Act constitutes unfair discrimination. Looked at from the perspective of solvent spouses, it is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary. Indeed it could arise whenever a vindicatory claim (whether justified or not) is brought against a person in possession of property. Again, the inconvenience and burden of having to resist such a claim does not

lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature.

[68] It follows, in my opinion, that Mrs Harksen has not established that the provisions of section 21 of the Act, especially in its context, constitute unfair discrimination.

Sections 64 and 65

[69] Another complaint made by Mrs Harksen is that the provisions of sections 64 and 65 of the Act offend against her constitutional rights under the equality clause, the property clause, the privacy clause (section 13) and, because of the criminal sanction created by section 139 of the Act, her rights to freedom and security of the person (section 11(1)) under the interim Constitution.

[70] The arguments put before the Court by counsel for the applicant concerning the unconstitutionality of section 21 on the grounds that it infringes the equality and property clauses of the bill of rights were repeated in respect of sections 64 and 65 of the Act. For the same reasons that I would reject these challenges to section 21 of the Act, I would reject the similar challenges to sections 64 and 65 of the Act. More particularly, leaving section 21 aside, no creditor can have a legitimate complaint to being called as a witness under sections 64 and 65. Mrs Harksen's complaint concerns her being questioned about her own property and affairs. On the basis that it is constitutional to vest the property of a

solvent spouse temporarily in the Master or trustee, it follows that the solvent spouse similarly can have no legitimate complaint to being interrogated concerning her or his own property and affairs to the extent that they are relevant to the insolvent estate.

[71] As far as reliance is placed upon sections 11(1) and 13 of the interim Constitution, it is necessary to have regard to the scope of questions which the provisions of sections 64 and 65 of the Act require a person summoned to answer. It is also necessary to ascertain the nature of the offences created by section 139 of the Act.

[72] Section 65(1) of the Act provides that a person summoned under section 64 may be interrogated:

> " . . . concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse: Provided that the presiding officer shall disallow any question which is irrelevant . . . ."

Thus the first limitation upon the questions which may be put to the person summoned relates to their relevance to the purpose of the meeting. That purpose is clearly the affairs of the insolvent estate. It follows that to the extent that persons may be required to answer questions concerning the business, affairs or property of the solvent spouse, the information sought must be relevant to the estate of the insolvent spouse.

[73] A second and even wider limitation is to be found in the provisions of section 139 read with section 66(3) of the Act. As already stated,[56] section 66(2) empowers the presiding officer to commit to prison a person summoned to appear under section 64 and who fails to appear at the meeting without a reasonable excuse. Similarly, under section 66(3) the presiding officer may commit to prison a person who refuses to answer a question *"lawfully put"* under section 65 or who does not answer the question fully and satisfactorily.

[74] In *Bernstein and Others v Bester and Others NNO*[57] this Court considered the meaning and implications of the offence created by section 418(5)(b)(iii)(aa) of the Companies Act 61 of 1973, as amended. The Companies Act makes it a punishable offence for a person summoned for examination at a meeting of creditors of an insolvent company "*without sufficient cause to answer fully and satisfactorily any question lawfully put to him . . .*". It was claimed in that case also that a number of the rights protected under the bill of rights were invaded by those provisions. The following passages from

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56 Above at para 22.

57 Above n 55 at para 61.

the judgment of Ackermann J (on behalf of the whole Court) are applicable to the present attack on sections 64 and 65 of the Act:

> "There is no other provision in s 417 or s 418, or for that matter in any other provision of the Act which expressly or by necessary implication compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's chap 3 rights. It must, in my view, follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's chap 3 rights. Fidelity to s 35(2) of the Constitution requires such a construction and fidelity to s 35(3) read with s 7(4) of the Constitution requires an appropriate remedy; in the present case that the examinee should not be compelled to answer a question which would result in the infringement of a chap 3 right."[58]

The conclusion was expressed as follows:

> "Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's chap 3 rights, this would constitute 'sufficient cause', for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token the question itself would not be one 'lawfully put' and the examinee would not, in terms of this very provision, be obliged to answer it. The answer to this leg of Mr *Marcus*' argument is that there is, on a proper construction of these sections, and in the light of this Court's order in *Ferreira v Levin*, no provision in s 417 or s 418 of the Act which is inconsistent with the examinee's right to privacy in terms of s 13 of the Constitution now under consideration."[59]

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58 Id at para 60.

59 Id at para 61.

[75] In *Nel v Le Roux NO and Others*[60] a similar conclusion was reached with regard to the provisions of section 205 of the Criminal Procedure Act 51 of 1977 which also obliges examinees referred to therein to answer questions on penalty of a criminal sanction. It is there provided that such an examinee is not obliged to testify or to answer any particular question he or she has "*a just excuse*" for refusing or failing to do so. It was held by this Court that in the relevant context there was no material difference between the expression "a just excuse" in section 189 of the Criminal Procedure Act and "*sufficient cause*" in section 418 of the Companies Act.[61]

[76] The position is no different in the present context with respect to the sections of the Act now under consideration. A presiding officer may not commit to prison any person who with "*reasonable cause*" refuses to attend a meeting or a person who refuses to answer a question not "*lawfully put to him*". A question which would constitute an invasion of a constitutional right of an examinee cannot be said to be one "*lawfully put*". To paraphrase the words of Ackermann J in *Nel v Le Roux NO and Others,*[62] if a presiding officer at a meeting of creditors held under the Act finds that, in answering any question, the examinee's rights under chapter 3 of the interim Constitution would be

60 Above n 55.

61 Id at para 7.

62 Id at para 9.

infringed he or she should hold that this did not constitute a question "*lawfully put*" to the examinee and that a refusal to answer such a question did not therefore constitute conduct punishable by imprisonment under section 66(3) and therefore would not constitute an offence under section 139(1).

[77] In my opinion this analysis provides the answer to the submissions on behalf of Mrs Harksen in respect of the alleged invasion of the rights contained in sections 11(1) and 13 of the interim Constitution. They fall to be dismissed.

[78] Mr Trengove, on behalf of the amicus curiae submitted that the costs incurred by it should be paid by Mrs Harksen. I do not agree. In this case, but for the intervention by the amicus, this Court would inevitably have appointed counsel to make submissions on the constitutionality of the impugned provisions. Mrs Harksen would not have been burdened with a costs order against her in that eventuality. In my opinion, the fact that the Council of South African Banks, in order to protect their own interests, decided to consult their attorneys and seek to intervene should not prejudice Mrs Harksen.

Order

[79] The following order is made:

1. It is declared that the provisions of section 21 and the impugned parts of sections

64 and 65 of the Insolvency Act 24 of 1936 are not inconsistent with the interim Constitution.

2. The case is referred back to the Cape of Good Hope Provincial High Court to be dealt with in the light of this judgment.

3. There is no order as to costs.

Chaskalson P, Langa DP, Ackermann J and Kriegler J concur in the judgment of Goldstone J.

O'REGAN J:

[80] I have had the opportunity of reading the judgment of Goldstone J in this matter. I am unable to agree with the order that he proposes for the reasons that I give in this judgment.

[81] At issue in this case, is the question of whether certain provisions of the Insolvency Act 24 of 1936 ("the Act") are inconsistent with the provisions of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution"). The provisions under challenge are sections 21, 64 and 65. Section 21 provides that all the property, movable and immovable, of the spouse of a person whose estate has been provisionally sequestrated shall automatically vest, first in the Master, and then in the trustee of the insolvent estate. Section 21(2) provides that a trustee shall release any property so vested

once it has been proved that it is property which falls within one of the listed categories, which include property which the solvent spouse owned before the marriage; property which was received by the spouse under a marriage settlement; and property which was acquired during the marriage by a title valid as against creditors of the insolvent. Section 21(4) provides that a solvent spouse may apply to court for the release of vested property. It is clear that the spouse carries the burden of proof to establish that the property is indeed his or hers.[1] Finally, section 21(10) provides that a solvent spouse may either at the time of the provisional sequestration order or thereafter approach the court to exclude property for a period determined by the court from the effect of the vesting in circumstances where the solvent spouse is a trader or where he or she is likely to suffer serious prejudice as a result of the vesting. Such spouse will have to satisfy the court that he or she is willing and able to make arrangements to safeguard the interest of the insolvent estate in such property.

[82] Sections 64 and 65 provide for meetings of creditors. Section 64(2) provides as follows:

> "The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or <u>to the spouse of the insolvent</u> or to be indebted to the estate, or any person (including the insolvent's spouse)

1 *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404; *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 505I–J.

> who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section *sixty-five*."

Section 65(1) provides that:

> "At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of sub-section (2) of section *sixty-four* and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse . . .".

The applicant objected to the portions of these provisions which I have underlined.

[83] The applicant objected to section 21 on two constitutional grounds: section 8 (the right to equality) and section 28 (the right to property) and to the identified portions of sections 64(2) and 65(1) on the grounds that they are in breach of section 13 (the right to privacy) and section 8.

Challenge to section 21 on the basis of the right to property

[84] The applicant challenged section 21 on the ground that it was in conflict with the provisions of section 28(3) of the Constitution. For the reasons given by Goldstone J (at

paras 29–39 of his judgment) I agree that this challenge was ill-founded. I would emphasise, however, that counsel for the applicant stated during argument that the applicant did not seek to rely on the provisions of section 28(1) or (2) of the interim Constitution. Our finding, therefore, is that section 21 of the Act is not in breach of section 28(3) of the interim Constitution.

Challenge to section 21 on the basis of the right to equality

[85] The applicant also argued that because the vesting provisions of section 21 apply only to spouses, broadly defined,[2] and not to other persons, these provisions were in breach of section 8 of the interim Constitution. I agree with the approach to section 8 adopted by the majority in Goldstone J's judgment in this case. My disagreement with the majority lies with the application of that approach, not with the approach itself. In order to determine whether a provision falls foul of section 8, two enquiries are necessary. The first requires us to consider whether there is a rational connection between the legislative or executive purpose and the differentiation which is challenged. If there is no such rational connection, then the provision or conduct will be in breach of section 8. If there is, a second enquiry is necessary to decide whether the differentiation is in breach of section 8(2).

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[2] Section 21(13) defines spouse as not only a wife or husband in the legal sense "but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another."

[86] Goldstone J has held that there is a rational connection between the differentiation occasioned by section 21 and the legislative purpose which underpinned it (at paras 55–60 of his judgment). I accept that the primary purpose of section 21 is that identified by the Appellate Division[3] which is to prevent collusion between spouses to the disadvantage of the creditors of the insolvent spouse.[4] I also accept that there is a rational connection between this purpose and the provisions of section 21.

[87] The second question that needs to be considered is whether section 21 is in breach of section 8(2) of the Constitution. Section 8(2) provides that:

> "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 Now the Supreme Court of Appeal in terms of section 166(b) of the Constitution of the Republic of South Africa, 1996.

4 *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13I; see also *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404.

The applicant argues that section 21 discriminates on the basis of marital status and on the basis of personal intimacy. The additional argument relating to personal intimacy arises from the extended definition of "spouse" contained in section 21(13) which provides that:

> "In this section the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another."

This definition extends the provisions of section 21 to marriages not generally recognised as marriages in our law.[5] It may well be that the concept of "marital status" is sufficient to capture such marriages within its ambit as well, but as will be seen, it is not necessary in this case to reach a conclusion regarding that question. For if section 21 is unconstitutional because it discriminates unfairly on the ground of marital status, it will have to be declared invalid on that basis. It would be superfluous to consider any further challenge.

[88] The effect of section 21 of the Act is that the provisional or final sequestration of the estate of an insolvent will result automatically in the estate of the insolvent's spouse being vested first in the Master and then in the trustee of the insolvent estate. This vesting

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5 The difficulties that the breadth of this provision occasions are illustrated by the facts in *Chaplin NO v Gregory (or Wyld)* 1950 (3) SA 555 (C) at 566A, in which the court held that it could not make an order vesting in the trustee of the insolvent estate the property of a woman with whom the insolvent lived, because the insolvent was in fact still married to another woman.

is without doubt invasive of the interests of the solvent spouse. As Berman AJ said in *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 (2) SA 551 (C) at 557H:

> "The divesting of the property of the solvent spouse and the vesting thereof in the hands of the Master (and thereafter in the hands of the trustee) constitute a drastic and arbitrary invasion upon, and inroad into, the proprietary right of citizens . . .".

No such vesting occurs in relation to other family members, no matter how closely entwined their affairs may be with the affairs of the insolvent. Nor does it occur to the property of business associates. There can be no doubt in my mind therefore that the basis for the differential treatment is the marital status of the spouse.

[89] However, "marital status" is not one of the specified grounds contained in section 8(2) of the interim Constitution. That it is not specified, does not mean that such differentiation cannot constitute unfair discrimination in terms of section 8(2). It does mean that the provisions of section 8(4) of the Constitution do not assist the applicant. That clause states:

> "*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."

If "marital status" were a listed ground, then differential treatment based on it would immediately be presumed to be sufficient proof of unfair discrimination. The court would

still have to consider on the facts before it whether the discrimination was "unfair". To do so, the court would have to consider the impact of the conduct upon the individuals or group concerned. Factors relevant to that exercise would include the identity of the individual, and his or her membership of a group previously disadvantaged by or vulnerable to discrimination, as well as the nature of the interests affected by the discrimination.

[90] As "marital status" is not a listed ground, the applicant will first have to establish that the ground upon which the differentiation has been effected is one which may give rise to unfair discrimination. The primary prohibition in section 8(2) outlaws unfair discrimination. It contains a list of grounds which may result in such discrimination, but that list is expressly not exhaustive. Indeed, the section stipulates that the list provided shall not derogate from the generality of the provision. In interpreting section 8(2), the primary question is always whether the conduct complained about constitutes "unfair discrimination".

[91] In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42, we held that:

> "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 s 8 and, in particular, ss (2), (3) and (4)."

And in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31, we reasoned that "discrimination" as contemplated by section 8(2) needs to be understood in the context of the history of this country.

> "Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity." (Footnote omitted.)

We have interpreted section 8(2) as a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve and particularly where treatment is determined not by the needs or circumstances of particular individuals, but by their attributes and characteristics, whether biologically or socially determined.

[92] In this case, disadvantages are imposed upon solvent spouses because they are married (or deemed to be in a marriage relationship in terms of the provisions of section

21(13)). Although marital status is not a ground specified in section 8(2), it does seem to me that it is a ground which may give rise to the concerns contemplated by section 8(2). In *Miron v Trudel* (1995) 29 CRR (2d) 189, the Canadian Supreme Court concluded that the exclusion of unmarried partners from accident benefits available to married partners was in breach of the equality provision of the Canadian Charter of Rights and Freedoms. McLachlin J held that the unifying principle to determine what grounds would constitute a breach of the Canadian Charter was the following:

> ". . . the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual." (At 207.)

She went on to find that:

> ". . . discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognised grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee." (At 208.)

I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship and its personal and

proprietary consequences. In my view, these considerations are sufficient to accept that marital status may give rise to the concerns of section 8(2). Accordingly, given the disadvantages conferred by section 21 on the basis of marital status, the applicant has established discrimination for the purposes of section 8(2). Of course, having decided that the provision in this case does amount to discrimination for the purposes of section 8(2), it is still necessary to decide whether the applicant has shown that the provision amounts to *unfair* discrimination.

[93] I agree with Goldstone J that to determine whether the discrimination has been unfair, it is necessary to consider the impact of the discrimination on the applicant and others in her situation (at paras 51 and 53 of his judgment). To determine whether the impact was unfair it is necessary to look at the group affected by the discrimination, at the nature of the power in terms of which the discrimination was effected and also at the nature of the interests which have been affected by the discrimination. This test is similar to the test adopted by L'Heureux-Dubé J in *Egan v Canada* (1995) 29 CRR (2d) 79 at 113-14 to determine what constitutes "discrimination" for the purposes of section 15 of the Canadian Charter of Rights and Freedoms.

[94] In this case, the group affected is married people, and, in particular, spouses of insolvents. Historically, the relationship of marriage in South Africa is one whose consequences have been closely governed by the law: African customary law and

common law were the primary sources of the rules relating to marriage but in both cases those rules were affected by statutory enactments over the years. In the past, discrimination on grounds of marital status generally occurred in two ways. First, people who lived together in close personal relationships but without getting married, or who were married according to religions or customs not afforded recognition, were denied benefits ordinarily afforded to married couples. Secondly, women who were married were often the subject of discrimination. Many of the laws governing marriage were based on an assumption that women were primarily responsible for the maintenance of a household, and the rearing of children, while men's responsibilities lay outside the household. These rules therefore both reflected and entrenched deep inequalities between men and women.[6] Not infrequently women's experience of marriage therefore was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household. A strong social expectation that married women would not work outside the household also translated into patterns of discrimination against married women outside of the marriage relationship, particularly in the labour market.

[95] The historical patterns of discrimination in the context of marital status are therefore quite complex. In the case before us, the discrimination facially affects all spouses in marriages recognised by law as well as people in some relationships which are

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6 See, for a full discussion, June Sinclair *The Law of Marriage* vol 1 (Juta Ltd, Kenwyn 1996) chapter 1.

not ordinarily afforded the consequences of marital status, but which are similar to marriage relationships and deemed to be such by section 21(13). Neither of the two groups who have historically been the subject of patterns of discrimination due to marital status is therefore singled out for consideration. The applicant did not seek to establish that the provisions under challenge were indirectly discriminatory on the ground of gender. Although I have little doubt that at times provisions discriminating on the grounds of marital status will implicate a pattern of discrimination rooted in one of the patterns established in our past, I cannot conclude that that is the case here.

[96] On the other hand, the effect of the discriminatory provisions on the spouses of insolvents is substantial. All property, movable and immovable, whether the subject matter of a bequest or marriage settlement, whether the personal, business or trading effects of the spouse entirely unrelated to the affairs of the insolvent or of an intrinsically personal nature such as clothing and personal effects, is as a result of the provisions of section 21 automatically vested in the Master and then the trustee. This may happen suddenly and without notice to the spouse of the insolvent.

[97] The Appellate Division has held obiter that the effect of the vesting is to transfer full dominium in the property from the spouse to the Master or trustee (*De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 15I–J). Even if the effect of the vesting were not to result in the transfer of full dominium to the Master or trustee, but only some

of the incidents of dominium, it is clear that the implications for the solvent spouse would remain severe. The solvent spouse loses rights to dispose of and control the property. He or she may not alienate, encumber or lease such property, for example, while it is subject to the vesting. If the trustee chooses, the spouse may also lose the use and enjoyment of the property. As well as the tremendous personal inconvenience and difficulty caused, the vesting may have grave implications for a spouse who carries on his or her own business or professional career.

[98] It is not surprising therefore that judges and commentators alike have considered the effect of the provisions to be extremely invasive on the rights of the spouse of an insolvent.[7] The South African Law Commission noted in its Review of the Law of Insolvency that:

> "Although section 21 endeavours to limit prejudice to the insolvent's spouse (compare subsections (2), (3), (10) and (11)), the possible hardships (financially (sic) and otherwise) brought about by the sudden vesting of property in the Master are not really eliminated."[8]

The SA Law Commission concluded that the provision was an anachronism and

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7 See, for example, Berman AJ in *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 (2) SA 551 (C) at 557H, quoted in text above; SA Law Commission Working Paper 41 Project 63 *Review of the Law of Insolvency: Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent* (1991); RG Evans "A critical analysis of section 21 of the Insolvency Act 24 of 1936" (1996) 59 *THRHR* 613–625 and (1997) 60 *THRHR* 71–83 at 83.

8 SA Law Commission Discussion Paper 66 Project 63 *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (1996) at 59, para 11.11.

recommended that it be abolished.[9] Similarly, the Cork Committee in the United Kingdom rejected a proposal that the assets of both spouses should be pooled upon the insolvency of one spouse. Although this proposal was not identical to section 21, it had some similarities to it. The Committee stated:

> "We reject this proposal as an unjustified interference with individual property rights, which would produce an unfair result in many cases, and which in many respects would be a reversion to outmoded concepts of matrimonial property which have long since been abandoned. If the proposal were adopted, elementary notions of fairness would require that the other spouse's own property, not derived directly or indirectly from the debtor, should be exempt. This would not only lead in many cases to an uncertain and unsatisfactory inquiry, but would in effect tend to reintroduce the Victorian concept of 'the wife's separate property' which was abandoned almost a century ago. We regard the proposal as entirely out of line with modern attitudes to the proprietary rights of husband and wife."[10]

Both the South African Law Commission and the United Kingdom's Cork Committee considered that such provisions were overly invasive of the interests of the spouse of the insolvent and constituted an anachronism in the context of modern matrimonial property law.

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9 Id at 63, para 11.16.

10 Report of the Review Committee *Insolvency Law and Practice* Cmnd 8558 (1981) at 280, para 1229.

[99] It is true that section 21(10), which permits the spouse to approach a court for an order excluding certain property from the effect of the vesting, does mitigate the effects of the provision to some extent. It does not in my view vitiate the onerous implications of the section however. An automatic vesting of all property occurs regardless of the relationship between the spouses or the nature of the property concerned unless the spouse undertakes litigation to prevent it. Even then, unless the court is satisfied that the spouse is able and willing to safeguard the interest of the insolvent estate, such an exclusion may not be ordered (*Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N) at 510). A spouse must be able to safeguard the estate against all reasonably possible contingencies including alienation of the property by the solvent spouse; intentional damage to or destruction of the property by the spouse or a third party; accidental damage to the property; fraudulent abandonment of the property by the spouse and theft of the property. It is not always easy for a spouse to satisfy a court that he or she will be able to provide the necessary protection. (See *Van Schalkwyk v Die Meester*, above, at 510.)

[100] In my view, there can be no doubt that the interests of the solvent spouse are adversely affected by the provisions of section 21. How grave such invasion will be will depend upon the circumstances and facts of each insolvency. There is no doubt, however, that in every insolvency where a spouse's property vests in the Master or trustee, that spouse's interests are impaired. The extent of the impairment is substantial and sufficient

to constitute unfair discrimination.

[101] Now that I have concluded that section 21 constitutes unfair discrimination as contemplated in section 8(2), it is necessary to consider whether the infringement occasioned by section 21 is justifiable in terms of section 33 of the interim Constitution. We have held that section 33 requires us to consider the proportionality between the invasion caused by the infringing provision and the importance, purpose and effects of that provision.[11] It is necessary therefore to consider more fully the purpose and effects of section 21 of the Act.

[11] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

[102] As stated above, the purposes of section 21 are to assist the trustee to finalise the estate of the insolvent, and in particular to protect the interests of the insolvent's creditors against collusion between spouses. As was stated in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 47, "[t]here is no question that protecting creditors is a valuable and important public purpose." In addition, as was also acknowledged in that case, there can be no doubt that the close relationship between spouses may in some circumstances lead to collusion.[12] However, it is plain that section 21 catches within its net all spouses of insolvents, even those spouses innocent of collusion, and even those whom the trustee and creditors accept to be innocent of collusion. All spouses of insolvents will have to take steps to have their property excluded from the vesting or released by the trustee in order to recover their property. Not only does the provision ensnare all spouses within its net, but all property as well. No matter how remote the relationship between a piece of property and the estate of the insolvent, that property will nevertheless vest in the trustee of the insolvent unless the spouse of the insolvent takes steps to have it excluded or released. The scope of the provision is indeed sweeping in relation to spouses.

[103] On the other hand, the provision does not affect a range of people who may be in a similarly questionable relationship with the insolvent, such as other close family members, personal friends or business associates. In that sense, the provision is under

[12] The possibility of collusion between spouses was also acknowledged in *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404; and *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 505.

inclusive in that it does not seek to prevent collusion by other people who may be equally well placed to act fraudulently. The section is therefore over broad given its purpose in relation to spouses and their property and too narrowly drawn in relation to other people.

[104] It may be that the provisions of section 21 would be acceptable if it were shown to achieve its aim of frustrating collusion between spouses. Little evidence was placed before the Court to indicate how effective the provision was in achieving such aim. It may be that such evidence is impossible to obtain. I am prepared to accept that the provision may deter collusion between spouses in at least some cases. However, it also seems plain to me that a calculated plan by fraudulent spouses would not easily be waylaid by a trustee's use of section 21. For, where spouses are set on a path of fraudulent conduct, they may dispose of any movable property without the trustee ever being aware of such property. Cash, jewellery and other valuable movables could easily be kept from the knowledge of the trustee. I find it hard to conclude in the circumstances that the sweeping nature of the provision is justified.

[105] I am bolstered in my conclusion that section 21 is not justifiable, by the fact that many jurisdictions apparently regulate the law of insolvency without reliance on any such provisions. In the United Kingdom, for example, following upon the publication of the Cork Report, the Insolvency Act, 1986 was enacted. The key technique employed by that legislation to prevent collusive conduct is to provide for a range of voidable transactions.

Transactions entered into that constitute preferential transactions or "undervalue" transactions, are voidable if entered into within a certain period of the insolvency. Where those transactions are between the insolvent and an associate, which includes spouses, relatives and business partners, the time period within which they may be set aside is considerably longer.[13] There is also a specific provision that in the circumstances of a loan by the solvent spouse to the insolvent spouse, the solvent spouse will only be repaid after all other creditors have been paid in full.[14]

[106] The approach adopted in the United Kingdom to voidable transactions has been recommended for South Africa by the SA Law Commission.[15] Such an approach recognises that a range of people other than spouses may be responsible for collusive conduct, and also seeks to create a balance between the interests of the spouse of an insolvent and other similarly situated people and the interests of creditors of the insolvent

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13 See sections 339–342 of the Insolvency Act, 1986.

14 Id at section 329.

15 See SA Law Commission Project 63 above n 8 at para 1.1 and 11.15.

estate.

[107] In Canada, as well, the primary mechanism to address collusion is the "reviewability" of transactions.[16] Transactions that are not at arm's length are deemed to be reviewable and persons who share a blood relationship or are related by marriage or adoption are deemed not to transact at arm's length.[17] A further rebuttable presumption deems all property in the possession of the insolvent at the time of the insolvency to belong to him or her. Any person claiming such property must institute litigation to recover the property and must prove ownership.[18]

[108] In Australia, too, there are no provisions equivalent to section 21. Once again, the insolvency legislation renders certain transactions voidable in the interests of creditors. Sections 120–123 of the Australian Bankruptcy Act 1966–1973 govern transactions entered into by the insolvent prior to bankruptcy which are void or voidable at the instance of the trustee. In New Zealand, too, the question of collusion appears to be

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16 See Part IV of the Bankruptcy and Insolvency Act, RSC 1985. The provisions of this legislation are supplemented by provisions of provincial legislation, for example, sections 4 and 5 of the Ontario Assignments and Preferences Act, RSO 1990 relating to suspect transactions, and by provisions of the common law, in regard to which see *Koop v Smith* (1915) 25 DLR 355 (SCC). For a full discussion, see Robert A Klotz *Bankruptcy and Family Law* (Carswell, Toronto 1994) at 197-200.

17 Sections 3 and 4 of the Bankruptcy and Insolvency Act, RSC 1985. In *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1989) 60 DLR (4th) 43 (BCCA), a majority of the court held that the presumption deeming related persons not to transact at arm's length was irrebuttable and did not infringe either the right to equality or liberty under the Charter. But see *Re Battiston Brothers Construction Ltd* (1986) 3 BCLR (2d) 135 (BCSC).

18 Section 81 of the Bankruptcy and Insolvency Act, RSC 1985.

regulated primarily through the mechanism of voidable transactions.[19] In both Australia and New Zealand, the legislation contains provisions similar to that existing in the United Kingdom concerning loans by the solvent spouse to the insolvent spouse.[20]

19 Sections 54–57 of the Insolvency Act, 1967.

20 Section 111 of the Australian Bankruptcy Act, 1966–1973; and section 43 of the New Zealand Insolvency Act, 1967.

[109] In Germany, there is a presumption that movable property in the possession of the insolvent spouse or in possession of both spouses is the property of the insolvent spouse. This provision, while bearing some similarity to section 21, is far narrower in scope – it contains no automatic vesting provision; it is restricted only to movable property and where the goods are for the exclusive personal use of one of the spouses, the goods will be deemed to be the property of that particular spouse.[21] Indeed, there is only one legal system that I have been able to identify where a provision similar to section 21 operates, that is the Netherlands. Articles 61 and 62 of the *Faillissementswet* of 1893 (as amended) stipulate that all property of a solvent spouse will fall within the insolvent estate and will be under the control of the curator from whom the spouse may reclaim property that is his or her exclusive property.

[110] This brief survey of foreign jurisdictions suggests that a variety of mechanisms are used to achieve purposes similar to those that motivate section 21. Most common is the mechanism of the voidable transaction, often accompanied by provisions which render transactions between spouses and people similarly situated particularly suspect or suspect for longer periods of time prior to the insolvency. The absence of provisions equivalent to section 21 in many foreign jurisdictions suggests that such provisions are not an essential component of insolvency law.

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21 Art 1362 of the German Civil Code (BGB).

[111] In summary, in determining whether section 21 meets the test for justifiability set by section 33, I must weigh the infringement of section 8(2) against the purpose and effect of section 21. As to the first, I have concluded that there is unfair discrimination against spouses. Although the extent of the infringement is not extremely offensive or egregious, it nevertheless constitutes a significant limitation of that right. On the other hand, although the purpose of section 21 is an important one, the relationship between purpose and effect is not closely drawn. In particular, the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately. The absence of similar provisions in other legal systems seems to support the conclusion that that balance has not been achieved. In the circumstances, I conclude that section 21 does not meet the test of section 33 and is therefore inconsistent with the provisions of the interim Constitution.

Challenge to the provisions of sections 64 and 65

[112] The applicant argues that to the extent that these provisions permit the investigation of the spouse's business, affairs or property at the meetings of creditors, they are inconsistent with the right to equality and the right to privacy in the Constitution. The amicus contends that the provisions are not unconstitutional. According to the amicus the primary purpose of the extended enquiry aspects of sections 64 and 65 is to enable the trustee fully to investigate and untangle the affairs of the spouses and, in

particular, to enable the trustee to identify and recover all the assets of the insolvent estate.

[113] If the focus of the provisions remains the estate of the insolvent, and not an enquiry into the independent affairs of the solvent spouse, there can be little constitutionally objectionable in the provisions.[22] There can be no doubt that a trustee needs to be given considerable leeway to identify and recover all the assets in an insolvent estate. The trustee is generally in a position of ignorance when he or she is appointed as to those affairs, and an enquiry into those affairs in the widest sense will often be needed to ensure that the trustee's task is properly completed. I do not think that a spouse can complain about questions being asked concerning his or her property, business or affairs if such questions are relevant in some way to the insolvent estate itself. Any person who has knowledge of the estate may be called upon to answer such questions.

[114] Complaint both under section 8 and section 13 of the interim Constitution could only arise, it seems to me, if questions could be asked of the spouse or someone else relating to the business, affairs or property of the spouse which bore no relevance to the insolvent estate at all. The question then is whether, upon a proper reading of sections 64 and 65 of the Act, this could happen. It is true that the provisions under challenge

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22 See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 51–92. See also *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 7–9.

expressly permit the business, affairs or property of the spouse of the insolvent to be the subject of investigation at creditors' meetings. The provisions contain no express qualification to suggest that such investigation will be permitted only to the extent that it is relevant to the investigation of the insolvent estate.

[115] There has been no reported judgment of any court considering the scope of the enquiry in relation to the estate of the solvent spouse. On the other hand, it is plain that it has long been recognised that the subject matter of the investigations that take place at creditors' meetings is "the affairs of the insolvent taken in the very widest sense."[23] And that the relevance of any particular question put to a witness will be determined by the subject matter of the enquiry.[24] Section 65(1) also provides that a presiding officer must disallow questions which are irrelevant. It is also clear from the subsection and from the reported decisions that the person presiding at creditors' meetings has wide powers to call and interrogate witnesses on all relevant matters.[25]

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23 *Yiannoulis v Grobler and Others* 1963 (1) SA 599 (T) at 601C; *Agyrakis and Another v Gunn and Another* 1963 (1) SA 602 (T) at 604–5; *Pretorius and Others v Marais and Others* 1981 (1) SA 1051 (A) at 1062H–1063D.

24 *Yiannoulis v Grobler* n 23 at 601C.

25 *Spain NO and Another v Officer designated under Act 24 of 1936, section 39(2), and Others* 1958 (3) SA 488 (W) at 492–4.

[116] The challenged provisions need to be read in the context of the Act as a whole and in particular in the context of a clear understanding that the purpose of creditors' meetings is to facilitate the final sequestration of the estate of the insolvent. Where the business, affairs or property of a spouse is relevant to that exercise, it is clear that such matters may be the subject of interrogation. However, where such affairs are not relevant, and it is clear that they are not relevant, then questions concerning such affairs will not be permissible at a creditor's meeting. In my view, therefore, sections 64(2) and 65(1) do not permit questions to be put to the spouse of an insolvent at a creditors' meeting concerning matters falling beyond the affairs of the insolvent estate, where it is clear from the information in the possession of the trustee that those matters do indeed fall outside the subject matter of the enquiry which is the "affairs of the insolvent in the widest sense". That interpretation of the provisions seems to be consistent with the purpose and intention of the Act. If, however, I am wrong, there is no doubt that the interpretation I have proposed is an interpretation that sections 64(2) and 65(1) are reasonably capable of bearing. Therefore it is that meaning that should be adopted in the light of the provisions of section 35(2) of the interim Constitution which provides:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

This approach, it seems to me, is consistent with the approach adopted by this Court in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 62–3 and *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 8–9. For these reasons, therefore, I agree with Goldstone J that the challenge to the provisions of sections 64(2) and 65(1) of the Act should fail.

[117] In conclusion, therefore, I find that section 21 is inconsistent with the provisions of the interim Constitution, but that the provisions of sections 64(2) and 65(1) of the Act are not.

Madala J and Mokgoro J concur in the judgment of O'Regan J.

SACHS J:

[118] In my view, section 21 of the Insolvency Act 24 of 1936 (the "Act") represents more than an inconvenience to or burden upon the solvent spouse. It affronts his or her personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution,[1] thereby being unfair in terms of section 8(2) of the interim Constitution. It is in this one crucial

[1] References to the "interim Constitution" are to the Constitution of the Republic of South Africa Act 200 of 1993.

respect that I find myself unable to concur in what I consider to be an otherwise admirable exposition and analysis of the issues by Goldstone J. I agree with his analysis of the law, and disagree only with the way he applies it in the circumstances of the present case.

[119] Goldstone J holds that the differentiation between solvent spouses and other persons who had dealings with insolvents is disadvantageous to the former and that the disadvantage relates to the attributes or characteristics of solvent spouses, thereby discriminating against them.[2] He goes on, however, to find that the inconvenience or prejudice suffered by solvent spouses in the context of the Act does not lead to an impairment of their fundamental dignity or constitute an impairment of a comparably serious nature.[3] He accordingly concludes that the applicant has not established that the discrimination was unfair. I shall briefly explain why, accepting his overall approach to the matter, I find that in fact the dignity and the fundamental rights of personality of solvent spouses are adversely affected in a manner which is unfair and violates section 8(2).

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2 At para 61 above.

3 At para 67 above.

[120] Manifestly patriarchal in origin,[4] section 21 promotes a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged. If the focus of the legislation had been on members of households rather than on spouses and had related to household property rather than to whole estates, then the inconvenience such merging caused would have been substantial but would not have raised issues of unfairness. As it is, its reach is too narrow in respect of the classes of persons affected and too wide in relation to the members of the group selected and the range of property which automatically vests to be considered purely as a pragmatic device to deal with collusion of spouses or confusion of goods. Its underlying premise is that one business mind is at work within the marriage, not two. This stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses.

[121] Take the case of Jill, a cabinet minister, judge, attorney, doctor, teacher, nurse, taxi driver or research assistant. She has a career, income and estate quite separate from that

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[4] This is evidenced by the language used in the interpretation of the section. Greenberg JP in *Maudsley's Trustees v Maudsley* 1940 TPD 399 at 404 said:

> " One knows that before the amendment of the law in 1926, it was a common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title."

The assumption is that husbands acquire property and use their wives as repositories so as to deceive creditors. So strong is the assumption that even in argument in the present case the solvent spouses were generally referred to in the feminine.

of her spouse Jack, who for his part has his own career, income and estate. If Jack falls down and breaks his financial crown, it is only on manifestly unfair assumptions about the nature of marriage that Jill should be compelled by the law to come tumbling after him. Their marriage vows were to support each other in sickness and in health, not in insolvency and solvency.

[122] The question, then, is not whether the trustee acts fairly in his or her application of the law, but whether the law itself, in selecting out a group defined in terms of marital relationship, is fair in its rationale, reach and impact. Any appraisal of fairness must, of course, include a balancing of fairness to the creditors with fairness to the solvent spouse. The less the solvent spouse is targeted because of assumptions made about spousal relationships and the more as a result of legitimate concern for the interests of the creditors, the less scope is there for an inference of unfairness. On this question, it is significant that the Act provides adequate mechanisms for securing assets as well as for setting aside voidable dispositions in terms of section 26, voidable preferences in terms of section 29, undue preferences in terms of section 30 or collusive transactions in terms of section 31, without gratuitously intruding on spousal autonomy by virtue of section 21. The conclusion one must draw is that the *raison d'etre* of the legislation is a blunderbuss application of the stereotype and not a fine-tuned satisfaction of the claims.

[123] Nor is the degree of inconvenience the critical factor. Rather, what is most

relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity[5] and privacy[6] requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality as promised by the Preamble[7] and section 8[8]. The intrusion might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them. The path which this Court embarked upon in *Prinsloo v Van der Linde and Another*[9] and *President of the Republic of South Africa and Another v Hugo,*[10] and as confirmed in the judgment of Goldstone J in the present matter, requires it to pay special regard to patterns of advantage and

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5 Section 10 of the interim Constitution reads: "Every person shall have the right to respect for and protection of his or her dignity."

6 Section 13 of the interim Constitution reads: " Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to . . . the seizure of private possessions . . . ."

7 It reads, in pertinent part:

> " Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a . . . constitutional state in which there is equality between men and women . . . so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

8 See above n 29 at para 40 of Goldstone J's judgment.

9 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

10 1997 (6) BCLR 708 (CC).

disadvantage experienced in real life which might not be evident on the face of the legislation itself. As Wilson J pointed out in *R v Turpin*:

> ". . . it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[11]

The larger historical context is well articulated by O'Regan J. I am satisfied that the present case points to a form of disadvantage affecting what one might call the moral citizenship (independence and self-fulfilment) of persons who happen to be married.

[124] The incremental development of equality jurisprudence presaged by *Prinsloo* requires us to examine on a case by case basis the way in which a challenged law impacts on persons belonging to a class contemplated by section 8(2). In particular, it is necessary to evaluate in a contextual manner how the legal underpinnings of social life reduce or enhance the self-worth of persons identified as belonging to such groups. Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal

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11 (1989) 39 CRR 306 at 335-36.

persons within the union, and encourages society to look at them not as "a couple" made up of two persons with independent personalities and shared lives, but as "a couple" in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness.

[125] Counsel were unable to point to any other open and democratic society where solvent spouses are singled out for this kind of treatment.[12] Given contemporary international values, I am not surprised, and join with O'Regan J in registering my dissent.

12 A comparative study by O'Regan J at paras 105-110 points only to the Netherlands as a country with a similar law.

For the applicant:	WRE Duminy SC and AM Breitenbach, instructed by Jan S. de Villiers & Son.
For the amicus curiae:	W Trengove SC and D Spitz, instructed by Edward Nathan & Friedland Inc.

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.
>
> (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.
>
> (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.
>
> (b) . . . .
>
> (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.
>
> . . . .

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”.

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).

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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.

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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

ACKERMANN J

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

ACKERMANN J

[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

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

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.

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[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.

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[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.

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[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.

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

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[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.

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[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

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[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.

SACHS J

[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."

SACHS J

[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.

SACHS J

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.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/99

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY	First Appellant/Applicant
SVEN PATRIK ALBERDING	Second Appellant/Applicant
FIONA JANE LIEBE SAUNDERS WATSON	Third Appellant/Applicant
MALCOLM CLIVE NORTH	Fourth Appellant/Applicant
FRANCK ANDRÉ CHARLES JOLY	Fifth Appellant/Applicant
LINDA AOUDIA	Sixth Appellant/Applicant
ARGYRIS SOTIRIS ARGYROU	Seventh Appellant/Applicant
CLINT LEWIS TATCHELL	Eighth Appellant/Applicant
LUCINDA SLINGSBY	Ninth Appellant/Applicant
STEVEN MARK LE GRANGE	Tenth Appellant/Applicant
HILTON MARC KAPLAN	Eleventh Appellant/Applicant
CHRISTINE HAZEBROUCQ	Twelfth Appellant/Applicant
JACOBUS JOHANNES DE WET STEYN	Thirteenth Appellant/Applicant
THE COMMISSION FOR GENDER EQUALITY	Fourteenth Appellant/Applicant

versus

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DEPUTY MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Third Respondent

Heard on : 17 August 1999

Decided on : 2 December 1999

JUDGMENT

ACKERMANN J:

Introduction

[1] This matter raises two important questions. The first is whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not to afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents. The second is whether, when it concludes that provisions in a statute are unconstitutional, the Court may read words into the statute to remedy the unconstitutionality. These questions arise from the provisions of section 25(5) ("section 25(5)") of the Aliens Control Act 96 of 1991 (the "Act") and the application of the provisions of section 172(1)(b) of the 1996 Constitution (the "Constitution") should section 25(5) be found to be inconsistent with the Constitution. Section 25(5) reads:

> "Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit."

[2] Section 25(5) was declared constitutionally invalid and consequential relief granted by

the Cape of Good Hope High Court (the "High Court")[1] (per Davis J, Conradie J and Knoll AJ concurring) in the form of the following order:

> "1. That Section 25(5) of the Aliens Control Act 96 of 1991 is declared invalid to the extent that the benefit conferred exclusively on spouses is inconsistent with section 9(3) in that on the grounds of sexual orientation it discriminates against same sex life partners.
>
> 2. That the declaration of invalidity of section 25(5) is suspended for a period of twelve months from the date of confirmation of this order to enable parliament to correct the inconsistency.
>
> 3. That the exclusion of same sex life partners from the benefits conferred by section 25(5) of the [Act] constitute[s] special circumstances requiring the grant of an application for exemption made in terms of section 28(2) of the Act by a same sex life partner of a person permanently and lawfully resident in the Republic. This part of the order shall remain in force for as long as it takes parliament to correct the inconsistency.
>
> 4. That under section 172(2)(b) of the Constitution second and further applicants are exempted, in terms of section 28(2) of the Act, from the provisions of section 23 thereof.
>
> 5. No action may be taken against them in terms of the Act arising out of their living working or studying in the Republic.
>
> That Respondents are to pay, jointly and severally the applicants' costs including

[1] The judgment is reported as *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C); 1999 (3) SA 173 (C). Subsequent references to this judgment will be to the BCLR report only.

the cost of two counsel."

[3] This order was made pursuant to an application by the fourteen appellants/applicants (hereinafter referred to as the "applicants") against the three respondents, namely the Minister, the Deputy Minister and the Director-General of Home Affairs (hereinafter referred to collectively as the "respondents" and individually as the "Minister", the "Deputy Minister" and the "DG" respectively) in which the applicants sought an order in the following terms:

> "1 Reviewing and setting aside or correcting the decision of the First Respondent to deny the Seventh Applicant an extension of the exemption granted on 23 April 1997 in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991, as amended, in consequence of his abiding same-sex relationship with the Thirteenth Applicant; and
>
> 2 Reviewing and setting aside or correcting the decision of the First Respondent to deny the Second to Sixth Applicants an exemption in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991, as amended, in consequence of their abiding same-sex relationships with the Eighth to Twelfth Applicants respectively; and
>
> 3 Reviewing and setting aside or correcting the decision of the First Respondent, alternatively the Third Respondent, that special circumstances no longer exist in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, to accommodate the same-sex life partners of South African citizens involved in committed relationships; and
>
> 4 Directing the Third Respondent to accept, process and refer the applications of the Second to Seventh Applicants for an immigration permit in terms of section 25(2) of the Aliens Control Act, Act 96 of 1991 as amended on terms no less favourable than those applicable to married couples under Section 25 of the Act, to the appropriate Immigrants Selection Board for consideration;
>
> 5 Declaring section 25 of the Aliens Control Act, Act 96 of 1991 as amended, to be inconsistent with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996, and therefore invalid to the extent of its

inconsistency;

6 Directing the First Respondent to extend the exemptions already granted to the Seventh Applicant in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, pending any amendment to the Aliens Control Act to comply with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996;

7 Directing the First Respondent to grant to the Second to Sixth Applicants exemptions in terms of section 28(2) of the Aliens Control Act, Act 96 of 1991 as amended, pending any amendment to the Aliens Control Act to comply with the provisions of the Constitution of the Republic of South Africa Act, Act 108 of 1996;

(8) Declaring that the failure of the First Respondent to recognise committed same-sex relationships as a special circumstance in terms of section 28(2) of the Act [is] unconstitutional.

. . . ."

[4] The applicants have appealed to this Court under the provisions of section 172(2)(d) of the Constitution[2] seeking a variation of the order granted by the High Court. They have simultaneously applied for confirmation[3] of the whole order, except those parts against which the appeal is brought and "those parts of the order, if any, which are not subject to confirmation by this court in terms of sections 167(5) and 172(2) of the Constitution." The respondents then appealed against the entire judgment and order of the High Court.

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2 Read with section 8(1)(b) of the Constitutional Court Complementary Act 13 of 1995 (the "CCC Act") and Rule 15(2) of this Court.

3 Under the provisions of section 172(2)(d), read with sections 172(2)(a) and 167(5) of the Constitution, and read with section 8(1)(b) of the CCC Act and Rule 15(4).

The High Court's refusal of a postponement to the respondents

[5] The respondents did not file any answering affidavits in the High Court. Less than twenty-four hours before the matter was due to be heard by the High Court, the respondents sought a postponement of the hearing. They tendered costs on the attorney and client scale, coupled with an undertaking that the *status quo* with regard to the second to thirteenth applicants would persist until the final determination of the matter. The purpose was, according to the respondents, to:

> ". . . file comprehensive answering affidavits, as this Honourable Court would otherwise be left with little assistance regarding the purpose and practical implementation of the statutory provisions in question and the Government's reasons for opposing this application. These include issues of ripeness and the meaning, nature and purpose of the fundamental rights on which the Applicants rely, any issues of justification which arise, and the nature of the interim and final relief described in the Applicants' heads of argument . . ."

The High Court refused the application for postponement.

[6] The relevant surrounding facts are detailed in the judgment of the High Court and need not be repeated here; their gist is summarised in the following passage of Davis J's judgment:

> "In this case the respondents were served with the applicants' papers some seven months before the matter came before this Court. Persistent efforts were made by the applicants to remind the respondents of their obligations not only to this Court but ultimately to the Constitutional Court. No explanation was provided as to why the respondents had chosen to ignore the proceedings for more than seven months. Mr Mokoena's [the DG's] affidavit simply states that the cabinet decided the day before the hearing that the

application should be opposed and that important matters were raised."[4]

[7] Davis J also correctly pointed out that this Court has made it clear[5] that any evidence that the State considers relevant to an issue of the constitutional invalidity of a statutory provision ought to be adduced before the High Court first hearing the matter.[6] The learned Judge held that such consideration, however important, did not in itself justify the granting of a postponement which had to be based on clear principle. Davis J pointed out that no reasons at all had been furnished for the respondents' failure to observe the rules of court, that they had treated their obligations to the court with disdain and had ignored the rights of the applicants to a resolution of their claims and that accordingly the application had been dismissed.[7]

[8] The respondents sought in this Court to revisit the refusal of this application in two ways. First, they applied on notice of motion for an order with, amongst others, the following terms:

"1. Condoning the [respondents'] failure to file their Answering Affidavit in the

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4 Above n 1 at 287 C-E.

5 In *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) at para 5, which was decided seven months before the application in the present matter was launched.

6 See above n 1 at 286 J - 287 B.

7 See above n 1 at 287 E - 288 A.

Court *a quo*;

2. Granting the [respondents] leave to file their Answering Affidavit together with the annexures thereto;
3. *Alternatively* to prayer 2 above, remitting the matter to the Court *a quo* for rehearing of the application;

. . . . "

If the relief sought in paragraph 2 of the above notice of motion were to be granted, their founding affidavit in the application in this Court would stand as answering affidavit in the High Court application. The respondents did not attempt to make out a case, nor argue, for the reception of the founding affidavit as new evidence on appeal,[8] or as

[8] Constitutional Court Rule 29 read with section 22(1) of the Supreme Court Act 59 of 1959.

material falling under Constitutional Court Rule 30(1).[9]

[9] Secondly, and in the alternative to the above, they applied for an amendment of their notice of appeal in order to introduce a further ground of appeal, namely, that the High Court "in exercising its discretion erred in rejecting the [respondents'] application for postponement." The effect of this would be to set aside the orders made by the High Court and to have the matter remitted to the High Court, either to reconsider the application for the filing of an answering affidavit or to reconsider the application in the light of the respondents' answering affidavit. Although there is a brief passing reference to the former application in the respondents' written

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[9] Rule 30(1) provides:

> "Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record: Provided that such facts -
> (a) are common cause or otherwise incontrovertible; or,
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

argument, neither application was even alluded to in the respondents' oral argument in this Court, despite the fact that both applications were comprehensively and vigorously opposed in the applicants' written argument, in which both are characterised as being without merit, constituting an abuse and their dismissal sought with costs on an attorney and own client scale.

[10] Both these applications have, as their ultimate objective, the nullification of the High Court order and a re-hearing of the issue on the basis of the respondents' answering affidavit. The first application is wholly misconceived. Short of setting aside on appeal an order made by another court and substituting a different order, this Court has no jurisdiction to make an order on behalf of another court properly seized of a matter or to condone, on behalf of such court, non-compliance with the rules of procedure to which such court is subject. The second application and the ground of appeal which it seeks to introduce, are without merit, for the reasons which follow.

[11] A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[10] On its face, the

[10] See *R v Zackey* 1945 AD 505 at 511-2; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9; and *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC) at 314 H- 315 A and the authorities there cited.

complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground, on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such dismissal ought to be refused. The question of the appropriate costs order will be dealt with at the conclusion of this judgment.

The statutory framework and relevant facts

[12] Before reaching the constitutional issue in this matter it is necessary to consider the contentions raised by the respondents that the High Court should not have decided the issue of the constitutional validity of section 25(5) because it was not ripe for decision. But even this preliminary issue requires a consideration of the statutory framework and the facts relevant to the issue to be determined.

[13] As its long title indicates, the Act is wide-ranging and provides for "the control of the admission of persons to, their residence in, and their departure from, the Republic; and for matters connected therewith." For purposes of the present case it is sufficient to refer to chapter III, which deals with residence in the Republic and domicile, and to certain of its relevant provisions. Section 24(1) of the Act establishes an Immigrants Selection Board which consists of the central committee and at least one regional committee (a "regional committee") for each of

the provinces of the Republic. An important provision, for purposes of this case, is section 23 which deals with "aliens", an "alien" being defined in section 1(1) as "a person who is not a South African citizen", and which provides as follows:

> "Subject to the provisions of sections 28 and 29, no alien shall-
> *(a)* enter or sojourn in the Republic with a view to permanent residence therein, unless he or she is in possession of an immigration permit issued to him or her in terms of section 25; or
> *(b)* enter or sojourn in the Republic with a view to temporary residence therein, unless he or she is in possession of a permit for temporary residence issued to him or her in terms of section 26."

[14] For present purposes the exceptions enacted in section 29 are not germane, but the exemptions provided for in section 28 are, and to the extent relevant stipulate:

> "28(2) Notwithstanding the provisions of this Act, the Minister may, if he or she is satisfied that there are special circumstances which justify his or her decision, exempt any person or category of persons from the provisions of section 23, and for a specified or unspecified period and subject to such conditions as the Minister may impose, and may do so also with retrospective effect.
> (3) . . .
> (4) The Minister may withdraw any exemption granted under subsection (2) . . . .
> (5) The Minister may, notwithstanding any provision to the contrary in this Act, issue to any person whose exemption is withdrawn under subsection (4), an appropriate temporary residence permit referred to in section 26 to sojourn in the Republic or any particular part of the Republic."

[15] It is in the above legislative context that the provisions of section 25 must be understood and evaluated:

> **"25 Immigration Permit**

(1) [An application by an alien for an immigration permit is to be submitted to the DG.]

(2) [Such application is in turn submitted by the DG to a regional committee, who may not consider the application unless the applicant intends taking up permanent residence within the province in respect of which that regional committee has been appointed.]

(3) [Unless contrary to the provisions of the Act] the regional committee concerned may authorize the issue to the applicant of [an immigration] permit and make the authorization subject to the condition that the applicant shall pursue his or her occupation in the province in which he or she intends to take up permanent residence, for a minimum period of 12 months, and any other condition which the committee may deem necessary.

(4) The regional committee concerned may authorize the issue to the applicant of an immigration permit if the applicant-

(a) (i) is of a good character; and

(ii) will be a desirable inhabitant of the Republic; and

(iii) is not likely to harm the welfare of the Republic; and

(iv) does not and is not likely to pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic; or

(b) is a destitute, aged or infirm member of the family of a person permanently and lawfully resident in the Republic who is able and undertakes in writing to maintain him or her.

(5) Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit.

(6) A regional committee may, in the case of a person who applies for an immigration permit and who has entered into a marriage with a person who is

permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application, refuse to authorize such a permit unless the committee is satisfied that such marriage was not contracted for the purpose of evading any provision of this Act.

(7) [Requires, subject to the discretion of the DG to extend the period, that the person to whom the immigration permit is issued must] enter the Republic for the purpose of permanent residence therein within a period of six months from the date of issue of the permit . . .

(8) If any person to whom a permit has been issued in terms of subsection (7) does not enter the Republic for the purpose of permanent residence therein within a period of six months from the date of issue of such permit or within the further period which the [DG] may determine, the validity of such permit shall lapse.

(9)*(a)* [Provides for the issue to an alien, who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26(1)*(b)*,of an immigration permit] *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.

(b) Notwithstanding the provisions of paragraph *(a)*, a regional committee may authorize a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic, if such person is a person referred to in subsection (4)*(b)* or (5).

(10) [Provides for the rejection and renewal of applications for an immigration permit.]

(11) [Provides for the reconsideration of an application at the request of the DG.]

(12) [Establishes the circumstances under which a regional committee refers an application to the central committee for consideration or reconsideration.]

(13) [Sets out the powers of the central committee on considering or reconsidering an application.]

(14) [Criminalises certain conduct in relation to the application for and the issuing of an immigration permit.]

(15) [Provides for certain procedural powers of the DG.]"

The attack on the constitutional validity of section 25(5) concentrated on the fact that it

enables preferential treatment to be given to a foreign national[11] applying for an immigration permit who is "the spouse . . . of a person permanently and lawfully resident in the Republic", but not to a foreign national who, though similarly placed in all other respects, is in a same-sex life partnership with a person permanently and lawfully resident in the Republic.

[11] The term "alien" to describe a non-citizen is outmoded and modern writings and international legislation use the term "foreign national" (see, J Baloro "Immigration and Emigration" in Joubert et al *The Law of South Africa* (*Lawsa)* first reissue (Butterworths, 1998) vol 11 para 39 footnote 1), which expression will be employed in this judgment to connote "alien" as defined in the Act.

[16] The first applicant is a voluntary association of individual gay, lesbian, bisexual and transgendered people in South Africa and of 69 organisations and associations representing such people. Its principal objectives include the promotion of equality before the law for all persons, irrespective of their sexual orientation; the reform and repeal of laws that discriminate on the basis of such orientation; the promotion and sponsoring of legislation to ensure equality and equal treatment of people in respect of their sexual orientation; and to challenge by means of litigation, lobbying, advocacy and political mobilisation, all forms of discrimination on the basis of such orientation. The second to seventh applicants, none of whom is a South African citizen, are the "same-sex life partners"[12] of the eighth to the thirteenth applicants respectively. The eighth to the thirteenth applicants (the "South African partners") are all permanently and lawfully resident in South Africa. The fourteenth applicant is the Commission for Gender Equality.[13]

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12 The import of this expression will be dealt with later in this judgment.

13 The statutory body established as such under section 187 of the Constitution.

[17] Because none is a South African citizen, the second to seventh applicants must all, for purposes of the Act, be regarded as "aliens".[14] Their same-sex life partnerships with their respective South African partners are of differing duration[15] and not all identical in content. They all have certain features in common. Each relationship is an overt, same-sex life partnership which is intimate and mutually interdependent. This emerges more explicitly in the case of certain of the applicants. The third applicant and her South African partner have lived together in a joint household since March 1995, jointly purchased a home in February 1998, share living expenses, have joint insurances, and regulate their relationship by a domestic partnership agreement. Their emotional, physical and material interdependence is, like other applicants,[16] such that they would marry each other if the law permitted them to do so. The fourth applicant and his partner celebrated a public affirmation of their relationship attended by family members and friends. The seventh and the thirteenth applicants are reciprocal beneficiaries in each others' wills. If the second applicant is not granted permanent residence in South Africa, the eighth applicant would emigrate in order to pursue the relationship.[17]

[18] After the 1994 elections the first applicant initiated discussions with the DG on a number of issues, including the failure to recognise same-sex relationships for purposes of immigration

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14 See section 1(1) of the Act cited in paragraph 13 above.

15 The fifth applicant's relationship had been established for a little longer than one year when the High Court application was brought. The others have all been longer; the second respondent's relationship as well as that of the fourth respondent have been longer than four years.

16 For example the second, fourth and fifth applicants and their respective partners.

17 The eleventh applicant would likewise emigrate in order to pursue his relationship with the fifth applicant if the latter were not permitted to remain in South Africa.

permits under section 25(4), (5) and (6) of the Act. Pursuant to these discussions, which apparently developed into a cordial working relationship, a written confirmation was given to the first applicant on behalf of the DG that:

> ". . . all the requests for exemptions in terms of section 23(b) of the Aliens Control Act . . . will be considered on merit."

Although the reference to section 23(b) of the Act is somewhat obscure, it is clear from the context that what was being referred to was an exemption under section 28 of the Act from the requirements of section 23(b).

[19] Notwithstanding the above confirmation, the first applicant continued making representations for the express statutory recognition of same-sex relationships for purposes of sections 25(4), (5) and (6) of the Act. In consequence thereof at least thirteen temporary exemptions were granted between April and November 1997 under section 28(2) of the Act to foreign same-sex partners of lesbian or gay South Africans who were seeking permanent residence in the Republic. The exemptions were granted by an official duly delegated by the Minister and in each case it was stated that the temporary exemption had been granted for a period of twelve months "to await the outcome of the memorandum submitted to the Minister of Home Affairs" and that the grantor was "satisfied that special circumstances exist which justify such an exemption" under the provisions of section 28(2) from the requirements of section 23(b) of the Act.

[20] During the course of 1997 the department changed its attitude which culminated on 9

January 1998 in a blanket refusal of such exemptions to foreign same-sex partners of South African permanent residents. This refusal was embodied in a letter of the same date from the DG to the first applicant in which the following was, amongst other things, stated:

> "In terms of section 28[2] of the Act the Minister may only grant exemptions where there are **special circumstances** which justify such a decision. In view of the steady flow of applications for exemptions, one can hardly argue that special circumstances exist in any of these cases as contemplated by the said section of the Act.
>
> The mere fact that the Aliens Control Act, 1991, does not cater for same-sex relationships cannot be considered as 'special circumstances' for the purposes [of] exercising the powers of exemption under that Act. In view of the above consideration, it has been decided not to grant exemptions under section 28[2] of the Act merely to accommodate alien partners in same-sex relationships." [Emphasis in the original]

The first applicant took various steps on behalf of certain of the applicants and other foreign partners in same-sex relationships to ameliorate their position in regard to the granting of exemptions under section 28(2) of the Act and otherwise, but to no avail, and ultimately the application was launched in the High Court.

The ripeness of the matter for hearing

[21] Although, in the High Court, the question of mootness[18] was also raised by the

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18 A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC), where Didcott J said the following at para 17:

> "[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."

See also *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (11) BCLR 1219 (CC); 1999 (4) SA 682 (CC) at paras 12-16, 18, 23 and Chaskalson et al

respondents, there has been no appeal against the High Court's dismissal of this argument. While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.[19]

Constitutional Law of South Africa third revision service, (Juta & Co Ltd, Kenwyn, 1998) page 8-15. Compare Laurence H Tribe *American Constitutional Law* 2 ed (The Foundation Press Inc., New York 1988) at 82.

19 *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC) at para 59; *Zantsi v Council of State, Ciskei, and Others* 1995 (10) BCLR 1424 (CC); 1995 (4) SA 615 (CC) at paras 2-5; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 199 and *S v Bequinot* 1996 (12) BCLR 1588 (CC); 1997 (2) SA 887 (CC) at paras 12-13. As Chaskalson et al, above n 18 at page 8-15 aptly put it -

> "[w]hile the 'ripeness' doctrine is concerned with cases which are brought too early, the 'mootness' doctrine is relevant to cases which are brought, or reach the hearing stage, too late, at a time when the issues are no longer 'live'."

Compare Tribe above n 18 at 78.

[22] On the issue of ripeness the argument followed much the same line as in the High Court. The contention was that the only remedy pursued by the second to seventh applicants was the obtaining of exemptions under section 28(2) of the Act. The decision regarding an exemption was one to be taken by the Minister. The applicants in question have never applied for an immigration permit under the provisions of section 25 of the Act, which application has to be dealt with by a regional committee and not the Minister. Without having followed such a course, so the argument ran, the applicants had not forced a determination of the issue as to whether a foreign national same-sex partner of a permanent and lawful resident in South Africa was entitled to be treated as a spouse and to the preferential treatment envisaged by section 25(5). The applicants had accordingly failed to pursue a non-constitutional remedy which, if successful, might have rendered it unnecessary to consider the constitutional validity of section 25(5). Such failure was in conflict, so it was contended, with the general principle, referred to in the previous paragraph, that where it is possible to decide any case without reaching a constitutional issue, that course should be followed.

[23] According to the respondents' argument, it was reasonably possible that a regional committee might, under section 39(2) of the Constitution,[20] interpret "spouse" in section 25(5) of the Act as including a same-sex life partner, thus making it unnecessary to consider the constitutional validity of the subsection. In my view the word "spouse" cannot, in its context, be so construed. There is, it is true, a principle of constitutional interpretation that where it is

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[20] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency.[21] Such a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered.

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21 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at para 85 and *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at para 59 and the authorities cited in footnotes 85 and 87.

[24] There is a clear distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" as required by section 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under section 172(1)(b), following upon a declaration of constitutional invalidity under section 172(1)(a). I deal later with the constitutional permissibility of reading words into a statutory provision.[22] What is now being emphasised is the fundamentally different nature of the two processes. The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

[22] See para 65 and following below.

[25] The High Court correctly concluded that "spouse" as used in subsection 25(5) was not reasonably capable of the construction contended for by the respondents. The word "spouse" is not defined in the Act, but its ordinary meaning connotes "[a] married person; a wife, a husband."[23] The context in which "spouse" is used in section 25(5) does not suggest a wider meaning. The use of the expression "marriage" in section 25(6) and the special provisions relating to a person applying for an immigration permit and "who has entered into a marriage with a person who is permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application" is a further indication that "spouse", as used in section 25(5), is used for a partner in a marriage. There is also no indication that the word "marriage" as used in the Act extends any further than those marriages that are ordinarily recognised by our law. In this regard reference may be made to the recent House of Lords decision in *Fitzpatrick (A.P.) v Sterling Housing Association Ltd*[24] where "spouse" likewise could not be given such an extensive meaning and *Quilter v Attorney-General*[25] where the statute at issue did not define "marriage" but the New Zealand Court of Appeal unanimously held that textual indications prevented the term from being construed to include same-sex unions.

[26] Had the word "spouse" been used in a more extensive sense in section 25(5) of the Act, it would have been unnecessary to provide specifically in section 1(1) that marriage "includes a customary union". It is significant that the definition of "customary union" namely:

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23 *New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

24 Delivered on 28 October 1999 and as yet unreported. References are to the pages of the typescript judgment.

25 [1998] 1 NZLR 523 (CA).

> ". . . the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is party to a subsisting marriage, which is recognised by the Minister in terms of subsection (2);"

is based on an opposite-sex relationship. Under all these circumstances it is not possible to construe the word "spouse" in section 25(5) as including the foreign same-sex partner of a permanent and lawful resident of the Republic. The applicants were accordingly not able in law to pursue successfully a non-constitutional remedy, based on such a construction of "spouse". Accordingly the respondents' contention that the constitutional issue was not ripe for hearing was rightly dismissed by the High Court.

The constitutional validity of section 25(5)

Introduction

[27] It is convenient to deal at the outset with a submission advanced on the respondents' behalf which is central to their approach to the case and their categorisation of the issues concerning the constitutionality of section 25(5). Mr Patel, who together with Ms Moroka and Mr Dhlamini appeared for the respondents, submitted that the Republic, as a sovereign independent state, was lawfully entitled to exclude any foreign nationals from the Republic; that it had an absolute discretion to do so which was beyond the reach of the Constitution and the courts; and that, to the extent that Parliament legislated to permit foreign nationals to reside in South Africa, it did so in the exercise of such discretion and that the provisions of such legislation were equally beyond the reach of the Constitution and the courts.[26] He submitted that

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[26] For this submission reliance was placed on, amongst others, DA Martin "Refugees and Migration" in Christopher C Joyner (ed) *The United Nations and International Law*, (American Society of International Law, Cambridge University Press, 1997) at 155; Sir Robert Jennings and Sir Arthur Watts *Oppenheim's*

this was recognised by the Constitution in that certain provisions of the Bill of Rights conferred significant rights only on citizens of the Republic. Thus only a citizen has the right to "enter, to remain in and to reside anywhere in the Republic";[27] to "a passport";[28] to certain political rights;[29] and to choose a "trade, occupation or profession freely".[30]

International Law 9 ed vol 1 (Addison Westley Longman Inc., 1997) at 897-9; *Fong Yue Ting v United States* 149 US 698 (1893) at 705-711; Nishimura Ekiu v United States 142 US 651 (1892); *Galvan v Press* 347 US 522 (1954) at 530-2; *Adams v Howerton* 673 F2nd (Ninth Circuit) 1036 at 1042; *Naidenov v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T) at 901 C-E; *Parekh v Minister of Home Affairs and Another* 1996 (2) SA 710 (D) at 714 G - 715 C. But see also *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC). Other authorities dealing with the consequences of a state's territorial authority and its right to control the entry of foreign nationals into its territory are usefully collated in Van Heerden AJ's judgment in *Dawood and Another v The Minister of Home Affairs and Others; Shalabi and Another v The Minister of Home Affairs and Others; Thomas and Another v The Minister of Home Affairs and Others*, (the "*Dawood* case") case nos 12745/98; 13503/98; and 13435/98, a judgment in the Cape of Good Hope High Court of 21 September 1999 and as yet unreported. The authorities appear at 76-7 of the typescript judgment. This case is pending before this Court under section 172(2)(a) of the Constitution and on appeal.

27 Section 21(3).

28 Section 21(4).

29 Section 19.

[30] Section 22.

[28] Such an argument, even if correct, would not assist the respondents, because in the present case we are not dealing with such a category of foreign nationals, but with persons who are in intimate life partnerships with persons who are permanently and lawfully resident in the Republic (to whom I shall refer as "South Africans"). This is a significant and determinative difference. The failure of the Act to grant any recognition at all to same-sex life partnerships impacts in the same way on the South African partners as it does on the foreign national partners. In my view this case can, and ought properly to be decided, on the basis of whether section 25(5) unconstitutionally limits the rights of the South African partners, namely the eighth to the thirteenth respondents. In an important line of decisions, the Zimbabwean Supreme Court has held that the constitutional right of citizens to freedom of movement is contravened when the foreign national spouses of such citizens are denied permission to reside in Zimbabwe.[31] We do not reach the question of freedom of movement in the present case but it is important to note that the issue of the contravention in the Zimbabwean cases was considered in relation to the rights of the citizen spouse residing in Zimbabwe.

[29] Such an approach presents no procedural or substantive difficulty. It is true that the parties seeking immigration permits are the foreign national partners. On the objective theory of unconstitutionality adopted by this Court[32] a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right

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31 *Rattigan and Others v Chief Immigration Officer, Zimbabwe, and Others* 1995 (2) SA 182 (ZSC); *Salem v Chief Immigration Officer, Zimbabwe, and Another* 1995 (4) SA 280 (ZSC); *Kohlhaas v Chief Immigration Officer, Zimbabwe, and Another* 1998 (3) SA 1142 (ZSC), particularly at 1146 E-1147 B.

32 See *Ferreira v Levin* above n 19 at paras 26-28; *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at para 22; *Member of the Executive Council for Development Planning and Local Government, Gauteng v the Democratic Party*

unconstitutionally infringed is not that of the litigant in question but of some other person. Thus the second to the seventh applicants are entitled to rely on any unconstitutional infringement of any of the rights of the South African partners (the eighth to the thirteenth applicants) which has been brought about by the failure of the Act to grant any recognition to same-sex life partnerships. Obviously the South African partners may also invoke such infringement themselves.

The limitation by section 25(5) of the section 9 right to equality and the section 10 right to dignity

[30] Section 9 of the Constitution provides:

> "**Equality**
>
> (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

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1998 (7) BCLR 855 (CC); 1998 (4) SA 1157 (CC) at para 64.

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."

Section 10 provides:

"**Human dignity**

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

[31] Davis J found that section 25(5) constituted a clear limitation of the section 9 guarantee against unfair discrimination because it differentiated on the grounds of sexual orientation; under section 9(5) such differentiation, being a ground specified in section 9(3), is presumed to be unfair unless the contrary is established; and that the contrary had not been established.[33] The High Court considered it unnecessary to deal with the other grounds on which section 25(5) had been attacked. In National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others[34] (the "*Sodomy* case") this Court pointed out that in particular circumstances the rights of equality and dignity are closely related and found the criminal offence of sodomy to be unconstitutional because it breached both rights.[35] In the present case the rights of equality and dignity are also closely related and it would be convenient to deal with them in a related manner.

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33 Above n 1 at 291 G - 292 F.

34 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC).

35 Id at para 30. The Court also held that the right to privacy had been breached, which is not relevant to the present case.

[32] In dealing with the equality challenge I shall follow the approach laid down by this Court in various of its judgments as collated and summarised in *Harksen v Lane NO and Others*[36] and as applied to section 9 of the Constitution in the *Sodomy* case.[37] The differentiation brought about by section 25(5) is of a negative kind. It does not proscribe conduct of same-sex life partners or enact provisions that in themselves prescribe negative consequences for them. The differentiation lies in its failure to extend to them the same advantages or benefits that it extends to spouses. The applicants' complaint, as upheld by the High Court, is in effect that section 25(5) is "under-inclusive [because] it confers a benefit on a class that is defined too narrowly in that the class fails to include all members that have an equality-based right to be included."[38] This is, for purposes of establishing a breach of the right to equality, constitutionally irrelevant. Section 9(1)

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36 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 53 per Goldstone J.

37 Above n 34 at paras 58-63.

38 P Hogg *Constitutional Law of Canada* 3ed (Carswell, Toronto, 1992) at para 37.1(h) at 910.

> "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."[39]

[33] Before this Court the respondents challenged the conclusion reached by the High Court that the omission in section 25(5) of spousal benefits to same-sex life partners was a differentiation based on the ground of sexual orientation. It was submitted on their behalf that the differentiation was based on the ground that they were non-spouses, which had nothing to do with their sexual orientation, and that accordingly, because the differentiation was on "non-spousal" grounds, rather than on marital status, it did not constitute unfair discrimination. There is no merit in this submission, because as indicated above in paragraph 25, spouse is defined with regard to marriage and is but the name given to the partners to a marriage.

[34] In the alternative it was argued that, even if the differentiation was on grounds of marital status, there was nothing that prevented gays and lesbians from contracting marriages with persons of the opposite sex, thus becoming and acquiring spouses and accordingly being entitled to the spousal benefits under section 25(5). Therefore, so the submission proceeded, the fact that they did not enjoy the advantages of a spousal relationship was of their own choosing. What the submission implies is that same-sex life partners should ignore their sexual orientation and, contrary thereto, enter into marriage with someone of the opposite sex.

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39 The *Sodomy* case above n 34 at para 59.

[35] I am unable to accede to this line of argument. It confuses form with substance and does not have proper regard for the operation, experience or impact of discrimination in society. Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts. As recognised in the *Sodomy* case -

> "[t]he experience of subordination - of personal subordination, above all - lies behind the vision of equality."[40]

[36] Moreover, the submission fails to recognise that marriage represents but one form of life partnership. The law currently only recognises marriages that are conjugal relationships between people of the opposite sex. It is not necessary, for purposes of this judgment, to investigate other forms of life partnership. Suffice it to say that there is another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex. The law currently does not recognise permanent same-sex life partnerships as marriages. It follows that section 25(5) affords protection only to conjugal relationships between heterosexuals and excludes any protection to a

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40 Above n 34 at para 22, quoting with approval Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Basil Blackwell, Oxford, 1983) at xiii.

life partnership which entails a conjugal same-sex relationship, which is the only form of conjugal relationship open to gays and lesbians in harmony with their sexual orientation.

[37] A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships. A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament's commitment to equality on the ground of sexual orientation,[41] there is still no appropriate recognition in our law of the same-sex life partnership, *as a relationship*, to meet the legal and other needs of its partners.

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41 See, for example, the use of the expressions "spouse, partner or associate" in section 6(1)(f) of the Independent Media Commission Act 148 of 1993 and sections 5(1)(e) and (f) of the Independent Broadcasting Authority Act 153 of 1993 and the fact that, for purposes of these provisions, "spouse" includes "a *de facto* spouse"; "life-partner" in sections 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act 57 of 1997 and section 27(2)(c)(i) the Basic Conditions of Employment Act 75 of 1997; the definition of spouse in section 31 of the Special Pensions Act 69 of 1996 to mean "the partner . . . in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years"; the definition of "family responsibility" in section 1 of the Employment Equity Act 55 of 1998 which includes "responsibility of employees in relation to their spouse or partner"; the definition of "dependant" in the Medical Schemes Act 131 of 1998 which includes the "the spouse or partner, dependant children or other members of the member's immediate family in respect of whom the member is liable for family care and support"; and the definition of "spouse" in section 8(6)(e)(iii)(aa) of the Housing Act 107 of 1997 which includes "a person with whom the member lives as if they were married or with whom the member habitually cohabits" and sections 9(4) and 11(5)(b) of the South African Civil Aviation Authority Act 40 of 1998 and "life partners" in sections 10(2) and 15(9) of the Road Traffic Management Corporation Act 20 of 1999.

[38] It follows that same-sex partners are in a different position from heterosexual partners who have not contracted a marriage and have not become spouses. As will be emphasised later in this judgment, it is unnecessary in this case to deal at all with the position of such unmarried heterosexual partners. The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.[42]

[39] There is much to be said for the view that the discrimination in section 25(5) is on the ground of sexual orientation. As previously pointed out, the section 25(5) protection is not extended to the only form of conjugal relationship in which gays and lesbians are able to participate in harmony with their sexual orientation, namely, same-sex life partnerships. A similar conclusion was reached by the Canadian Supreme Court in *Canada (Attorney-General) v Mossop*,[43] *Egan v Canada*[44] and *M v H*.[45]

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42 *Quilter v Attorney-General* above n 25 at 537 per Thomas J.

43 (1993) 100 DLR (4th) 658 at 672 g - 673 a.

44 (1995) 29 CRR (2d) 79 at 141.

[45] (1999) 171 DLR (4th) 577 at paras 2 and 62.

[40] The better view, however, in my judgment, is that the discrimination in section 25(5) constitutes overlapping or intersecting discrimination on the grounds of sexual orientation and marital status, both being specified in section 9(3) and presumed to constitute unfair discrimination by reason of section 9(5) of the Constitution. As Sachs J correctly pointed out in the *Sodomy* case:[46]

> "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, that is globally and contextually, not separately and abstractly." [footnotes omitted]

I also agree with the following observations by L'Heureux-Dubé J in *Mossop*:[47]

> "This argument [of Lamer CJC] is based on an underlying assumption that the grounds of 'family status' and 'sexual orientation' are mutually exclusive. However . . . [i]t is increasingly recognized that categories of discrimination may overlap and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex . . . Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of

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46 Above n 34 at para 113.

47 Above n 43 at 720 e-721 a. Although Lamer CJC, for the majority, did not find overlapping grounds in the case at hand, he expressly recognized the principle of overlapping grounds at 673 g-h of the judgment.

discrimination may be present and intersect."

The prerequisite of marriage before the benefit is available points to that element of the discrimination concerned with marital status, while the fact that no such benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the grounds of sexual orientation. I propose dealing with the present case on this basis.

The impact of the discrimination on the affected applicants

[41] As affirmed in the *Sodomy* case the determining factor regarding the unfairness of discrimination is, in the final analysis, the impact of the discrimination on the complainant or the members of the affected group. The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness.[48] Important factors to be assessed in this regard (which do not however constitute a closed list) are:

(a) the position of complainants in society and whether they have suffered in the past from patterns of disadvantage;

(b) the nature of the provision or power and the purpose sought to be achieved by it.

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48 Above n 34 at para 19.

If its purpose is manifestly not directed, in the first instance, at impairing the complainants in their fundamental human dignity or in a comparably serious respect, 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 the complainants have in fact suffered the impairment in question.

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[49]

It is noteworthy how the Canadian Supreme Court has, in the development of its equality jurisprudence under section 15(1) of the Canadian Charter, come to see the central purpose of its

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[49] Id.

equality guarantee as the protection and promotion of human dignity.[50]

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50 In *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR (4th) 1, Iacobucci J, writing for a unanimous Supreme Court stated the following at paras 52-4:

> ". . . [I]n the articulation of the purpose of s. 15(1) . . . a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment.
>
> . . . .
>
> [T]he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.
>
> . . . .
>
> The equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light

of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis."

[42] In the *Sodomy* case this Court dealt with the seriously negative impact that societal discrimination on the ground of sexual orientation has had, and continues to have, on gays and their same-sex partnerships,[51] concluding that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.[52] Although the main focus of that judgment was on the criminalisation of sodomy and on other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the patterns of discrimination to which they have been and continue to be subject are also applicable to lesbians. Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

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51 Above n 34 at paras 20-27.

52 Id at para 26(a).

[43] Similar views, with which I agree, were expressed in *Vriend v Alberta*,[53] where Cory J[54] expressed himself thus:[55]

> "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."

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53 (1998) 156 DLR (4th) 385 per Cory and Iacobucci JJ (Lamer CJC, Gonthier, McLachlin and Bastarache JJ concurring; L'Heureux-Dubé and Major JJ concurring in part and dissenting in part).

54 In this part of the judgment writing for the Court.

55 At paragraphs 69 and also 102 respectively, in passages cited in the *Sodomy* case, above n 34, at paras 22 and 23 respectively. See also *Egan* above n 44 at 144 - 5. Although the Court was divided in *Egan* on the disposition of the case, no disagreement was expressed with the views expressed in this passage from the joint dissenting judgment of Cory and Iacobucci JJ.

[44] This Court has recognised that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair."[56] Vulnerability in turn depends to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past disadvantage is so important. In a passage endorsed in *M v H*,[57] Iacobucci J in the *Law* case[58] expressed this tellingly as follows:

> "[P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group [citations omitted]. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact on them, since they are already vulnerable."

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56 Per O'Regan J in *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC) at para 112 as confirmed by the Court in the *Sodomy* case above n 34, at para 27 and n 33 in that judgment.

57 Above n 45 at para 68.

58 Above n 50 at para 63.

In the present case, like in *M v H*,[59] there is significant pre-existing disadvantage and vulnerability.

[45] I turn now to deal with the discriminatory impact of section 25(5) on same-sex life partners. I agree with the submission advanced on respondents' behalf that section 25(5) is manifestly aimed at achieving the societal goal of protecting the family life of "lawful marriages" (which I understand to mean marriages which are formally valid and contracted in good faith and not sham marriages for the purposes of circumventing the Act) and certain recognised customary unions, by making provision for family re-unification and in particular by entitling spouses of persons permanently and lawfully resident in the Republic to receive permanent residence permits. The pertinent question that immediately arises is what the impact of being excluded from these protective provisions is on same-sex life partners.

59 Above n 45 at para 69.

[46] The starting point is to enquire what the nature of such family life is in the case of spouses that section 25(5) specially protects and benefits. For purposes of this case it is unnecessary to consider comprehensively the nature of traditional marriage and the spousal relationship. It is sufficient to indicate that under South African common law a marriage "creates a physical, moral and spiritual community of life, a consortium omnis vitae"[60] which has been described as:

> ". . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business . . . ."[61]

60 June D Sinclair assisted by Jaqueline Heaton *The Law of Marriage* Vol 1 (1996)("Sinclair and Heaton") 422 and authorities there cited.

61 Per Erasmus J in *Peter v The Minister of Law and Order* 1990 (4) SA 6 (E) at 9 G.

As Sinclair and Heaton point out,[62] the duties of cohabitation and fidelity flow from this relationship. In *Grobbelaar v Havenga*[63] it was held that "[c]ompanionship, love, affection, comfort, mutual services, sexual intercourse — all belong to the married state. Taken together, they make up the *consortium*."

[47] It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises. Sinclair and Heaton,[64] after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

> "But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the state and the family. Its heterogeneous society is 'fissured by differences of language, religion, race, cultural habit, historical experience and self-definition' and, consequently,

62 Above n 60 at 423.

63 1964 (3) SA 522 (N) at 525 E.

64 Above n 60 at 6-7.

> reflects widely varying expectations about marriage, family life and the position of women in society." [Internal citations omitted]

[48] In other countries a significant change in societal and legal attitudes to same-sex partnerships in the context of what is considered to constitute a family has occurred. Evidence of these changes are to be found in the jurisprudence dealing with equality issues in countries such as Canada,[65] Israel,[66] the United Kingdom[67] and the United States.[68] In referring to these judgments from the highest courts of other jurisdictions I do not overlook the different nature of their histories, legal systems and constitutional contexts nor that, in the last two cases, the issue was one essentially of statutory construction and not constitutional invalidity. Nevertheless, these judgments give expression to norms and values in other open and democratic societies

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65 In *M v H* above n 45 at paras 49 - 53, 57, 59, 60; *Miron v Trudel* (1995) 124 DLR (4th) 693 at paras 151-8; 96 - 100.

66 *El Al Israel Airlines Ltd v Danilowitz and Another* High Court of Justice case no. 721/94, a judgment of the Supreme Court of Israel sitting as the High Court of Justice.

67 *Fitzpatrick (A.P.) v Sterling Housing Association Ltd* above n 24 at paras 3, 7, 13-4.

68 *Braschi v Stahl Associates Company* (1989) 74 N.Y.2d 201 at 211-3.

based on human dignity, equality and freedom which, in my view, give clear expression to the growing concern for, understanding of, and sensitivity towards human diversity in general and to gays and lesbians and their relationships in particular. This is an important source from which to illuminate our understanding of the Constitution and the promotion of its informing norms.[69]

[49] The impact of section 25(5) is to reinforce harmful and hurtful stereotypes of gays and lesbians. At the heart of these stereotypes whether expressly articulated or not, lie misconceptions based on the fact that the sexual orientation of lesbians and gays is such that they have an erotic and emotional affinity for persons of the same sex and may give physical sexual expression thereto with same-sex partners:

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69 Section 39(1) provides in its relevant parts:

> "When interpreting the Bill of Rights, a court, tribunal or forum -
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) . . .
> (c) may consider foreign law."

> "There are two predominant narratives that circulate within American society that help to explain the difficulty that lesbians and gays face in adopting children and establishing families. First, there is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as 'exclusively sexual beings' stands in stark contrast to the perception of heterosexual parents as 'people who, along with many other activities in their lives, occasionally engage in sex.' Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality."[70] [Footnote omitted]

Such false classifications must be rejected. Our law has never proscribed consensual sexual acts between women in private[71] and the laws criminalising certain consensual sexual acts between males in private and certain acts in public have been declared constitutionally invalid.[72]

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70 Timothy E Lin "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases" in 99 *Columbia Law Review* 739 (1999) at 741-2.

71 The *Sodomy* case above n 34 at para 14 and the authorities there referred to.

72 Id.

[50] A second stereotype, often used to bolster the prejudice against gay and lesbian sexuality, is constructed on the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple. Gays and lesbians are certainly individually permitted to adopt children under the provisions of section 17(b) of the Child Care Act 74 of 1983[73] and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

[51] From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or

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[73] Section 17(b) provides that:

> "A child may be adopted —
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> . . .
>
> (b) by a widower or widow or unmarried or divorced person; . . ."

sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

[52] I find support for this view in the following conclusions of L'Heureux-Dubé J (with whom Cory and McLachlin JJ concurred) in *Mossop*:[74]

> "The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version."

[53] The message that the total exclusion of gays and lesbians from the provisions of the sub-section conveys to gays and lesbians and the consequent impact on them can in my view be conveniently expressed by comparing (a) the facts concerning gays and lesbians and their same-sex partnerships which must be accepted, with (b) what the subsection in effect states:

(a) (i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;

(ii) Sexual orientation is a ground expressly listed in section 9(3) of the Constitution and under section 9(5) discrimination on it is unfair unless

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74 Above n 43 at 710 c-e and the judgment of Thomas J in *Quilter* above n 25 at 534.

the contrary is established;

(iii) Prior criminal proscription of private and consensual sexual expression between gays, arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;

(iv) Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity;

(v) They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;

(vi) They are individually able to adopt children and in the case of lesbians to bear them;

(vii) In short, they have the same ability to establish a consortium omnis vitae;

(viii) Finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

(b) The subsection, in this context, in effect states that all gay and lesbian permanent residents of the Republic, who are in same-sex relationships with foreign nationals, are not entitled to the benefit extended by the subsection to spouses married to foreign nationals in order to protect their

> family and family life. This is so stated, notwithstanding that the family and family life which gays and lesbians are capable of establishing with their foreign national same-sex partners are in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they are to spouses.

[54] The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.

[55] We were pressed with an argument, on behalf of the Minister, that it was of considerable public importance to protect the traditional and conventional institution of marriage and that the government accordingly has a strong and legitimate interest to protect the family life of such marriages and was entitled to do so by means of section 25(5). Even if this proposition were to be accepted it would be subject to two major reservations. In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

[56] In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under section 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the section 25(5) benefits to same-sex life partners could negatively effect such protection. A similar argument has been roundly rejected by the Canadian Supreme Court,[75] which Court has also stressed, correctly in my view, that concern for the protection of same-sex partnerships in no ways implies a disparagement of the traditional institution of marriage.[76]

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75 In *M v H* above n 45 at para 109 Iacobucci J, writing for the Court, said the following:

> "Even if I were to accept that Part III of the Act is meant to address the systemic sexual inequality associated with opposite-sex relationships, the required nexus between this objective and the chosen measures is absent in this case. In my view, it defies logic to suggest that a gender-neutral support system is rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. In addition, I can find no evidence to demonstrate that the exclusion of same-sex couples from the spousal support regime of the *FLA* in any way furthers the objective of assisting heterosexual women."

76 In *Mossop* above n 43 at 712 d L'Heureux-Dubé J said the following:

> "[I]n some ways, the debate about family presents society with a false choice. It is

possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values."

The same learned judge confirmed this view in *Miron v Trudel* above n 65 at para 100:

"[L]egislatures have intervened in a wide variety of contexts to protect individuals' vested interests in relationships of some permanence and interdependence. These interventions are not anti-marriage. They simply acknowledge that the family unit is evolving in response to changing times."

[57] There is nothing in the scales to counteract such conclusion. I accordingly hold that section 25(5) constitutes unfair discrimination and a serious limitation of the section 9(3) equality right of gays and lesbians who are permanent residents in the Republic and who are in permanent same-sex life partnerships with foreign nationals. I also hold, for the reasons appearing throughout this judgment and culminating in the conclusion reached at the beginning of this paragraph, that section 25(5) simultaneously constitutes a severe limitation of the section 10 right to dignity enjoyed by such gays and lesbians. Having come to this conclusion it is unnecessary to consider whether any of the freedom of movement rights of the eighth to the thirteenth applicants, guaranteed under section 24 of the Constitution, have been limited in any way by section 25(5).

Justification

[58] I now apply the section 36(1) justification analysis, incorporating that of proportionality applied to the balancing of different interests, as enunciated in *S v Makwanyane and Another*[77] and as adapted for the 1996 Constitution in the *Sodomy* case.[78] The rights limited, namely equality and dignity, are important rights going to the core of our constitutional democratic values of human dignity, equality and freedom.[79] The forming and sustaining of intimate personal relationships of the nature here in issue are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities. Although expressed in a different context and when marital status was not a ground specified in

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77 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) para 104.

78 Above n 34 at paras 33-5.

79 See sections 1(a) and 7(1) of the Constitution.

section 8(2) of the interim Constitution, the following remarks of O'Regan J in *Harksen*,[80] are apposite:

> "I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one."

The effect of omitting same-sex life partnerships from section 25(5) limits the above rights at a deep and serious level.

[59] There is no interest on the other side that enters the balancing process. It is true, as previously stated, that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life partners were appropriately included under the protection of section 25(5). There is in my view no justification for the limitation in the present case and it therefore follows that the provisions of section 25(5) are inconsistent with the Constitution and invalid.

[60] It is important to indicate and emphasise the precise ambit of the above holding. The Court is in the present case concerned only with partners in permanent same-sex life partnerships. The position of unmarried partners in permanent heterosexual partnerships and

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80 Above n 36 at para 93.

their omission from the provisions of section 25(5) was never an issue in the case nor was any argument addressed thereon. The Court does not reach the latter issue in this case and I express no view thereon, leaving it completely open. Nor does the Court in this case reach the issue of whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships and this issue is similarly left open.

The appropriate remedy

[61] The High Court was faced with the difficult task of devising an appropriate remedy consequent upon its finding section 25(5) to be constitutionally invalid because of what it omitted.

[62] As far as the declaration of invalidity is concerned the High Court considered that three options were open to it. The first was to remedy the constitutional invalidity of section 25(5) by introducing ("reading in") words into the section in such a way that its provisions also applied to persons in same-sex life partnerships. The High Court decided against such remedy as an appropriate one, principally because it was of the view that it was not possible to define with a sufficient degree of precision the words that had to be inserted in section 25(5) in order for it to comply with the Constitution.[81] The second was postulated as follows:

> "Were a declaration of invalidity to provide that the section is inconsistent with the Constitution to the extent that it confers an exclusive benefit on spouses and hence discriminates on the grounds of sexual orientation, the rest of the section could remain valid. Thus spouses as defined in terms of the Act at present would continue to enjoy a

81 Above n 1 at 294 B - 295 G.

benefit."[82]

The third was to "declare the section in its entirety to be invalid."[83] The High Court purported to adopt the second option because it appeared -

> ". . . preferable to frame the declaration of invalidity so as to save a legitimate purpose (that is, acknowledging the importance of some forms of permanent relationships) rather than to deny a benefit to all who deserve it. But this perpetrates discrimination in respect of certain forms of permanent relationships. Thus legislative action is required to remedy the position and ensure that no unjustified discrimination is permitted by the Act,"[84]

and accordingly drafted paragraph 1 of its order to read:

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82 Id at 296 B.

83 Id at 296 C.

84 Id at 296 C - D.

> "Section 25(5) of the Aliens Control Act 96 of 1991 is declared invalid to the extent that the benefit conferred exclusively on spouses is inconsistent with section 9(3) in that on grounds of sexual orientation it discriminates against same sex-life partners".[85]

The High Court suspended this order for a period of twelve months "from the date of confirmation of this order to enable Parliament to correct the inconsistency" and made the further orders quoted in paragraph 2 of this judgment.

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85 Id at 296 H.

[63] While appreciating the novelty and difficulty of framing an appropriate order in the circumstances of the present case, one is driven to conclude that the High Court did not, in effect, through paragraph 1 of its order, bring about the invalidity of any portion of section 25(5). This is so for two reasons. It appears clearly from its motivation for the second option (which it adopted) that it aimed, through its order, to preserve the benefits of the section for spouses and was intent on giving an order to achieve this object. This was in fact also the effect of the order, the interpretation of which is complicated by the fact that it conflates reasons for the order with its operative terms. The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the *presence* of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision. An order giving effect to and embodying such notional severance in the case of constitutional invalidity was made for the first time in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others.*[86]

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86 Above n 19 where, in paragraph 1 of the order at para 157 of the judgment, the following declaration is made:

> "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

[64] Where, however, the invalidity of a statutory provision results from an *omission,* it is not possible, in my view, to achieve notional severance by using words such as "invalid to the extent that", or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance. This is implicit in the constitutional jurisprudence of Canada and the United States dealt with later in this judgment and has been expressly so held in Germany.[87] The only logical equivalent to severance, in the case of invalidity caused by omission, is the device of reading in. In the present case there are only two options; declaring the whole of section 25(5) to be invalid or reading in provisions to cure such invalidity.

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and satisfactorily."

87 See BVerfGE 18, 288 at 301 and 22 BVerfGE 349 at 360.

[65] In fashioning a declaration of invalidity, a court has to keep in balance two important considerations. One is the obligation to provide the "appropriate relief " under section 38 of the Constitution, to which claimants are entitled when "a right in the Bill of Rights has been infringed or threatened".[88] Although the remedial provision considered by this Court in *Fose*[89] was that of the interim Constitution,[90] the two provisions are in all material respects identical and the following observations in that case are equally applicable to section 38 of the Constitution:

> "Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[91] [Footnote omitted]

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88 The relevant part of section 38 reads as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights..."

89 *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC).

90 Section 7(4)(a) provided the following:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

91 Above n 89 at para 69. The footnote omitted from the end of the quotation in the text, reads as follows:

> "See the observations of Verma J in the *Nilabati Behera* case (*supra)* n 123 as quoted in para 51 *(supra)* and the remarks of Harlan J in the *Bivens* case *supra* n 25 at 407 quoted in paras 33, 34 and n 67 *(supra)*. In *Nelles v Ontario* (1989) 60 DLR (4th) 609 at 641-2

ACKERMANN J

Lamer J observed as follows:
'When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.'"

The Court's obligation to provide appropriate relief, must be read together with section 172(1)(b) which requires the Court to make an order which is just and equitable.

[66] The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.[92]

[67] I am persuaded by Mr Trengove's submission that, as far as deference to the legislature is concerned, there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In the one case by excision and in

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92 *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) at paras 99-100.

the other by addition.

[68] This chance difference cannot by itself establish a difference in principle. The only relevant enquiry is what the consequences of such an order are and whether they constitute an unconstitutional intrusion into the domain of the legislature. Any other conclusion would lead to the absurdity that the granting of a remedy would depend on the fortuitous circumstance of the form in which the legislature chose to enact the provision in question. A legislature could, for example, extend certain benefits to life-partners generally and exclude same-sex life partners by way of express exception. In such case there would be no objection to declaring the exception invalid, where a court was satisfied that such severance was, on application of whatever the appropriate test might be, constitutionally justified in relation to the legislature. It would be absurd to deny the reading in remedy, where it was equally constitutionally justified in relation to the legislature, simply because of its form.

[69] There is nothing in the Constitution to suggest that form must be placed above substance in a way that would result in so glaring an anomaly. The supremacy clause, section 2, does not enact that "words" inconsistent with the Constitution are invalid but rather that inconsistent "law" is. Similarly section 172(1)(a) obliges a competent court to declare that "any law . . . that is inconsistent with the Constitution is invalid to the extent of its inconsistency" and not "any words" or "any words in any law". The same conclusion regarding the nature and permissibility of reading in as a constitutional remedy was reached by the Canadian Supreme Court in the leading case of *Schachter v Canada*.[93]

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93 (1992) 93 DLR (4th) 1 per Lamer CJC for the Court at 12 h to 13 h.

[70] I accordingly conclude that reading in is, depending on all the circumstances, an appropriate form of relief under section 38 of the Constitution and that

> ". . . whether a court 'reads in' or 'strikes out' words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result."[94]

The real question is whether, in the circumstances of the present matter, reading in would be just and equitable and an appropriate remedy.

94 *Knodel v British Columbia (Medical Services Commission)* (1991) 91 CLLC ¶ 17, 023 at 16, 343, [1991] 6 WWR 728; 58 BCLR (2d) 356 (SC) per Rowles J, as quoted with approval by Lamer CJC in *Schachter*'s case above n 93 at 13 f.

[71] I am strengthened in this conclusion by the fact that in several jurisdictions, courts have held that they do possess the power to read words into statutes where appropriate. In *Schachter*,[95] the leading Canadian case, the Supreme Court of Canada held that a court may read words into a statute in appropriate circumstances and set out principles to guide such decisions. Since then, Canadian courts have read words into statutes on several occasions.[96] Courts in the United States also accept that they have the power to read words into statutes to provide remedies for unconstitutionality.[97] The Israeli Supreme Court[98] and the German Constitutional

95 Above n 93 at 11-25.

96 See *Miron v Trudel* above n 65 paras 178-181. See also *Egan v Canada* above n 44 at 159-161 (in which the dissenters proposed the reading of words into a statute); *Rodriguez v British Columbia (Attorney-General)* (1994) 107 DLR (4th) 342 at 383-4.

97 See *Iowa-Des Moines National Bank v Bennett* 284 US 239 (1931); *Welsh v United States* 398 US 333 (1970); *Califano, Secretary of Health, Education and Welfare v Westcott et al* 443 US 76 (1979); *Skinner v Oklahoma* 316 US 535 (1942); and a discussion of the issue by Bruce K Miller "Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of *Heckler v Mathews*" in 20 *Harvard Civil Rights - Civil Liberties Law Review* (1985) 79 and by Evan H Caminker "A Norm-Based Remedial Model for Under-inclusive Statutes" in 95 *Yale Law Journal* (1985-6) 1185.

98 *El Al Israel Airlines*, cited above n 66.

Court[99] have also made similar orders.

[72] Criticism has also been expressed of a model for remedy selection, with respect to under-inclusive provisions, which assumes that there is no constitutional norm, albeit inchoate, which can guide such selection. While it is impossible to reflect adequately, in any summary, the richness and depth of the contentions advanced in this regard by Caminker, the following passages capture important aspects of their thrust and are relevant to the present enquiry:

> " . . . [G]iven the presence of an inchoate substantive norm and the absence of structural values obliging judicial passivity, the current model's assumption that courts conclude their 'essentially judicial' role simply by mandating equal treatment through either extension or nullification is false. Though both remedies are formally adequate, one is substantively preferred; courts (at least temporarily) can further actualize constitutional norms by choosing the preferred remedy.

99 The Court had previously declined to make such an order but in a landmark decision in November 1998 it adopted an approach which essentially constituted the reading in of words to a statute. Reported in 1999 NJW 557.

> Setting the remedial starting point in this manner maintains respect for the legislature's authority to participate in the remedial decision; the potential for subsequent legislative review 'vitiates any objection that the Supreme Court, in fashioning interstitial rules, violates separation of powers principles vis-a-vis Congress.' Indeed, employing the norm-based model not only will better execute the judiciary's proper remedial function, but it also will enrich the legislature's contribution by enhancing its subsequent deliberative process. When selecting a particular remedy according to this model, a court necessarily will discuss candidly the source and strength of the constitutional preference expressed by relevant inchoate norms. This discussion will inform the ensuing legislative deliberations and generate normative claims for leaving the court's starting point undisturbed; the legislature therefore is more likely to take account of both constitutional values and policy preferences when formulating its ultimate remedial response."[100][Footnotes omitted]

[73] Having concluded that it is permissible in terms of our Constitution for this Court to read words into a statute to remedy unconstitutionality, it is necessary to summarise the principles which should guide the court in deciding when such an order is appropriate. In developing such principles, it is important that the particular needs of our Constitution and its remedial requirements be constantly borne in mind.

[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute

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100 Above n 97 at 1204-5.

is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.

[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion.[101] In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected,

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101 See the discussion concerning the appropriateness of a retrospective order which has serious budgetary implications in *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1996 (11) BCLR 1439 (CC); 1997 (1) SA 585 (CC) at para 9.

sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.[102]

102 *Schachter* above n 93 at 23-5.

[76] It should also be borne in mind that whether the remedy a court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, "fine-tuning" them[103] or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.[104]

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103 As it was put in *Westcott*, above n 97.

104 See, for example, Caminker, above n 97 at 1187 where the following is aptly stated:

> "Whether a court creates graveyards or vineyards, its choice is not final. Where courts nullify provisions, legislatures can respond by enacting extended and hence constitutional versions; where courts extend provisions, legislatures can subsequently repeal them. Thus, the legislature retains final control over the extension/nullification

decision.

Still, a court must implement a remedy which acts as a 'starting point' for legislative review." [Footnotes omitted]

See also Bruce Miller "Constitutional Remedies For Underinclusive Statutes: A Critical Appraisal of *Heckler v Mathews*" above n 97, and Nitya Duclos and Kent Roach "Constitutional Remedies as Constitutional Hints - A Comment on R v Schachter" in 36 *McGill Law Journal/Revue De Droit de McGill* (1991) 1, for illuminating discussions on this general topic.

[77] I turn finally to the application of the principles or guidelines, referred to above, to the facts and legislative unconstitutionality in the present case. The striking down of section 25(5) will have the unfortunate result of depriving spouses, as presently defined, from the benefits conferred by the section; it will indeed be "equality with a vengeance" and create "equal graveyards".[105] This consequence cannot properly be addressed by the device of suspending such order for a fixed period of time. The above unfortunate consequences would ensue if Parliament did nothing and the suspension lapsed with the effluxion of time.

[78] More important perhaps, is the fact that, normatively, such an order would convey an impression that achieving equality by striking down the benefits which spouses presently enjoy would be a constitutionally permissible result. It is unnecessary and undesirable to decide, in the present case, whether the failure to afford spouses the benefits that they currently enjoy by virtue of the provisions of section 25(5) would be constitutionally defensible. It would be equally undesirable to suggest the contrary by making a striking down order.

105 See *Schachter* above n 93 at 15 g.

[79] In any event the benefits conferred on spouses express a clear policy of the government to protect and enhance the family life of spouses. This policy extends back at least 69 years, for the provisions of section 3(1)(b)(v) of the Immigration Quota Act 8 of 1930 provided a comparable benefit, although less fully and in a more discriminatory manner.[106] The indications are therefore strong that, had Parliament considered the most appropriate way for it to remedy the unconstitutionality of section 25(5), it would have chosen a remedy which did not deprive spouses of their current benefits under the section. This view is fortified by the fact that the government is, in other areas, giving effect to its legislative obligations under the equality clause in respect of same-sex partners.[107] All these considerations indicate that, if reasonably possible, a striking down order should not be the remedy resorted to.

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106 The relevant part of section 3(1) reads:

> "Subject to the provisions of sub-section (2) of this section it shall be competent for the board in any calender year to permit in its discretion any person born in any particular country not specified in the Schedule to this Act to enter the Union for permanent residence therein, notwithstanding that the maximum number of persons born in that country which may, under section *one*, be permitted to enter the Union, have already been granted permission to enter the Union during that year:
> Provided -
> (a) . . .
> (b) that every person so admitted -
> (i) is of good character; and
> (ii) is in the opinion of the board likely to become readily assimilated with the inhabitants of the Union and to become a desirable citizen of the Union within a reasonable period after his entry into the Union; and
> (iii) is not likely to be harmful to the economic, or industrial welfare of the Union; and
> (iv) does not and is, in the opinion of the board, not likely to pursue a profession, occupation, trade or calling in which, in the opinion of the board, a sufficient number of persons is already engaged in the Union to meet the requirements of the inhabitants of the Union; or
> (v) *is the wife or a child under twenty-one years of age, or a destitute or aged parent or grandparent of a person permanently and lawfully resident in the Union who is able and undertakes to maintain him or her*." [Emphasis supplied]

107 See the statutes referred to in n 41 above.

[80] The group that reading in would add to "spouses" in section 25(5), namely same-sex life partners, must be very small in comparison to the group benefited by the section. No statistics were provided by any of the litigants to quantify this, but it is safe in my view to make this assumption. The government's policy behind the section 25(5) benefit would thus be left intact by a reading in remedy and the budgetary implications would be minuscule.

[81] In my view the observations made in *Fose*[108] which were quoted above[109] are of particular application in the present case. In order for the norms and values lying at the heart of our Constitution to be made concrete, it is particularly important for the Court in this case to afford an effective remedy, which will also be seen to be effective, to the eighth to thirteenth applicants, and people similarly placed within the context of section 25(5). If, in order to do this properly, new tools have to be forged and innovative remedies shaped, this must be done.

[82] An appropriate remedy in the present case must vindicate the rights of permanent same-sex life partners to establish a family unit that, while retaining the characteristic features derived from its same-sex nature, receives the same protection and enjoys the same concern from the law and from society generally as do marriages recognised by law. But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because

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108 Above n 89.

109 Id at para 65.

> "[t]he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society."[110]

The most effective way of achieving this in the present case is by a suitable reading in order, if this is reasonably possible.

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110 Per L'Heureux Dubé J in *Mossop* above n 43 at 698 b. See also the plea by Thomas J in *Quilter* above n 25 at 550:

> "If [the basic human rights of minority groups are being denied], it is important to spell that denial out if the basic dignity of everyone in a more enlightened age is to be secured."

[83] The only bar to such an order in this case would be if it were not possible to define with sufficient precision how section 25(5) ought to be extended in order to comply with the Constitution. What constitutes sufficient precision must depend on the facts and the demands of each case. In deciding what sufficient precision is, one must not lose sight of the fact that the reading in is not a final act. It is important to point out in this context that if the remedy decided upon by a court were the striking down of section 25(5), coupled with a suspension order, the question of interim relief to protect the successful applicants would present the same problems concerning the precise formulation of such an interim order as does the remedy of reading in. It was for this reason that the Court in *Miron*[111] declined to make a suspended striking down order coupled with a constitutional exemption as a form of relief.[112]

111 Above n 65.

112 Id at para 179.

[84] The legislature is empowered to amend or fine-tune any extension that the Court, through its order, might make to section 25(5), or to do so with regard to any related or relevant provision, in order to give more accurate effect to its policy, provided it does so in a manner which is not inconsistent with the Constitution. Equal protection and non-discrimination as guaranteed under section 9 do not require identical treatment.[113] The family unit of a same-sex life partnership is different from the family unit of spouses and to treat them identically might in fact, in certain circumstances, result in discrimination. Spouses in a conventional marriage are in a legal relationship acknowledged by the law in a particular way and the existence of the conventional marriage is capable of easy and virtually incontestable proof; the legal relationship can also not be terminated without the intervention of the courts. Same-sex life partnerships are as yet not recognised or protected in a comparable manner by the law. In order to ensure equal protection and non-discrimination for persons in such different family units it might be necessary to treat them differently.[114]

[85] Reasonable legislative and administrative steps may be taken to prevent abuse of section 25(5) and evasion of the provisions of the Act generally. Section 25(6) is such a step for it provides that

> "[a] regional committee may, in the case of a person who applies for an immigration

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113 See *President of the Republic of South Africa and Another v Hugo* above n 56 at para 41, n 63 and at para 112 of that judgment; and compare Hogg above n 38 at paras 52.6 (a) and (b).

114 *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC) at para 46.

> permit and who has entered into a marriage with a person who is permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application, refuse to authorize such a permit unless the committee is satisfied that such marriage was not contracted for the purpose of evading any provision of this Act."

Should the provisions of section 25(5) be extended to include permanent same-sex life partners, it would likewise be permissible for Parliament and the executive to take reasonable steps to prevent persons falsely purporting to be in same-sex life partnerships from evading the provisions of the Act.

[86] Against the background of what has been said above I am satisfied that the constitutional defect in section 25(5) can be cured with sufficient precision by reading in, after the word "spouse", the following words: "or partner, in a permanent same-sex life partnership," and that it should indeed be cured in this manner. Permanent in this context means an established intention of the parties to cohabit with one another permanently. In my view, such a reading in, seen in the light of what has been said above concerning the legislature's right to fine-tune the section as so extended and other provisions that may be relevant thereto, does not intrude impermissibly upon the domain of the legislature.

[87] It is necessary to emphasise again that the Court need only provide the reading in remedy for excluded same-sex life partners, because it is only in relation to them that the Court was called upon to decide, and only in relation to them that it has been decided above, that their exclusion from the provisions of section 25(5) is constitutionally invalid. Apart from those cases where the Constitution makes express provision to the contrary, a court decides constitutional disputes and makes, where appropriate, orders of constitutional invalidity, only on the issues

presented to it and not as a matter of abstract constitutional adjudication. When a statutory provision has been partially invalidated by way of notional severance, the hypothetical possibility always exists that subsequently, because of the issues and contentions then placed before the court, the ambit of the constitutional invalidity might have to be extended. Likewise, after reading in matter to cure a constitutionally invalid under-inclusive provision, the possibility exists that, for identical reasons, a court may have to extend the reading in, in order to cure the constitutional invalidity. There is in principle no difference between these two possibilities. The conclusion I have reached in this case is that section 25(5) is unconstitutional in that it fails to include within its benefits a group entitled to such benefits. The order to be made affords relief to such group. This does not mean that other groups are not entitled to the benefits provided by section 25(5).

[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related

benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgment, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership, is disclosed.

The Order

[89] No case has been made out for the suspension of an order giving effect to such reading in. Permanent same-sex life partners are entitled to an effective remedy for the breach of their rights to equality and dignity. In the circumstances of this case an effective remedy is one that takes effect immediately. At the same time, if the order were to have retrospective effect, it might cause uncertainty concerning the validity of decisions taken and acts performed in the past, in good faith and in reliance on the provisions of the Act as they then read, with regard to applications under the Act by partners in permanent same-sex life partnerships. In my view such uncertainty ought, if possible, to be avoided by limiting the order so that it has no retrospective effect. Such an order can cause no prejudice to partners in permanent same-sex life partnerships who wish to seek afresh, or persist with seeking, relief under the Act, for nothing prevents them from doing so immediately after the order is granted. It is therefore just and equitable to make such a limiting order.

Costs

[90] Mr Trengove submitted that the costs which should be awarded to the applicants in respect of the two abortive interlocutory applications in this Court should include the costs of two counsel and should be taxed on the scale as between attorney and own client for two reasons; first, because they constitute an abuse of court process and, second, because they are manifestly without merit.

[91] The fact that both applications are manifestly without merit appears from what has already been said. The High Court is rightly critical in its judgment of the conduct of the respondents in the High Court proceedings, their dilatory approach to the litigation, and their attempt at the last moment to delay the hearing of the case. The same criticism can be directed to their belated attempt to raise new issues through the two abortive interlocutory applications to which I have referred at the commencement of this judgment, and their failure to explain why, even at the stage of the hearing of the matter before this Court, they had for a period of over 14 months failed to lodge an answer to the factual averments made in the main application.

[92] The wasted costs occasioned by these applications form part of the costs which the respondents will be required to pay. What is in issue is whether the applications constitute an abuse of the process of the court which merits the making of an order that the costs of the applications be paid as between attorney and client.

[93] If the argument addressed to this Court by the respondents concerning the merits of the appeal had revealed the same lack of substance and apparent disregard for the rights of the applicants I would have had no hesitation in ordering them to pay costs as between attorney and

client, notwithstanding the fact that such costs are rarely awarded on appeal.[115]

[94] As far as the merits of the appeal are concerned, however, there is no criticism of the respondents' conduct. They raised issues of substance, and it cannot be said that their decision to oppose the confirmation of the order made by the High Court, and to appeal against the order made, was frivolous.

[95] The two applications were concerned with collateral issues which could be disposed of summarily and took up very little time. There are some wasted costs occasioned by the respondents having had to consider the issues raised in the interlocutory applications and to respond to them on affidavit. In relation to the costs of the appeal as a whole, however, such costs will be comparatively slight.

[96] It is regrettable that the state should have considered it appropriate to raise before this court issues of such little merit as those contained in the two abortive applications. Its conduct in doing so, however, taken in the context of the appeal as a whole, does not constitute such a serious abuse of the process of the Court as would warrant an order that the costs of such

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115 See *Herold v Sinclair and Others* 1954 (2) SA 531 (A) at 537 A-E; *Ward v Sulzer* 1973 (3) SA 701 (A) at 707 B-D and *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC); 1999 (2) SA 91 (CC) at para 55.

applications be paid on an attorney and client basis.

Summary

[97] Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by section 9 of the Constitution and their right to dignity under section 10. This limitation is not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom and accordingly does not satisfy the requirements of section 36(1) of the Constitution. This omission in section 25(5) of the Act is therefore inconsistent with the Constitution. It would not be an appropriate remedy to declare the whole of section 25(5) invalid. Instead, it would be appropriate to read in, after the word "spouse" in the section, the words "or partner, in a permanent same-sex life partnership". The reading in of these words comes into effect from the making of the order in this judgment.

[98] The following order is made:

1. The applications of the respondents for

    (a) condonation of their failure to file answering affidavits in the High Court;

    (b) leave to file their answering affidavits;

    (c) the matter concerning the filing of answering affidavits to be remitted to the High Court; and

(d) an amendment of their notice of appeal

are dismissed with costs, including the costs of two counsel, such costs to be paid by the respondents jointly and severally.

2. The appeal of the applicants succeeds and paragraphs 1, 2 and 3 of the order made by the High Court are set aside and replaced with the following:

2.1 the omission from section 25(5) of the Aliens Control Act 96 of 1991, after the word "spouse", of the words "or partner, in a permanent same-sex life partnership," is declared to be inconsistent with the Constitution;

2.2 section 25(5) of the Aliens Control Act 96 of 1991, is to be read as though the following words appear therein after the word "spouse":

"or partner, in a permanent same-sex life partnership".

3. The orders in paragraph 2 only come into effect from the moment of the making of this order.

4. Paragraphs 4, 5 and the costs part of the High Court order are confirmed.

5. The costs of the proceedings in this Court, including the costs of two counsel, are to be paid by the respondents, jointly and severally.

ACKERMANN J

Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concurred with the above judgment.

ACKERMANN J

For the applicants/appellants: W Trengove SC and A Katz instructed by the Legal Resources Centre.

For the respondents: EM Patel SC, KD Moroka and TP Dhlamini instructed by the State Attorney.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 63/03

MINISTER OF FINANCE First Applicant

THE POLITICAL OFFICE BEARERS PENSION FUND Second Applicant

versus

FREDERIK JACOBUS VAN HEERDEN Respondent

Heard on : 24 February 2004

Decided on : 29 July 2004

JUDGMENT

MOSENEKE J:

Introduction

[1] This case raises important constitutional issues of equality, restitutionary measures and unfair discrimination. These issues arise within the context of a challenge to the constitutionality of certain rules of the Political Office-Bearers Pension Fund (the Fund) that provided for differentiated employer contributions in respect of members of Parliament and other political office-bearers between 1994 and 1999.

[2] The constitutional attack is mounted on two grounds. The first is that the relevant rules of the Fund offend the equality provisions of the Constitution because they are unfairly discriminatory. The second ground is that, in any event, the Fund as a whole is a nullity because it was not validly established under section 190A of the interim Constitution[1] or section 219 of the Constitution.[2] The equality challenge is

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[1] Section 190A provides:

> "(1) There shall be paid out of and as a charge on the pension fund referred to in subsection (2) to a political office-bearer upon his or her retirement as a political office-bearer, or to his or her widow or widower or dependent or any other category of persons as may be determined in the rules of such pension fund upon his or her death, such pension and pension benefits as may be determined in terms of the said rules.
> (2) A pension fund shall be established for the purposes of this section after consultation with a committee appointed by Parliament, and such a fund shall be registered in terms of and be subject to the laws governing the registration and control of pension funds in the Republic.
> (3) All political office-bearers shall be members of the said pension fund.
> (4) Contributions to the said fund by members of the fund shall be made at a rate to be determined in the rules of the fund, and such contributions shall be deducted monthly from the remuneration payable to members as political office-bearers.
> (5) Contributions to the said fund by the State shall be made at a rate to be determined by the President, and such contributions shall be paid monthly from the National Revenue Fund and the respective Provincial Revenue Funds, according to whether a member serves at national or provincial level of government.
> (6) In this section "political office-bearer" means —
> (a) an Executive Deputy President;
> (b) a Minister or Deputy Minister;
> (c) a member of the National Assembly or the Senate;
> (d) the Premier or a member of the Executive Council of a province;
> (e) a member of a provincial legislature;
> (f) a diplomatic representative of the Republic who is not a member of the public service; or
> (g) any other political office-bearer recognised for purposes of this section by an Act of Parliament."

[2] Section 219 states:

> "(1) An Act of Parliament must establish a framework for determining —
> (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
> (b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.
> (2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).
> (3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
> (4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

contested on the basis that the differentiation in the rules of the Fund is not unfairly discriminatory because it constitutes a "tightly circumscribed affirmative action measure" permissible under the equality provisions of our Constitution.

[3] The claimant is Mr Frederik Jacobus van Heerden (respondent). He served as a National Party member of the old Parliament from 1987 to 1994. With the advent of the new democratic Parliament in 1994, he was returned to office for the same political party as member of the National Assembly until April 1999. Like many parliamentarians whose term straddled the old and new Parliaments, he is a member of the Fund and of the Closed Pension Fund (CPF).[3] He purports to act also on behalf of 145 other similarly placed members of the Fund. Thring J, sitting in the Cape High Court (High Court), upheld the claim and declared the provisions of rule 4.2.1 of the Fund to be unconstitutional and invalid in *Van Heerden v The Speaker of Parliament and Others* (the High Court judgment).[4] The Minister of Finance, the first applicant, and the Fund, the second applicant, are aggrieved by this decision and seek leave of this Court to appeal against it.

Factual background

> (5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192."

[3] Described in more detail in paras 5 and 6 below.

[4] Case no 7067/01, 12 June 2003, unreported.

[4] From 1983 to 1994, the pension benefits of members of the tricameral Parliament and of other political office-bearers were regulated by statute.[5] In 1993, at the Kempton Park constitutional negotiations,[6] the ruling party of the time raised concern regarding the security of existing pensions of political office-bearers. There had been speculation by parliamentarians and other political office-bearers of the time that the new political regime may not continue to pay their pension benefits. The negotiating parties agreed that a pension fund exclusive to members of the old Parliament and other political office-bearers of the time would be established and fully funded to pay defined benefits to its members, whether they were re-elected or not as members of the first democratic Parliament of 1994.

[5] Pursuant to this agreement, legislation established the CPF.[7] It came into operation on 5 January 1994. As its name intimates, the CPF had several exclusionary features. Only members of Parliament and political office-bearers who held office before 1994 could become its members.[8] No new members could be admitted. It follows that persons who were elected to Parliament for the first time in the 1994

[5] Members of Parliament and Political Office-Bearers Pension Scheme Act 112 of 1984 (the previous Pension Act).

[6] These were the negotiations between the liberation movement and other political parties on the one hand, and the apartheid government on the other, for the adoption of an interim Constitution and the establishment of a democratic government. They were formally known as the Multi-Party Negotiation Process.

[7] Closed Pension Fund Act 197 of 1993.

[8] This is because the CPF only provided benefits to people already provided for by the previous Pension Act. This included all existing parliamentarians and office bearers. The relevant part of section 3 of the CPF Act provides:

> "(1) Every person who receives a pension in terms of a pension provision or who on the termination of membership of the Pension Scheme or on the vacation of the office mentioned in section 13 of the Constitution or on the death of such person becomes entitled to the payment of a pension, shall be a member of the fund."

general elections were excluded. A further significant feature is that members of the old Parliament who on the 26 April 1994 had not served for a period of seven and a half years were entitled only to a gratuity.[9]

[6] Yet another distinguishing feature of the CPF is its financing provisions. The pension liability of the CPF to its beneficiaries was to be fully financed by public funds and not based on employer or employee contributions.[10] As a result, after January 1994, its members were not required to make any contributions to the CPF irrespective of whether they were returned to office or not in the 1994 general elections.

[7] Another relevant sequel to the negotiations at Kempton Park was the establishment of a Special Pension Fund to provide for people who had undergone sacrifices in order to bring about the new democratic order.[11]

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[9] Section 9(1)(a) of the previous Pension Act provides for the payment of office bearers with more than five years of pensionable service. Section 9(1)(b) provides for a lesser payment to office bearers with less than five years pensionable service. Under section 8(a), ordinary members of Parliament could only receive pension payments if they had served seven and a half years of pensionable service, but instead received a gratuity if they had served for less than five years under section 11(2). The result was that benefits accruing to members of less than 5 years were substantially less.

[10] Section 9 of the Closed Pension Fund Act. This was confirmed in an affidavit by Alant, former Adjunct Minister of Finance:

> "[D]ie Geslote Pensioenfonds is mettertyd ten volle befonds. Die betaling van al die pensioene van al die lede van die Geslote Pensioenfonds is dus ten volle verseker."

[11] The Special Pensions Act 69 of 1996 provides for pensions of not more than R30 000 per annum for individuals aged between 45 and 64 years at the time of enactment. Within this age band, individuals with 7 years of qualifying service would receive a pension of R14 400 per annum, whilst individuals with 15 years service would receive a pension of R24 000 per annum.

[8] As the new democratic Parliament of April 1994 convened, it and its members had no pension arrangements. A new pension fund for the new Parliament had to be brought into being. This was in fact a constitutional obligation under section 190A of the interim Constitution.[12] Clearly, this constitutional obligation could not be achieved at the outset. The setting up of a new pension fund was a venture that would take time. As an interim measure, all concerned agreed that from 27 April 1994, the National Assembly and each of its members would contribute 12,5% and 7,5% of a member's pensionable annual income respectively towards the pension fund to be formed.[13] Pending the creation of the envisaged pension fund, employer and member contributions were paid to the Public Investment Commission, subject to the accrued aggregate capital and interest thereon being refundable to the pension fund to be formed.

[9] For reasons not immediately apparent, four years elapsed before Parliament turned its attention to its own new pension scheme. In June 1998, Parliament supported recommendations on the formation of the new pension fund, with four political parties in Parliament dissenting.[14] On 3 August 1998 a parliamentary

[12] For the text of section 190A, see n 1 above.

[13] These employer and employee contributions were based on the Melamet Report, a report delivered by the Interim Committee of Inquiry into Conditions of Remuneration of Elected Members of the National and Provincial Governments. This Committee was appointed in 1994 by the State President to make recommendations on remunerations, pending the establishment of a commission under section 207 of the interim Constitution. The Committee was chaired by Justice Melamet. The Report, delivered on 30 April 1994, recommended that members contribute 7,5% of their pensionable salary, and that government contribute 12,5% of the pensionable salary towards retirement benefits (at 33-5).

[14] The National Party, the Democratic Party, the Freedom Front and the Pan-Africanist Congress of Azania.

committee[15] tabled before the National Assembly a further report on the nature, benefits and management of the new pension fund.[16] The report included a proposal that pension contributions by employers for the period 27 April 1994 to 30 April 1999 should be paid retrospectively on a differentiated basis to new and continuing political office-bearers. On 13 August 1998, the report was debated and adopted by the National Assembly with only one party dissenting.[17] Towards the end of 1998, only a few months before the end of the first term of the new Parliament, the Fund was established but took effect retrospectively from 27 April 1994. The rules of the new fund were finalised and registered in terms of section 4(4) of the Pension Funds Act.[18] Predictably, the main object of the Fund was to provide for retirement, death and other benefits for serving and retired parliamentarians.[19]

The rules of the Fund

[10] The rules of the Fund create three categories of members. Rule 2 spells out the categories:

> "'Category A Member' shall mean a Member who has been notified to the Trustees by the Employer as a Member who has not reached age 49 years and who is not a member of the Closed Pension Fund.

[15] Chaired by an African National Congress Member of Parliament, Mr Peter Hendrickse.

[16] The Hendrickse Report, 3 August 1998.

[17] The Freedom Front.

[18] Act 24 of 1956.

[19] Rule 1.3 of the Fund.

> 'Category B Member' shall mean a Member who has been notified to the Trustees by the Employer as a Member who has reached age 49 years and who is not a member of the Closed Pension Fund.
> 'Category C Member' shall mean a Member who is a member of the Closed Pension Fund."

The rules require that each member must make a contribution to the Fund towards retirement benefits at a monthly and uniform rate of one-twelfth of 7,5% of his or her annual pensionable salary. However, the contributions payable by the various employers[20] within the Fund are calculated according to a differentiated scale. Rule 4.2.1 prescribes the variance in this manner:

> "The Employer shall make contributions towards the retirement benefit of each Member in its Service at the rate of:
> (a) in the case of a Category A Member, one twelfth of 17 per cent of his Pensionable Salary;
> (b) in the case of a Category B Member
> (i) for the period of 27 April 1994 to 30 April 1999, one twelfth of 20 per cent of his Pensionable Salary;
> . . . .
> (c) in the case of a Category C Member

[20] Rule 2 of the Fund defines "employer" as:

"an Employer admitted to the Fund with the consent of the Minister and shall include: The National Assembly; The National Council of Provinces; The nine Provincial Legislatures; Any department of State where Political Office-Bearers are in Service."

"Political office bearer" is in turn defined as:

> "(a) an Executive Deputy President;
> (b) a Minister or Deputy Minister;
> (c) a member of the National Assembly or National Council of Provinces (Senate);
> (d) the Premier or a member of the Executive Council of a province;
> (e) a member of the Provincial Legislature;
> (f) a diplomatic representative of the Republic who is not a member of the public service; or
> (g) any person recognised as a Political Office-Bearer for the purposes of Section 190A of the Interim Constitution."

> (i) for the period of 27 April 1994 to 30 April 1999, one twelfth of 10 per cent of his Pensionable Salary".

From 1 May 1999, the differentiation between the three categories fell away, and the contribution of employers became standardised for all members at a rate of one-twelfth of 17 percent of their annual pensionable salaries.

[11] The nub of the respondent's unfair discrimination complaint is that over the designated five years the differentiated employer contributions scheme improperly disfavours him and other category C members who are in receipt of pensions from the CPF, in comparison with new parliamentarians who are either below or above 49 years of age and do not receive pension benefits from the CPF.

The High Court

[12] The High Court found that the challenged provisions are not mere "differentiation" but rather "discriminatory in nature" because for five years lower employer contributions were paid for the less favoured class of members of the Fund to which they all belonged and contributed equally, with the result that the less favoured class of members will receive substantially smaller pensions than will members of the favoured classes. It also found the differentiation to be "prima facie unfair" because first, it is arbitrary as no reason is advanced for it and secondly, it is based on intersecting grounds of race and political affiliation — the latter a matter of

conscience and belief — all being prohibited grounds listed in section 9(3) of the Constitution.[21]

[13] The High Court reasoned that a person who relies on section 9(2) to justify discriminatory measures bears the "onus" of establishing on a balance of probabilities that the measures have been taken to promote the achievement of equality and that "generally speaking it cannot be an easy onus to discharge". The discrimination, it held, has to be "convincingly justified" to discharge the presumption of unfairness under section 9(5).

[14] The High Court found that the Minister and the Fund had failed to discharge the "onus" that the impugned measures are justified under section 9(2) because the measures relied upon do not bear a rational connection to the end they purport to achieve. It held that there is no "causal nexus" between means and ends because it has not been shown that in order to benefit members of the favoured categories less must be given to the disfavoured category.

[15] The High Court took the view that even if the measures were assumed to be directed at promoting the achievement of equality they were unlikely to do so because on "various calculations . . . the alleged inequality between categories A and B, on the

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[21] Section 9(3) provides:

> "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."

one hand and category C, on the other, subsisted."[22] It also held that even accepting that the disfavoured members (category C) are now better off than the other categories (A and B) that would not cure the defect in the ameliorative measures. It concluded that the measures were not only "haphazard, random and overhasty" but also "arbitrary". The High Court held the differentiated employer contributions to be unconstitutional and declared them invalid. However, no order was made regulating the consequences of the declaration of invalidity on the Fund and its members.

[16] The High Court dismissed the assertion by the Minister and the Fund that certain interested parties to the proceedings had not been joined and condoned the delay on the part of the claimant in instituting the claim. Since the claimant had succeeded on other grounds, the High Court found it unnecessary to decide the merits of the claim that the Fund had been improperly established in breach of the President's constitutional obligations under section 190A of the interim Constitution.

Equality submissions

[17] Before us, the gravamen of the applicants' complaint is that the High Court misconceived the true nature of the equality protection recognised by our Constitution, by resorting to a formal rather than a substantive notion of equality. They argued that the purpose of the differentiated scheme of employer benefits was to advance equality by identifying three separate indicators of need for increased pension benefits over a

[22] High Court judgment above n 4 at 19.

finite period. In that way the scheme rationally pursues a legitimate governmental purpose of distributing pensions on an equitable basis.

[18] The applicants urged us to have regard to the actual impact of the differentiated employer contribution scheme. Its effect on the respondent and members of his class is that they remain considerably privileged and better off in respect of their pension benefits than members of the favoured categories A and B. Moreover, it was submitted, the scheme is neither unfair nor invasive of the dignity of anyone. The complaint of the respondent and his class is not one that says the scheme invades their dignity but rather one propelled by financial benefit out of public funds and a desire to maintain historical privilege.

[19] In this Court, the argument advanced by the respondent had three components. He argued that ameliorative measures under section 9(2) of the Constitution, if based on any of the anti-discrimination grounds listed in section 9(3), constitute, in his words, "positive discrimination" and must be presumed unfair. The party implementing the measures must show them to be fair. The differentiation here, he argues, is informed by race because the scheme has a disproportionate impact on 143 white, coloured and Indian members of Parliament as against two black members.[23] He urged us to take the view that the applicants have failed to rebut the resultant presumption of unfairness of the discriminatory measures.

[23] The racial and gender composition of members of the Closed Pension Fund who remained in Parliament after 27 April 1994 is: Blacks 2, Indians 11, Coloureds 28 and Whites 105, and 6 members of the class are women.

[20] A further contention of the respondent is that the scheme is unfair because the state does not allege that in order to benefit the favoured group it was essential that the disfavoured group should receive lower employee benefits. In his view, limited resources do not necessitate the scheme, as the state cannot credibly claim that it cannot afford to pay pension contributions for all members at the same level. After all from 1999 it did. In emphasising the point that the state is not out of pocket, the respondent draws attention to an announcement by the Minister on 12 November 2003, a date after the judgment of the High Court, that the national treasury plans to put aside as a budget item R400 million for additional service benefits for members of Parliament and of provincial legislatures.

[21] The respondent concedes the correctness of the comparative actuarial calculations, presented by the Minister and the Fund, which indicate that members of Parliament who are also members of the CPF are better off than those who are not despite the increased employer contribution. It is contended, however, that this is not so in all cases. The respondent points to 15 category C members who are saddled with membership of the CPF without the benefit of generous pensions.[24] He regards these cases as *jammergevalle*.[25] He argues that in testing the constitutional invalidity of the challenged scheme, an objective approach would require that the position of all members affected by the challenged measure should be considered. As a result, he

[24] In their papers, the state and the Fund provide pension details of the disfavoured, category C members. They contend that only 13 to 17 members may be properly regarded as in receipt of meagre pension benefits from the CPF and for that reason are loosely referred to as *jammergevalle.*

[25] This phrase loosely translated means "the unfortunate ones".

submitted, the adverse impact of the scheme on the *jammergevalle* is sufficient to render the employer contributions scheme as a whole unfairly discriminatory.

Equality and unfair discrimination

[22] The achievement of equality goes to the bedrock of our constitutional architecture.[26] The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom.[27] Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.[28]

[23] For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and

[26] *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill* of 1995 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 52; *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 74; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 6; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 17. The importance of equality (although specifically in relation to gender) has also been recognised in the regional and international sphere; see Heyns (ed) *Human Rights Law in Africa* Vol 1 (Martinus Nijhoff Publishers, Boston 2004) at 845-50.

[27] Sections 1(a) and 7(1) of the Constitution.

[28] Some academic writers draw attention to the place of the right to equality as a constitutional value, which goes beyond the individual or personal affront of the claimant. See Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *SAJHR* 248 at 272-3. See also Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (New Africa Books, Cape Town 2001) at 128, who discusses equality as a core or foundational value.

economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to "improve the quality of life of all citizens and free the potential of each person".[29]

[24] Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality[30] — a duty which binds the judiciary too.[31]

[25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice.[32] In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

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[29] Preamble to the Constitution.

[30] Section 7(2).

[31] Section 8(1).

[32] *Bel Porto* above n 26 at para 6; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 1; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[26] The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution.[33] As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.[34] From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.[35] Of this Ngcobo J, concurring with a unanimous Court, in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*[36] observed that:

> "In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it."[37]

[27] This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social

[33] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40; *Hugo* above n 26 at para 41; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 26; *Satchwell* above n 26 at para 17.

[34] See, for example, sections 1(a), 7(1) and 39(1)(a).

[35] Gutto above n 28.

[36] 2004 (7) BCLR 687 (CC).

[37] Id at para 74 (footnotes omitted).

differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.[38] It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context,[39] in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive"[40] approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages. These are set out by this Court in *Harksen v Lane NO and Others*.[41]

Restitutionary measures

[28] A comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand, section 9(3) proscribes unfair discrimination by the state against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is

[38] See, for example, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

[39] *Hugo* above n 26 at para 41; *Walker* above n 33 at paras 46 and 128.

[40] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 126.

[41] 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54.

established. However, section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Restitutionary measures, sometimes referred to as "affirmative action", may be taken to promote the achievement of equality. The measures must be "designed" to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.

[29] Section 9(1) provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law." Of course, the phrase "equal protection of the laws" also appears in the 14th Amendment of the US Constitution. The American jurisprudence has, generally speaking, rendered a particularly limited and formal account of the reach of the equal protection right.[42] The US anti-discrimination approach regards affirmative action measures as a suspect category which must pass strict judicial scrutiny. The test requires that it be demonstrated that differentiation on the grounds of race is a necessary means to the promotion of a compelling or overriding state interest. A rational relationship between the differentiation and a state interest would be inadequate.[43] Our equality jurisprudence differs substantively from the US approach to equality. Our respective histories, social context and

[42] See, for example, *Washington v Davis* 426 US 229 (1976) and *General Electric Co v Gilbert* 429 US 125 (1976). Section 15(1) of the Canadian Charter of Rights and Freedoms also protects equality "before and under the law" and warrants "equal protection and equal benefit of the law". For its authoritative interpretation see, for example, *R v Turpin* [1989] 1 SCR 1296.

[43] Compare *McLaughlin v Florida* 379 US 184 (1964) at 191. Also see a critical discussion of the relevant American precedent in Van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (Juta and Co, Cape Town 1994) at 198-9.

constitutional design differ markedly. Even so, the terminology of "affirmative action" has found its way into general use and into a number of our statutes directed at prohibiting unfair discrimination and promoting equality, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. But in our context, this terminology may create more conceptual and other difficulties than it resolves. We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of "suspect categories of state action" and of "strict scrutiny". The Afrikaans equivalent "regstellende aksie" is perhaps juridically more consonant with the remedial or restitutionary component of our equality jurisprudence.

[30] Thus, our constitutional understanding of equality includes what Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another*[44] calls "remedial or restitutionary equality".[45] Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not "reverse discrimination" or "positive discrimination"[46] as

[44] Above n 40.

[45] Id at para 61.

[46] See debate on the nature of these measures in De Waal et al *The Bill of Rights Handbook* 4 ed (Juta and Co, Cape Town 2001) at 223-5; Gutto above n 28 at 204-5. See also Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (Juta and Co, Cape Town 1994) at 144-5; Kentridge "Equality" in Chaskalson et al *Constitutional Law of South Africa* (Juta and Co, Cape Town 1999) at para 14-59-60; Cachalia et al *Fundamental Rights in the New Constitution* (Juta and Co, Cape Town 1994) at 31; Rycroft "Obstacles to employment equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" (1999) 20 *Industrial Law Journal* 1411; Pretorius "Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview" *Heidelberg Journal of International Law* Vol 61 (2001) 403; Van Reenen "Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa" (1997) 12 *SA Publiekreg/Public Law* 151.

argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights".[47] A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.

[31] Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.

[32] The High Court favoured the approach that in effect, the measures under attack were not mere differentiation but discriminatory and that they must be convincingly justified because they are premised on grounds listed in section 9(3) and therefore attract an onus "that cannot be easy to discharge". In *Public Servants Association of*

[47] Section 9(2). See also *National Coalition for Gay and Lesbian Equality* above n 40 at para 62: "Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes 'the full and equal enjoyment of all rights and freedoms'."

South Africa and Others v Minister of Justice and Others,[48] Swart J, in dealing with the "affirmative action" claim of the government in that case, adopted an equivalent route in the interpretation and application of section 8(3)(a) of the interim Constitution. I am unable to agree with that approach. Legislative and other measures that properly fall within the requirements of section 9(2) are not presumptively unfair. Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2).

Onus of proof and section 9(2)

[33] It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory.[49] To hold otherwise would mean that the scheme of section 9 is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage.[50] I cannot accept that our

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[48] 1997 (3) SA 925 (T); 1997 (5) BCLR 577 (T).

[49] For writers who seem to favour the view that once measures have been shown to qualify as designed to protect and advance groups previously disadvantaged they are not open to constitutional attack on the grounds of fairness or disproportionality, see Du Plessis and Corder above n 46; Kentridge above n 46; Cachalia above n 46; Rycroft above n 46; De Waal et al above n 46; Van Wyk above n 43 at 207-9. For the opposite view, see Pretorius above n 46.

[50] Van Reenen above n 46, who argues that in the light of the substantive notion of the equality which may be gathered from all the provisions of our Constitution, the provisions of section 9(2) are a redundant interpretative aid since restitutionary measures are implicit in the notion of equality contemplated in section 9(1).

Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.

[34] Following the reasoning in *Public Servants Association*,[51] the High Court made much of the presumption of unfairness against the differentiated pension scheme and the burdensome onus it attracts. I have concluded that legislative and other measures, which properly fall within the provision of section 9(2), do not attract any such burden.

[35] It follows that the High Court is clearly mistaken in approaching this matter on the limited basis that it need not decide whether and the extent to which members of Parliament who were members of the CPF were better off than those who were not,[52] since the applicants had omitted to make certain averments, which the court regarded as essential to discharge the section 9(5) onus.

Requirements of section 9(2)

[51] See above n 48 at 979C-D and 982I.

[52] See the High Court judgment above n 4 at 15 (regarding onus) and 20 (regarding the decision not to decide the factual comparison).

[36] The pivotal enquiry in this matter is not whether the Minister and the Fund discharged the presumption of unfairness under section 9(5), but whether the measure in issue passes muster under section 9(2). If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3).

[37] When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.

[38] The first question is whether the programme of redress is designed to protect and advance a disadvantaged class. The measures of redress chosen must favour a group or category designated in section 9(2). The beneficiaries must be shown to be disadvantaged by unfair discrimination. In the present matter, the Minister and the Fund submitted that the differentiated contribution scheme was set up to promote the

attainment of equality between members of the CPF and new members who were in the past excluded on account of race and or political affiliation. This objective they would advance by identifying three separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it is clear that not all new parliamentarians of 1994 belong to the class of persons prejudiced by past disadvantage and unfair exclusion. An overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief. [53]

[39] The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with "pure" differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or "hard cases" or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. In this regard I am in respectful agreement, with the following observation of Gonthier J, in *Thibaudeau v Canada*: [54]

[53] The uncontested evidence of the Chief Director of the Directorate of Pensions Administration of the Department of Finance and Deputy Chairperson of the Fund, Mr Maritz, is that:

> "The overwhelming majority of new political office bearers had been excluded from access to political office under the tri-cameral regime (and thereby from the generous benefits of the Closed Pension Fund) by virtue of either their race or their political affiliation or both their race and their political affiliation."

[54] 29 CRR (2d) 1 (SCC). See also *Miron v Trudel* 29 CRR (2d) 189 (SCC).

> "The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial."[55]

[40] In the context of a section 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion. It is clear that the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned.

[41] The second question is whether the measure is "designed to protect or advance" those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end.[56] Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2).

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[55] Id at 32.

[56] *Prinsloo v Van der Linde* above n 33 at paras 24-6 and 36; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 16. Also compare the remarks of Van der Westhuizen J in *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 480B-D.

[42] In *Public Servants Association*,[57] Swart J, in interpreting section 8(3)(a) of the interim Constitution, held that:

> "The measures must be designed to *achieve* something. This denotes . . . a causal connection between the designed measures and the objectives."[58]

In the present matter Thring J followed this approach and held that no such causal nexus is present because the sponsor of the differentiated employer contribution scheme does not say that less had to be paid for the disfavoured category in order to give more to the favoured group. I cannot support this approach. Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn, and defeat the objective of section 9(2).

[43] It is untenable to require, as Thring J did, that a sponsor of remedial measures must show a necessity to disfavour one class in order to uplift another. The provisions of section 9(2) do not prescribe such a necessity test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity or purpose to prejudice or penalise others, and so require supporters of

[57] Above n 48.

[58] At 989A-B.

the measure to establish that there is no less onerous way in which the remedial objective may be achieved. The prejudice that may arise is incidental to but certainly not the target of remedial legislative choice. On the facts of this case, the members of the disfavoured class, barring a few, are beneficiaries of a generous publicly funded pension scheme which pre-dates the differential measure. The favoured categories are, in the main, not. The disfavoured category was and, as the High Court observed, remains better situated than its new parliamentary counterparts as far as state-funded pension benefits go.

[44] The third and last requirement is that the measure "promotes the achievement of equality". Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. As Ngcobo J observed in *Bato Star*:

> "The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities."[59]

However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse

[59] Above n 36 at para 76.

society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.

Discussion

[45] At the threshold, the challenged pension contribution scheme differentiates among its members. The differentiation is based on several indicators. However, the discontent of the respondent is confined to the distinction made between state pension contributions in respect of pre- and post-1994 parliamentarians. In my view, we are obliged to look at the scheme as a whole. We must bear in mind its history of transition from the old to the new 1994 Parliament; the duration, nature and purpose of the scheme; the position of the complainant and the impact of the disfavour on the respondent and his class.

[46] The scheme has a finite lifespan of five years. It is a transitional, limited and temporary tool to allocate public resources. Its effect is retrospective. Nothing significant turns on that. The scheme was set up late in the life of the first democratic Parliament. Properly so, the pension benefits of all concerned were best protected by a retrospective date of commencement. Otherwise all members would have found

themselves without pension benefits, although they had served Parliament for nearly four and a half years since April 1994.

[47] The scheme creates several classes of members in regard to employer pension contributions. The first class (category A) focuses on parliamentarians younger than 49 years of age, who are not members of the CPF. They receive employer contributions of 17% of their annual pensionable salary. Their colleagues older than 49 years (category B) who are not members of the CPF get a higher contribution of 20%. The third class (category C) receives pension benefits from the CPF and is allocated employer contributions of 10%. Lastly, the class of those over 49 years (category B) who left office in 1999 continue to receive a 5% employer contribution for five years after they left office. Those of the same class who remained in office receive no comparable benefit.

[48] It is clear to me that the differentiated scale of employer contributions was one decided and applied to ameliorate past disadvantage related to the pension benefits need of new political office-bearers, premised on three indicators. First, members who did not have access to the generous benefits of the CPF, as a class, had a greater need for pension benefits than the class of members who were already in receipt of these benefits. The inequality of pensions between the overwhelming majority of new parliamentarians and the vast majority old parliamentarians arises from past unjustified legislative and other exclusions of the former. That, in a large measure, explains the line drawn between new and old parliamentarians. Although the class of

the new parliamentarians of 1994 is drawn predominantly from disadvantaged backgrounds, it is racially and gender diverse and drawn from different political parties.

[49] Within the class of new parliamentarians a sharper indicator of need is utilised. Members over the age of 49 years (category B) being, as a class, closer to retirement, had a greater need for increased pension benefits than members under that age (category A). The older class was accordingly given 20% employer contributions while the younger class received 17% contributions.

[50] Thirdly, within the class of category B, members who left office in 1999, as a class, had a greater need for increased pension benefits than those who remained in office because the latter would continue to accumulate benefits under the Fund. The class that left office in 1999 accordingly continued to receive a 5% employer contribution for five years after they left office. The class that remained in office received no comparable benefit because the latter would continue to accumulate benefits under the Fund.

[51] Within each class of members of the Fund, individual variations are to be expected. Conceivably some new members of Parliament who do not receive pensions from the CPF may have accumulated pension benefits before joining Parliament. Conversely, some old parliamentarians may not receive pensions as generous as most members of the CPF. Comparable individual variations may be

found amongst younger members who leave office early or older members who are elected to office several times. In my view, none of these possible exceptions to the three membership categories diminishes the efficacy of the indicators as general guides to the payment of the relative increased pension benefits.

[52] I am satisfied that the evidence demonstrates a clear connection between the membership differentiation the scheme makes and the relative need of each class for increased pension benefits. The scheme was designed to distribute pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. In that sense the scheme promotes the achievement of equality. It reflects a clear and rational consideration of the need of the members of the Fund and serves the purpose of advancing persons disadvantaged by unfair discrimination.

[53] The high watermark of the respondent's complaint is that the impact of this differentiation on him and others in his position is that he will earn from the Fund less pension than otherwise. That is so.[60] The argument the respondent did not advance is that, as a class, new parliamentarians who are members of the Fund earn an average annual pension higher than that earned by him and his class of parliamentarians who are also members of the CPF. He cannot credibly advance that assertion. The

[60] The respondent points out that an "ordinary member" of Parliament with an annual pensionable salary of R211 385 would be entitled to R335 000 at June 1999 if he or she was a category A member, R425 000 if he or she was a category B member who left office in 1999, and R370 000 if he or she remained in office. By contrast, a category C member would earn only R240 000 by that time.

actuarial evidence tendered by the Minister and the Fund[61] demonstrates that the applicant and his class remain a privileged class of public pension beneficiaries notwithstanding the challenged remedial measures. Their pensions are indeed generous and several times more generous than they would, on their pensionable annual salaries, have been entitled to under comparable public sector pension funds. Moreover, they are considerably more generous than pensions payable out of the Special Pension Fund to people who had undergone sacrifices in order to bring about the new democratic order.[62]

[54] The respondent does not claim that he and his class of parliamentarians are in any sense vulnerable or marginalized or that in the past they were unfairly excluded or discriminated against. Nor do I think that he and his class were. He does not complain that the scheme is invasive of his dignity or of any of the members of the CPF. There is no evidence to suggest any indignity. His claim appears to be propelled by a desire to earn more in circumstances where his pensions benefit is well ahead of that of his newer colleagues in parliament, despite the remedial measures challenged.

Jammergevalle

[61] This is according to the uncontested evidence of the actuary, Mr Potgieter and Mr Maritz.

[62] Based on actuarial figures in the High Court, the CPF benefits are, in general, just under 3 times more generous than those paid to category B members, 3,81 times more generous than pension funds paid out in the private sector, and 4 to 5 times more generous than pensions provided under the Special Pensions Act. The average amount paid out to CPF members was R104 596, 68. For amounts payable under the Special Pension Fund see above n 11.

[55] *Jammergevalle* is an appellation that both counsel used to describe the class of some 15 members[63] of the Fund who were also members of the CPF, but did not receive the generous payments that accrued to the overwhelming majority of parliamentarians who are members of the CPF. Their terminal benefits were calculated in accordance with a formula under section 11 of the Members of Parliament and Political Office-Bearers Pension Scheme Act.[64] Ordinary members of the old Parliament who had rendered less than seven and a half years service at April 1994 were entitled to no more than a gratuity. Other office-bearers with less than five years of service at April 1994 also fall into the category. It is thus clear that within category C not all members receive generous benefits from the CPF. Their relatively limited terms of office before the advent of the new Parliament earned them only a lump gratuity payment in the CPF. Nonetheless, under the differentiated scheme of the Fund, they fall within the disfavoured category C membership.

[56] The question is whether the adverse impact of the employer contribution scheme on *jammergevalle* is such as to render it unfairly discriminatory. One must, however, keep in mind that they are a notional sub-class comprising approximately 10% of the total class of 146 category C members of the Fund, even on their argument. In many respects they do not, in terms of state funded pension benefits, share the financial attributes of 90% of the respondent and class he seeks to represent. Put differently, *jammergevalle* are unrepresentative of the class complaining of unfair

[63] This is according to the respondent. The Minister and the Fund claim that there may be as few as 13 members who may be said to fall in that class. Nothing important turns on this marginal difference.

[64] See above n 9.

discrimination and are therefore not an appropriate comparator. The comparison to be made must be with the overwhelming majority of the class asserting the equality claim. I am satisfied that the circumstances of this sub-class of category C members do not invalidate the legal efficacy of the scheme of the Fund.

Conclusion

[57] I have come to the conclusion that it is in the interests of justice to grant this application for leave to appeal from the decision of the High Court. The order of the High Court declaring rule 4.2.1 of the Fund unconstitutional and invalid cannot be supported. The appeal has merit and must be upheld.

Section 190A of the interim Constitution

[58] In his fourth set of affidavits before the High Court, the respondent raised a new cause of action that the Fund as a whole is invalid as it was not properly established under section 190A or its employer contributions are not set at a rate determined by the President.

[59] The High Court declined to decide this cause of action because it had disposed of the matter on the basis of unfair discrimination. In its further judgment on the application for leave to appeal and for a certificate in terms of the old Rule 18 of this Court,[65] the High Court took the view that the section 190A contention did not form part of its reasons for judgment and thus cannot be the subject of any appeal. I

[65] *Van Heerden v The Speaker of National Parliament and Others* 7067/2001, 28 October 2003, as yet unreported.

respectfully agree that "an argument in support of an appeal on this ground would be virtually impossible to formulate in logic." However, in this Court the respondent persisted in this argument.

[60] The crux of the respondent's contention is that the Fund has no legal effect because it was not established in terms of section 190A or, if it was, the levels of employer contributions to the Fund were set by cabinet resolution and not by the President as required by section 190A(5). In response, the Minister and the Fund disavowed any reliance on section 190A for the establishment of the Fund. They argue that mere reference to section 190A in the affidavit of one of their deponents[66] does not convey that the Fund was created under that constitutional provision.

[61] It appears to me plain that the Fund could not be established under the provisions of section 190A. The Fund came into force on 23 September 1998.[67] Section 190A was repealed on 4 February 1997, the day the final Constitution took effect.[68] Accordingly, the question whether the level of employer contributions of the impugned rules of the Fund was set by the cabinet rather than the President in accordance with the requirements of section 190A(5) does not arise. The legal power to set up a pension fund could not possibly arise from a repealed and therefore lifeless

[66] In a supporting affidavit, Maritz, in giving the history to the Fund stated that "the creation of a new pension fund for political office bearers . . . was, in fact, a constitutional obligation imposed by section 190A of the interim Constitution."

[67] The Fund was adopted at a Cabinet meeting on this day.

[68] Schedule 7 to the Constitution specifically repeals the Constitution of the Republic of South Africa Second Amendment Act 3 of 1994, which had introduced section 190A into the interim Constitution.

constitutional provision, irrespective of the mistaken views or preferences of those concerned. The impugned pension scheme could not be set up pursuant to the repealed provisions of section 190A of the interim Constitution.

Section 219 of the Constitution and section 8 of the Remuneration Act

[62] Before us the respondent advanced a new reason why the Fund as a whole should be invalidated. He argues that levels of challenged employer contributions were determined by the cabinet and not in compliance with section 219[69] of the Constitution and section 8[70] of the Remuneration of Public Office-Bearers Act (the Remuneration Act).[71]

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[69] See above n 2 for full text.

[70] Section 8 provides:

> "Pension benefits
> (1) There shall be paid out of and as a charge against the pension fund of which an office bearer is a member, such pension and other benefits as may be determined in terms of the law or rules governing such pension fund.
> (2) The amount of the contribution to be made to the pension fund by the national government, of which a Deputy President, a Minister, a Deputy Minister, a member of the National Assembly or a permanent delegate is a member, shall be determined by the Minister of Finance after taking into consideration the recommendations of the Commission, and such amount shall annually be paid from monies appropriated by Parliament for that purpose.
> (3)(a) The upper limit of the contribution to be made to the pension fund of which a Premier is a member, shall be determined by the President by proclamation in the *Gazette* after taking into consideration the recommendations of the Commission.
> (b) The provincial legislature concerned shall by resolution, if the provincial legislature is then sitting, or if it is in recess, within 30 days of its next ensuing sitting, determine the amount of the contribution and such amount shall annually be paid from monies appropriated for that purpose by the provincial legislature concerned.
> (4)(a) The upper limit of the contribution to be made to the pension fund of which a member of the Executive Council or a member of a provincial legislature is a member, shall be determined by the President by proclamation in the *Gazette* after taking into consideration the recommendations of the Commission.
> (b) The Minister of Finance shall determine the amount of the contribution by notice in the *Gazette* and such amount shall annually form a charge against the Provincial Revenue Fund.
> (5) (a) The upper limit of the contribution to be made to the pension fund of which a member of a Municipal Council is a member, shall be determined by the Minister after taking into consideration the recommendations of the Commission.
> (b) The Municipal Council, after consultation with the pension fund concerned, shall determine the amount of the contribution and such amount shall annually form a charge against and be paid from the budget of the municipality concerned.
> . . .

[63] It is so that the Constitution does not contain a direct equivalent of section 190A. Unlike section 190A of the interim Constitution, section 219 of the Constitution enjoins Parliament to create a legislative framework for determining salaries, allowances and benefits of members of the National Assembly and other persons holding public office. Such legislation is the Remuneration Act. Section 8(2) of the Remuneration Act requires the Minister of Finance to determine the amount of the contributions to be made to the pension fund by the national government, after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-Bearers (Remuneration Commission), established in terms of the Independent Commission for the Remuneration of Public Office-Bearers Act (Commission Act),[72] which legislation came into operation on 29 June 1998.

[64] The respondent raised the contention on section 219 for the first time before us on appeal. None of the facts relevant to the issue are traversed in the affidavits lodged in the High Court. Neither the Minister nor the Fund had a proper opportunity to deal with the matter in written argument or during the hearing before us. The matter is not an issue in the appeal. There is no application for direct access. The matter is not properly before us and must be dismissed without deciding its merits.

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(6) The provisions of this section shall, subject to any other Act of Parliament to the contrary, not apply to a traditional leader, a member of a provincial House of Traditional Leaders and a member of the National House of Traditional Leaders."

[71] Act 20 of 1998.

[72] Act 92 of 1997.

Unreasonable delay and non-joinder

[65] The applicants urged us to uphold the appeal on the ground that the High Court ought to have disallowed the respondent's claim because there was unreasonable delay in bringing it before court. They also raised issues of non-joinder, contending that provincial legislatures and the President should have been joined as parties. In the light of the decision I have come to on the merits of the case, it is unnecessary to decide these issues.

Costs

[66] The applicants sought an order for costs against the respondent. The respondent has raised issues of broad public concern and constitutional importance. In circumstances such as these, this Court seldom makes a cost order.[73] I am, therefore, not minded to grant an adverse cost order against the respondent.

Order

The following order is made:

(a) The application for leave to appeal against the judgment and order of the High Court made on 12 June 2003 is granted.

(b) The appeal is upheld.

[73] *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at para 35; *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) at para 52.

(c) The order of the High Court of 12 June 2003 declaring the provisions of rule 4.2.1 of the Political Office-Bearers Pension Fund to be unconstitutional and invalid including its order as to costs is set aside.

(d) No order as to costs of the present application is made.

Chaskalson CJ, Langa DCJ, Madala J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke J.

MOKGORO J:

Introduction

[67] I have read the judgment prepared by my colleague Moseneke J. I agree with the order that he proposes as well as his findings in relation to section 190A of the interim Constitution and section 219 of the Constitution. I also agree with his conclusion that the impugned measure does not violate section 9 of the Constitution,[1]

[1] Section 9 of the Constitution reads as follows:

> "Equality —(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."

but am unable to agree with the route taken to arrive at this conclusion. Whereas Moseneke J concludes that section 9(2) of the Constitution applies to this case, I am of the view that the facts of this case are to be decided in terms of section 9(3) of the Constitution.

[68] The facts of this case have been clearly set out in the main judgment.[2] The High Court upheld the claim of Mr Van Heerden (the respondent) that the differentiation between the amounts of contributions of members of the Political Office-Bearers Fund (POBF) amounted to unfair discrimination on the basis of race and political affiliation. As the main judgment makes clear, the High Court held that the state bears an onus to show that the impugned measures fall under section 9(2) of the Constitution. The High Court held that the applicant (the Minister) had failed to discharge this onus. One of the main reasons for this finding was that the Minister had failed to show that it was necessary to require that the various employers identified under the Fund's rules contribute less to the pensions of category C members in order for category A and B members to receive greater contributions. In other words, the High Court held that there was no causal connection between the benefit to the new members of Parliament and the disadvantage to the old members. Moseneke J has dealt sufficiently with the issue that the High Court's approach to section 9(2) and the nature of the burden to be discharged were incorrect. I agree with the analysis and conclusions of Moseneke J in this regard.

[2] Paras 4 -11 of the main judgment.

Arguments in this Court

[69] The Minister argues that the High Court adopted an approach to the interpretation of section 9 which is based on the notion of formal equality. In contradistinction to the notion of formal equality it was argued that the Constitution embraces substantive equality which permits remedial measures to be enacted to address past unfair discrimination. According to the Minister, the differentiation that occurs under the rules of the POBF constitutes a positive measure to create equity amongst parliamentarians in respect of the pensions that they will ultimately draw. This measure, it was argued, is of the type envisaged by section 9(2) of the Constitution because it aims to advance persons previously disadvantaged by unfair discrimination and in so doing promotes the achievement of equality.

[70] Before this Court, the respondent persists with his argument that the measure unfairly discriminates on the basis of race and political affiliation. The respondent argues that any measure, which is restitutionary in nature but discriminates against persons on one of the listed grounds, attracts the presumption of unfairness in terms of section 9(5). The state must show the measures to be fair in order successfully to resist his equality challenge. The respondent further argues that the state has failed to show that it cannot afford to pay all parliamentarians equally and, as such, has failed to show the necessity of discriminating in the way that the POBF does. As a consequence, so the argument goes, the measure is unfair and unconstitutional.

Equality and unfair discrimination

[71] The role of the right to equality in our new dispensation cannot be overstated. Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched.

[72] It was with this in mind that the interim Constitution recognised in its preamble the need to create a society "in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms". The Constitution now makes clear the fundamental importance of equality in our constitutional framework by establishing that one of the fundamental values upon which our society is founded is the "achievement of equality".[3] As this Court held in *Prinsloo v Van der Linde and Another*:

> "Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the

[3] The relevant part of section 1 of the Constitution reads:

> "Republic of South Africa —The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

> arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage."[4]

[73] It is no mistake that our Constitution uses the phrase "achievement of equality". The tremendous indignity and political oppression that characterised the years of apartheid was coupled with the systemic entrenchment of economic disadvantage for millions of South Africans. The vast majority of this country's wealth remained then and remains still, as a consequence of the entrenched disadvantage, in the hands of a minority. Sprawling and over-crowded informal townships inhabited by poor and jobless people without property to call their own and without many of the basic amenities necessary for a dignified human existence sit beside most affluent neighbourhoods with people who have access to the best schools, the best jobs and the best opportunities. The use of the phrase "achievement of equality" therefore recognises that the creation of democracy and equal treatment before the law are not enough to foster substantive equality. Unless the disparity that currently exists is consciously and systematically obliterated, it can easily be overlooked and will as a result continue to define our society for a long time to come.

[74] In *Brink v Kitshoff NO*[5] this Court remarked that

> "[a]s in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chap 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional

[4] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20.

[5] 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

> context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[6]

Although these remarks refer to section 8 of the interim Constitution they are equally apposite today.

Restitutionary measures

[75] Moseneke J is indeed correct when he points out that the provisions of section 9 must be understood against the backdrop of the circumstances highlighted above and the need to foster substantive equality. Section 9(2) in particular was enacted with the idea that true equality can never be said to exist until the patterns of disparity which were created in the past have been eradicated. The measures it envisages therefore form an integral part of our overall conception of equality. When in 1994 democracy was established in South Africa the right to equality for all South Africans was constitutionally protected. However, section 9(2) acknowledges that our notion of substantive equality requires measures to be enacted to make up for that part of the past which cannot simply be corrected by removing the legal bars to equality of treatment.

[6] Id at para 40.

[76] For this reason, I join Moseneke J in his criticism of the High Court's approach to section 9(2). To require the state to demonstrate that it is necessary to give less to one group in order to advance another would be to undermine the scheme of section 9(2). The reason for the enactment of section 9(2) is to authorise restitutionary measures for the advancement of those previously disadvantaged by unfair discrimination. Whenever a group is given certain advantages it must follow that it receives more than others in the context of the particular measure which is being enacted. But the measure will not necessarily be enacted with the aim of taking from one group to give to another. The logical consequence of the respondent's submissions is that practically no measure may be enacted of a restitutionary nature because each time the state attempts to do so it will, more often than not, fail to prove the necessity of giving more to one person or group than another. The approach of the High Court presupposes that it will only be permissible to favour a particular group if there are insufficient resources to give equally to everyone. The Minister is correct when he argues that the approach of the High Court is premised on a notion of formal equality which is at odds with the vision of substantive equality in our Constitution. It would be contrary to the spirit of section 9(2) and inimical to its purpose to require the state to show that it has insufficient resources to give advantages equally, every time that it attempts to enact a restitutionary measure which advances those previously disadvantaged.

[77] I further agree with the judgment of Moseneke J in its approach to the interaction between section 9(2) and section 9(3). The whole structure of our equality

clause and the important aim of substantive equality would be undermined by an approach which requires the state to show that measures which aim at advancing the substantive notion of equality and fostering a society which no longer resembles that of the South Africa of old are fair. It is an invariable consequence of enacting measures that advance certain groups that other groups will be disadvantaged in that regard, albeit that this would not be the intention of such measures. More often than not, such disadvantage will be on the basis of one of the listed grounds in section 9(3). The logical consequence of the approach advanced by the respondent is that practically all restitutionary measures would attract a presumption of unfairness. This cannot be what section 9(2) envisages. An interpretation of the Constitution which renders certain provisions redundant should be avoided.

[78] I wish to make one further observation about the difference between section 9(2) and section 9(3). Section 9(2) is forward looking and measures enacted in terms of it ought to be assessed from the perspective of the goal intended to be advanced. The measures must promote the achievement of equality by advancing those previously disadvantaged in the manner envisaged. This is not to say that the interests of those not advanced by the measure must necessarily be disregarded. However, the main focus in section 9(2) is on the group advanced and the mechanism used to advance it.

[79] Our equality jurisprudence in terms of section 9(3) is, however, different. When assessing a measure under section 9(3), the focus is on the group or person

discriminated against. Here, the impact on the complainant and his or her position in society is of utmost importance. The aim of the challenged measure and whether it advances a legitimate government purpose will of course be important. However, the main focus is on the complainant and the impact of the measure on him or her.

[80] This distinction is in my view important. It would frustrate the goal of section 9(2) if measures enacted in terms of it paid undue attention to those disadvantaged by the measure when that disadvantage is merely an invariable result and not the aim of the measure. The goal of transformation would be impeded if individual complainants who are aggrieved by restitutionary measures could argue that the measures unfairly discriminated against them because of their undue impact on them. As Ngcobo J said in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*:[7]

> "There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution."[8]

It is for this reason that the equality jurisprudence developed by this Court in the context of section 9(3) is unsuited to analysis under section 9(2). The test as established by cases such as *Harksen v Lane NO and Others*[9] and *President of the*

[7] 2004 (7) BCLR 687 (CC).

[8] Id at para 76.

[9] 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

Republic of South Africa and Another v Hugo[10] would focus unduly on the position of the complainant to be appropriate to a section 9(2) analysis.

[81] Because of this distinction it is important that a measure purportedly enacted under section 9(2) fits properly within it. If measures are incorrectly defended under it, insufficient weight will be given to the position of the complainant. Conversely, if the equality jurisprudence under section 9(3) is built into the test for section 9(2), the process of transformation, as envisaged by the Constitution, will be unduly hampered.

The correct approach to section 9(2)

[82] Given my view that section 9(2) measures ought not to be tested against section 9(3), it is clearly necessary to ascertain what requirements a section 9(2) measure must meet. I endorse the three aspects of the review standard identified by Moseneke J in the main judgment, namely that "[t]he first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."[11]

[10] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

[11] Para 37 of the main judgment.

[83] I further support the approach of the main judgment to the question of the purpose of the measure[12] and also the connection between the means employed and the end sought to be achieved.[13] I cannot, however, support the approach taken by Moseneke J to what he describes as the "first yardstick" – that the measure must be aimed at advancing persons or categories of persons previously disadvantaged by unfair discrimination.

[84] In a case such as the present, an applicant will approach the courts and claim that a particular measure unfairly discriminates against him or her. If, as a defence, the state successfully demonstrates that a measure falls within the ambit of section 9(2), the state in my view is relieved of the burden to show that the measure is fair, which it might otherwise have borne. Because a restitutionary measure which discriminates at all will almost certainly discriminate on the basis of one of the listed grounds, if it were not for section 9(2), a restitutionary measure would invariably attract a presumption of unfairness. Section 9(2) therefore relieves the state of having to show that the discrimination in question is fair. It is important that this should be so, for the reasons regarding transformation mentioned above. It would be inimical to the pursuit of substantive equality if the state was required to show that each restitutionary measure that it enacted was fair, as would be required by section 9(3).

[12] Para 44 of the main judgment.

[13] Para 42 of the main judgment.

[85] Another aspect of section 9(2) is that it allows a person or categories of people to be advanced. This is important because of the nature of the unfair discrimination that was perpetrated by apartheid. The approach of apartheid was to categorise people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered out according to one's membership of a group. Recognising this, section 9(2) allows for measures to be enacted which target whole categories of persons. Therefore a person or groups of persons are advanced on the basis of membership of a group. The importance of this is that it is unnecessary for the state to show that each individual member of a group that was targeted by past unfair discrimination was in fact individually unfairly discriminated against when enacting a measure under section 9(2). It is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination in order to benefit from a provision enacted in terms of section 9(2).

[86] On this understanding of section 9(2), it is clear that various consequences attach to the state when invoking it. The state need not show that any discrimination caused by the measure is fair, or that each individual member of the advanced group actually suffered past disadvantages as long as an individual was part of a group targeted. Because section 9(2) relieves the state of these burdens, it is my view that care should be taken to ensure that measures enacted under it actually do fall within the ambit intended by the section. If the aim of the section is to advance persons or groups previously disadvantaged by unfair discrimination, the section should be used

for that purpose alone. To do otherwise would be to allow the section to be used to enact measures which should not be tested under section 9(2) because they benefit persons who do not belong to groups previously disadvantaged by unfair discrimination.

[87] Section 9(2) is a unique constitutional provision which has been enacted to respond decisively to the particular history of inequality and the impact of that history on our society. It makes clear that restitutionary measures are part of the scheme for the realisation of substantive equality. A measure which is part of the framework for the advancement of equality cannot ever be said to discriminate unfairly. That being the case, once a measure can properly be said to satisfy the internal test in section 9(2) and fall within the ambit of the section, the scrutiny that other measures are subjected to in terms of section 9(3) does not apply. Once the state successfully demonstrates that a measure falls within section 9(2), that measure is constitutionally compliant without any further justification. That being the case, section 9(2) must be used only in appropriate cases and with great circumspection. The vision of substantive equality and the need for transformation cannot be underestimated. For that reason section 9(2), as an instrument for transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect will be to render constitutionally compliant a measure which has the potential to discriminate unfairly. This cannot be what section 9(2) envisages.

[88] The main judgment is compelling in its argument that a measure will fall under section 9(2) if the "overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion".[14] By this reasoning, a measure will still fall under section 9(2) even if some of those who benefit from it were not members of groups targeted for unfair discrimination in the past. Moseneke J might be correct when he says that "the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned."[15] However, it is not necessary for me to decide the correctness of this test for determining a category or group of persons under section 9(2) because it is my view that this case does not concern exceptional cases or tiny minorities.

[89] As already indicated, it is not necessarily the case, and I leave this question open, that every person in whose favour a restitutionary measure has been enacted must be shown to be a member of a group which has previously been disadvantaged by unfair discrimination. However, in the light of my remarks about the importance of section 9(2) and the burden that it removes from the state, it is my view that a measure must be more carefully crafted in relation to the group targeted for advancement than the present one, to fall under section 9(2).

[14] Para 40 of the main judgment.

[15] Id

[90] In this case, there are two possible grounds of previous disadvantage which this measure might have been enacted to redress: race and political affiliation. The notion of discrimination on the basis of political affiliation is complex. It might seem on the surface as if the majority of Members of Parliament (MPs) who joined for the first time in 1994 were previously unable to be members, on the basis of their political affiliation or belief. However, it is my view that this is not a conclusion which is supported by the evidence. Nor, in my view, is it capable of being supported by such evidence. The majority of parliamentarians who joined the legislatures in 1994 were black. Black people were prohibited by law on account of their race from standing for national election in South Africa and were only permitted to do so in the so-called independent homelands. They therefore did not have any choice whatsoever about standing for national elections.

[91] Unlike some of the white MPs who stood for election for the first time in 1994, who might claim that even though as whites they were entitled to vote under the old dispensation their disgust with the system prevented them from participating, black persons, even if they had no objection to running for Parliament, by law had no choice. It is artificial to say, therefore, that such black persons were previously disadvantaged on the basis of political affiliation. If black people had not been prohibited from voting or standing for national office prior to 1994, it might be that some of those MPs elected for the first time in 1994 might have run for office previously, as some did in the homelands. Even if this is unlikely it is impossible to speculate about decisions people might have taken when in reality they had no choice.

The prohibition on standing for office based on race was so integral to the system of apartheid that it is hard to speculate what might have been, had black people been allowed to vote at national level.

[92] The political affiliation argument is based on the premise that a person was excluded on the basis of his or her belief. It was introduced in this case to explain why white people could justifiably benefit from the restitutionary measure in the POBF. The idea is that the white beneficiaries, who ran for office for former liberation movements in 1994, could not participate in Parliament prior to 1994 not because of a legal bar but because of an ideological distaste for the system. Unlike their black counterparts, they were not discriminated against under the law. Their non-participation in the parliamentary process arose from a choice that they made – a choice which must be acknowledged for its significance in the fight for democracy and the very equality envisaged by section 9(2). The significance of this choice should not be underemphasised. Be that as it may, since it has not been ascertained or shown whether this is the case for the vast majority of MPs elected for the first time in 1994, it is my view that the POBF cannot be seen as a restitutionary measure aimed at redressing previous discrimination on the basis of political affiliation.

[93] I turn to the question of race as a basis for advancement. On the evidence before this Court, it seems that there were 251 members elected to the National Legislature for the first time in 1994. There were therefore 251 people who benefited from the higher pension rate provided for in the POBF. Of these, 53 were white. This

means that 79 per cent of the beneficiaries of the higher rate were black. However, within this group were also black people who were not excluded from membership of Parliament during apartheid. Because of the system's approach to race classification, they were permitted to be part of the tri-cameral Parliament. Therefore, although it seems that 79 per cent of the new members were previously excluded on the basis of their race, the figure may be significantly less. In my view, and I limit my remarks to the facts of this case, the evidence does not show that the advanced group are in the overwhelming majority designated in terms of race. It has also not been shown that this is the case in terms of political affiliation. In my view, unless a measure is shown to stand the internal test in section 9(2), it does not qualify as a section 9(2) measure.

The scheme of the equality clause

[94] In the present matter, the respondent approached the High Court claiming that the differentiation in terms of the POBF unfairly discriminated against him on the basis of race and political affiliation. In response, the Minister did not contend that the measure constitutes fair discrimination or mere differentiation. Rather, the Minister raised section 9(2) as a defence and argued that the measure was restitutionary in nature. This raises the question whether the Minister must stand or fall by his submissions. It also raises the question whether the fact that the Minister relied on section 9(2) precludes a court from finding that the measure, although not restitutionary in the terms of section 9(2), is nevertheless fair having subjected it to equality analysis in terms of section 9(3).

[95] The main judgment has made it clear that section 9(2) is part of a unified view of the right to equality in section 9. I support that view. A measure enacted in terms of section 9(2) is not an exception to our notion of equality; it is an integral part of it. From this must follow that section 9 must be viewed as a whole and any matter which engages the issue of equality engages the whole section. This is not to say that all five subsections will always be relevant to every enquiry. Certain forms of discrimination might be so irrational that they do not even survive challenge in any of the terms of section 9. Other forms might attract a presumption of unfairness which can be rebutted. A measure might fall squarely under section 9(2) in which case it will not attract a presumption of unfairness and will not need to be tested in terms of section 9(3). What is important is to avoid a notion of equality which divides section 9 into artificial parts.

[96] In the present matter, the Minister has relied on facts in support of his contention that the measure falls under section 9(2). These facts in my view also support a finding that the discrimination in this case is fair. As I have found above, the measure does not meet the requirements of section 9(2). However, as I make clear below, it is my view that the measure does not constitute unfair discrimination. Many of the factors that Moseneke J advances in his judgment in support of his contention that the differentiation in the POBF is an acceptable restitutionary measure are, in my view, relevant to the fairness of the measure.[16] Given that section 9 must be viewed as a whole and given that the Minister relies on facts which demonstrate that the measure

[16] See, in particular, paras 53 and 54 of the main judgment.

is fair, it would not be logical to hold that the appeal on the basis of section 9(2) must either be upheld or dismissed altogether.

Section 9(3)

[97] Nothing in section 9(2) limits the circumstances in which the state can enact measures to advance a purpose other than to remedy disadvantage caused by past unfair discrimination. Such measures will then need to be tested in terms of section 9(3). It is important to observe that a measure might resemble a restitutionary measure because it is aimed at creating equity between groups of persons but falls short of protection in terms of section 9(2). This would be the case when any of the three requirements identified by Moseneke J are not fulfilled. In view of the approach I take of the group targeted for disadvantage in the past, the inclusion of those not so targeted affects the group in a way that disqualifies it for advancement under a section 9(2) remedial measure. Such a measure may, generally on the basis of justification in terms of section 9(3) and particularly in view of the objective of the measure, pass muster. The evidence for advancement of the group or for justification may be the same or it may be different, depending on the circumstances of each case. It would be untenable to strike the measure down only because it does not fall under section 9(2) when it could be decided under section 9(3). Doing so would frustrate any programme designed for the achievement of equity.

[98] The measure created by rule 4.2.1 is most certainly aimed at the achievement of equity. However it falls short of all the requirements of section 9(2) in that it fails to

target a group previously disadvantaged by unfair discrimination. In my view it must thus be tested against section 9(3) of the Constitution.

[99] In *Harksen v Lane NO*[17] the Court considered the following to be relevant to whether discrimination is unfair:

> "(a) [T]he 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."

Various factors are therefore relevant to an analysis of unfair discrimination. Of importance is the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage. So too, whether the discrimination

[17] Above n 9 at para 51.

in the case under consideration is on a specified ground. The nature of the provision or power and the purpose sought to be achieved by it is also important. The question to be asked is whether the provision is aimed at an important societal goal. Unlike under section 9(2), other factors to emphasise include the extent to which the discrimination has affected the rights or interests of the complainants and whether the discrimination is of a serious nature and impairs the fundamental dignity of the complainants.

[100] It is my view that there is clearly discrimination on the facts of this case, but that such discrimination is not on a listed ground. The discrimination is between those members who served in Parliament prior to 1994 and those who did not. However, it is possible to assume in favour of the respondent that the discrimination in question is based on one of the listed grounds, either race or political affiliation.

[101] Assuming in favour of the respondent that the discrimination is based on race or political affiliation attracts the presumption that the measure unfairly discriminates. Even so, I am of the view that the measure is fair. The main judgment points out that the actuarial evidence before this Court shows that the respondent and the majority of his group "remain a privileged class of public pension beneficiaries notwithstanding the challenged remedial measures."[18] This suggests that the consequences of the measure do not impact unduly on the interests of the respondent. In fact, the respondent concedes that the majority of members of Parliament who are members of

[18] Para 53 of the main judgment.

the Closed Pension Fund (CPF) are better off than those who benefit from the increased contributions in terms of the POBF. He argues, however, that there are sufficient exceptions – referring to the so-called 'jammergevalle'[19] – to conclude that the measure is unfair. I return to the case of the 'jammergevalle' below. In so far as the respondent has correctly conceded that the majority of members of the CPF are in fact better off than their colleagues who joined Parliament for the first time in 1994 as a result of their membership of the CPF, it cannot be said that they are victims of unfair discrimination. It cannot be said that a measure which creates no disadvantages unfairly discriminates unless it attracts one of the other characteristics which this Court has held in previous equality cases to constitute a violation of section 9, such as a negative impact on the complainant's dignity. Moseneke J correctly points out that the measures do not impact negatively on the dignity of the complainants.[20] The scheme does not have an impact on their dignity, because it does not negatively impact on the complainants' sense of self worth. Furthermore, the respondent conceded in argument that the only loss suffered was pecuniary in nature. His motivation for contesting the measure was indeed to earn more.

[102] Another factor of importance is whether the measure advances an important societal goal or whether it is aimed at impairing the complainant. It is clear that the current measure advances an important societal goal. It is aimed at creating equity between new MPs and those members of the current Parliament who, because of the

[19] See para 55 of the main judgment.

[20] Para 54 of the main judgment.

fact that they were also members of the tri-cameral Parliament, are members of the CPF. It cannot be contested that a person who was not unfairly excluded in the past could have chosen to run for a right-wing party for the first time in 1994 and still benefit from the POBF. The scheme was instituted to benefit all newcomers, rather than those excluded on the basis of their race or political affiliation, because it was seen as a government concern that new MPs did not have a substantial pension to fall back on in their retirement. That is a legitimate objective in terms of section 9(3). The scheme in no way targets the complainants, nor does it seek to impair them.

Jammergevalle

[103] While acknowledging that the majority of parliamentarians who receive lower contributions in terms of the POBF are actually still better off because of their membership of the CPF, the respondent argues that the existence of the 'jammergevalle' – those members of the POBF who are worse off even though they are members of the CPF because of when they joined Parliament – is sufficient to render the scheme unfair.

[104] There is a dispute between the parties as to the number of 'jammergevalle'. According to the respondent, 15 people fall into this category. According to the Minister, however, only 13 people are in fact worse off – a difference which is rather insignificant. Regardless of whether 15 or 13 people are affected, I am of the view that the measure is fair. As the main judgment holds, in any legislative scheme which differentiates between classes, there will be hard cases. These hard cases should not

prevent a court from concluding that a measure is not unfair and is therefore constitutionally compliant.

[105] I have cautioned that, in the context of section 9(2), great care must be taken to define the group because of the nature of the subsection and the advantage of not having to justify the measure on the part of the author of the remedial measure in invoking it. It is my view that the facts of this case are such that the measure is not one envisaged by section 9(2). The basis for this conclusion is that a significant number of the beneficiaries are not members of a category previously disadvantaged by unfair discrimination. There is a significant difference between a finding that a measure must be tightly crafted to fall under section 9(2) because of its specific requirements and the consequences which attach to that section and a finding that the existence of exceptional circumstances does not render an otherwise fair measure unfair. My conclusion in this regard is not at odds with my conclusion that the 'jammergevalle' do not constitute an obstacle to finding the present measure to be fair. The conclusion in respect of section 9(2) is based on the narrow purpose for which it was designed and its special place in our equality jurisprudence in view of the history of inequality in our society. The conclusion in respect of the 'jammergevalle' is based on an acknowledgment that, under our section 9(3) jurisprudence, to allow hard cases to undermine otherwise constitutionally compliant schemes would place a burden on government that would unduly impede its ability to transform our society.

Conclusion

[106] A consideration of the factors mentioned above leads me to the conclusion that the measure in this case does not unfairly discriminate against the respondent. I would therefore agree with the order proposed by Moseneke J and also uphold the appeal.

Sachs J and Skweyiya J concur in the judgment of Mokgoro J.

NGCOBO J:

Introduction

[107] At the centre of this application for leave to appeal are the provisions of rule 4.2.1 read with the relevant definitions of the rules of the Political Office-Bearers Pension Fund (the Fund). The impugned rules provide for differentiated employer contributions in respect of members of Parliament. They treat members of Parliament who came to Parliament for the first time in 1994 (new members) more favourably than those who were members of Parliament prior to 1994 (old members). The respondent attacked these rules on the grounds that they discriminate unfairly against old members. The applicant resisted this attack on the grounds that the rules constituted a "limited affirmative action measure" in favour of new members of

Parliament under section 9(2) of the Constitution. The High Court found that the impugned rules did not fall under section 9(2) and concluded that the impugned rules violate the equality clause of the Constitution. The main judgment finds that the rules fall under section 9(2) and are therefore within the constitutional bounds.

[108] The main judgment holds that for a measure to come under section 9(2) it must meet three requirements, namely, it must: (a) target persons or categories of persons who have been disadvantaged by unfair discrimination; (b) be designed to protect or advance such persons; and (c) promote the achievement of equality. With this, I agree. I doubt whether section 9(2) applies to the facts of this case. In particular, I doubt whether on the facts of this case the requirement that the measure must target persons or categories of persons who have been disadvantaged by discrimination has been met. The beneficiaries of the measure included persons who were not disadvantaged by past discrimination. This issue was not fully argued in this Court. However, in the view I take of the central question whether the impugned rules discriminate unfairly against the respondent, I consider it unnecessary to reach any firm conclusion in this regard.

[109] The fact that a remedial measure under constitutional challenge does not come under section 9(2) of the Constitution does not necessarily mean that it violates the equality clause. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*[1] this Court held that the principles underlying remedial equality do

[1] 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 62.

not operate only in the context of section 9(2). It follows therefore that the constitutional validity of the impugned rules must still be determined in light of the equality guarantee. The respondent contended that the impugned rules unfairly discriminate against him and those similarly situated and are therefore irrational. This contention must be considered in the light of the equality guarantee.

Equality Analysis

[110] The relevant provision of the Constitution in section 9 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.
> (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."

[111] The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision.

If the differentiation bears no such rational connection, there is a violation of section 9(1) and the second enquiry does not arise. Similarly, if the differentiation does not amount to unfair discrimination, the third enquiry does not arise.[2] It is to the first enquiry that I now turn.

Rationality of Differentiation

[112] It is common cause that the impugned rules differentiate between old and new members of Parliament in relation to parliamentary pension benefits. The need for differentiation arose because old members of Parliament were members of the Closed Pension Fund (CPF) and thus entitled to pension benefits from that fund. New members of Parliament were excluded from the CPF and thus were not entitled to any benefits under that fund. When the new fund was created after April 1994, old members of Parliament became entitled to benefits under the new fund. This resulted in the old members of Parliament being entitled to parliamentary benefits from two pension funds. The differentiation in contributions to be made in respect of different categories of members was designed to bring about equity in the spread of parliamentary pension benefits amongst old and new political office-bearers.

[113] The legitimacy of this purpose cannot be gainsaid. There was inequality in the entitlement to pension benefits in that old members of Parliament were entitled to benefits from a parliamentary pension fund from which new members were excluded. Nor can there be any doubt as to the existence of a rational connection between the

[2] *Hoffman v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 24; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 53.

differentiation created by the impugned rules and the legitimate governmental purpose. It follows therefore that the contention by the respondent that the differentiation was irrational must fail. The question which falls to be determined is whether this differentiation amounted to unfair discrimination.

Discrimination

[114] It was contended on behalf of the respondent that race was an important factor in the differentiation. There can be no question that the differentiation had a disproportionate impact on persons who were previously classified as white, coloured and Indian. These racial groups were the only racial groups that were eligible to be members of the tri-cameral parliament. It is also clear from the papers that one of the primary considerations in adopting the impugned rules was the fact that an overwhelming majority of those who were excluded from the CPF were excluded from the tri-cameral parliament because of race and political affiliation.

[115] In all the circumstances we are concerned here with a differentiation on a listed ground. But the rules are facially neutral as far as race and political affiliation is concerned. This finding raises a rebuttable presumption that the impugned rules indirectly discriminate unfairly against the respondent. The ultimate question, however, is whether in fact the impugned rules indirectly discriminate unfairly as contended by the respondent.

Do the impugned rules discriminate unfairly?

[116] At the heart of our equality guarantee is the prohibition of unfair discrimination and remedying the effects of past unfair discrimination. Human dignity is harmed by unfair treatment that is premised upon personal traits or circumstances that do not relate to the needs, capacities and merits of different individuals. Often such discrimination is premised on the assumption that the disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumption that the disfavoured group is inferior to other groups.[3] And this is an assault on the human dignity of the disfavoured group. Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as "second class citizens, that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity".[4]

[117] In *President of the Republic of South Africa and Another v Hugo,* this Court outlined the purpose of the equality clause, in particular, the prohibition of unfair discrimination and said:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a

[3] In *Moller v Keimoes School Committee and Another* 1911 AD 635 at 643, the Appellate Division acknowledged this:

> "As a matter of public history we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We know also, that while slavery existed, the slaves where blacks and that their descendents, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites."

[4] *Egan v Canada* (1995) 29 CRR (2nd) 79, cited with approval by this Court in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41.

> society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[5]

[118] However, it is not every distinction or differentiation in treatment which falls foul of the equality guarantee. Legislatures, to govern effectively, may treat different individuals and groups in different ways. In *Prinsloo v Van der Linde and Another*,[6] this Court accepted that in order to govern a modern country efficiently and to harmonise the interests of all its people for common good, it may be necessary for government to make distinctions. Such distinctions will "very rarely" constitute unfair discrimination to such regulation, without the addition of a further element.[7]

[119] Our concept of equality therefore recognises that at times it may be necessary to treat people differently for example when it is necessary to recognise the different social or economic situations in which individuals are situated. This is a recognition of the fact that treating unequals as if they are equals may produce inequality. Our concept of unfair discrimination therefore recognises that:

> …"[A]lthough 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 a thorough understanding of the impact of discriminatory action upon the particular people concerned to determine whether its

[5] *Hugo* above n 4 at para 41.

[6] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 24-26.

[7] Id

> 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."[8]

[120] As noted previously,[9] it is also important to note that the principles of remedial equality do not only operate in the context of section 9(2) of the Constitution. This Court has recognised that they are relevant in deciding whether the discriminatory provisions have impacted unfairly on complainants.[10] Thus in *Harksen* when dealing with the purpose of the provision or power as a factor to be considered in deciding whether discrimination has impacted unfairly on the complainant, this Court held that:

> "If its purpose is manifestly not directed, at 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."[11]

[121] The question which falls to be determined therefore is the impact of discrimination on the respondent and those similarly situated. And in determining this question relevant considerations include the position of the respondent and those similarly situated in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or the interests of the respondent have been affected and

[8] Above n 5.

[9] At para 109 of this judgement.

[10] *National Coalition* above n 1 at para 62, quoting *Harksen* above n 2 at para 52 (b).

[11] *Harksen* at para 52(b).

whether the discrimination has impaired the human dignity of the respondent.[12] It is to that enquiry that I now turn.

The position of the members of the affected group in society

[122] The majority of the group affected is not one which has suffered discrimination in the past.[13] Members of this group are all politicians, and have some political power. This group cannot, in my view, be said to be a vulnerable group. That in itself does not render the discrimination fair.

The nature and the purpose of the power exercised by Parliament

[123] In adopting the impugned rules, Parliament was fulfilling its constitutional obligation to create a pension fund for political office-bearers. Under the interim Constitution this obligation was imposed by section 190A.[14] Under the Constitution

[12] *Harksen* at para 50 and *Hoffman* at para 27.

[13] Its racial composition is as follows: Whites − 105; Coloureds − 28; Indians − 11; and Africans − 2.

[14] Section 190A provides:

> "(1) There shall be paid out of and as a charge on the pension fund referred to in subsection (2) to a political office-bearer upon his or her retirement as a political office-bearer, or to his or her widow or widower or dependent or any other category of persons as may be determined in the rules of such pension fund upon his or her death, such pension and pension benefits as may be determined in terms of the said rules.
> (2) A pension fund shall be established for the purposes of this section after consultation with a committee appointed by Parliament, and such a fund shall be registered in terms of and be subject to the laws governing the registration and control of pension funds in the Republic.
> (3) All political office-bearers shall be members of the said pension fund.
> (4) Contributions to the said fund by members of the fund shall be made at a rate to be determined in the rules of the fund, and such contributions shall be deducted monthly from the remuneration payable to members as political office-bearers.
> (5) Contributions to the said fund by the State shall be made at a rate to be determined by the President, and such contributions shall be paid monthly from the National Revenue Fund and the respective Provincial Revenue Funds, according to whether a member serves at national or provincial level of government.
> (6) In this section "political office-bearer" means —
> (a) an Executive Deputy President;
> (b) a Minister or Deputy Minister;

that obligation is imposed by section 219.[15] The purpose of the impugned rules is, broadly speaking, to give effect to this constitutional obligation.

[124] The purpose behind the impugned rules is given as follows by Mr Maritz, the Chief Director in the Directorate of Pensions Administration of the Department of Finance and Deputy-Chairperson of the Political Office-Bearers Pension Fund, the Third Respondent herein:

> "15. The pension arrangements which applied in respect of political office bearers after the commencement of the 1983 tri-cameral Parliament were contained in the Members of Parliament and Political Office Bearers Pension Scheme Act 112 of 1984 ("the 1984 Act"). The pension scheme established in terms

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> (c) a member of the National Assembly or the Senate;
> (d) the Premier or a member of the Executive Council of a province;
> (e) a member of a provincial legislature;
> (f) a diplomatic representative of the Republic who is not a member of the public service; or
> (g) any other political office-bearer recognised for purposes of this section by an Act of Parliament."

[15] Section 219 states:

> "(1) An Act of Parliament must establish a framework for determining —
> (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
> (b) The upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.
> (2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).
> (3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
> (4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
> (5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192."

of the 1984 Act was a so called "pay as you go" scheme. This meant that no special fund was established for the payment of contributions. Rather, in terms of the 1984 Act, ordinary members of Parliament were required to pay 7% (seven percent) of their pensionable salary to the State Revenue Fund. When a member of Parliament retired, he or she became entitled to pension benefits in terms of the Act, and these benefits were paid out of the State Revenue Fund. No specific pension fund was established for purposes of payment of pensions in terms of the 1984 Act.

16. During the negotiations held in Kempton Park in the early 1990's, for the establishment of a democratic government in South Africa and the determination of a democratic constitution, the question of the pensions of members of the previous Parliament was raised. It was agreed that a closed pension fund would be established, and the actuarial interest of every member and existing pensioner of the pension scheme established under the 1984 Act would be determined and paid into that fund by the State. Consequent upon this agreement, the Closed Pension Fund Act 197 of 1993 was passed, ("the Closed Pension Fund Act") in terms of which the Closed Pension Fund was established. The total actuarial liability of that fund was about R773 700 000, 00 (SEVEN HUNDRED AND SEVENTY MILLION RAND) as at 1 February 1994. This liability which was funded to an amount of some R440 000 000, 00 (FOUR HUNDRED AND FORTY MILLION RAND) by the issuing of government stock, and the remaining obligation of some R333 700 000, 00 (THREE HUNDRED AND THIRTY THREE MILLION SEVEN HUNDRED THOUSAND RAND) by way of monies voted by Parliament under the budget vote of the Department of Finance. The latter amount was payed over several years together with interest of some R220 000 000, 00 (TWO HUNDRED AND TWENTY MILLION RANDS).

17. The Closed Pension Fund Act came into operation on 5 January 1994. As its name suggested, the membership of the Closed Pension Fund was closed from the inception of the Fund – it was limited to persons who, in their capacity as political office bearers of the South African state prior to the interim Constitution, received pensions, or were entitled to pension benefits in that capacity. Persons who were not already members of the Closed Pension Fund, and who were elected to Parliament or the provincial

legislatures in the first democratic elections in April 1994, did not thereby become members of the Closed Pension Fund.

18. In addition to being a closed fund, the Closed Pension Fund was an extremely generous fund. I attach marked **"PM1"** an affidavit of **ERICH POTGIETER**, the actuary of the Third Respondent. In annexure **PM1 POTGIETER** analyses the benefits provided by the Closed Pension Fund and shows that they were more than 2.5 times as generous as those provided by the Third Respondent to Category B members (the most privileged class of members of the Third Respondent), and just under 4 times as generous as the benefits provided by the typical defined benefit pension funds operating in the private sector.

19. Because the Closed Pension Fund was closed, after the first democratic elections in April 1994, it became necessary for a new pension dispensation to be established for members of Parliament and other political office bearers. The creation of a new pension fund for political office bearers ("the new fund") was, in fact, a constitutional obligation imposed by section 190A of the interim Constitution."

[125] And the rationale for the differentiation is given as follows by Mr Maritz:

"27 The rationale for the differentiation is the following:

27.1 With more pressing calls on the public purse and the expansion of Parliament and the creation of the provincial legislatures after the 1994 elections it was not affordable to create a pension scheme providing political office bearers with benefits as generous as those provided under the 1984 Act and the Closed Pension Fund.

27.2 The limited resources available for the pensions of political office bearers had to be spread in an equitable fashion.

27.3 Members of the Closed Pension Fund were already in receipt of generous pension benefits which were far in excess of those available to new political office bearers.

27.4 The overwhelming majority of new political office bearers had been excluded from access to political office under the tri-cameral regime (and thereby from access to the generous benefits of the Closed Pension Fund) by virtue of either their race or their political affiliation or both their race and their political affiliation.

27.5 In this context, the differentiated scheme of employer contributions under the Rules of the Third Respondent was designed to benefit new political office bearers whose exclusion from the benefits of the Closed Pension Fund by virtue of historical circumstances left them with a need for more generous pension benefits than their colleagues who had access to Closed Pension Fund benefits.

27.6 Within the class of new political office bearers, the differentiated scheme also conferred additional benefits on office bearers who were over the age of 50 and whose advanced age accordingly increased their immediate need for more generous pension benefits.

27.7 Consistent with its origins in a particular transitional historical context, the differentiation effected by the scheme was a limited affirmative action measure which operated only for the first five years of the democratic era. From 1 May 1999 there was to be a uniform employer contribution of 17% in respect of all members of the Third Respondent."

[126] From what Mr Maritz says, it is clear that as at April 1994 members of Parliament and other political office-bearers who held office prior to 1994 enjoyed extremely generous pension benefits under the CPF. The CPF was fully funded by

public funds. This fund was especially reserved for the benefit of this group. Persons elected to Parliament for the first time in 1994 were excluded from this fund. It was, as its name suggests, a closed fund. But for that exclusion, new members would have been entitled to join the same fund and benefit from its generous provisions. After the first democratic elections it became necessary to establish a new pension scheme for members of Parliament and other political office-bearers. Parliament was under a constitutional duty to do so.

[127] But the reality was that old members of Parliament already had a generous, publicly funded pension scheme. This had to be kept in mind when creating a new pension scheme. Old members of Parliament could not be excluded from the new pension fund simply on the basis that they were entitled to pension benefits from a closed fund. They were entitled to benefit under the new pension scheme. Yet, if they were included, they would now be entitled to two parliamentary pension benefits while new parliamentarians were only entitled to one. This put the respondent and those in his group in a better position financially than the new members. To have afforded old parliamentarians the same benefits, would have resulted in inequality because they had an unequal start. The challenge confronting the government was how to spread the limited resources available for the pensions of political office-bearers "in an equitable fashion".

[128] In confronting this challenge, the government took into consideration a number of factors including the limited resources available, the fact that old parliamentarians

were already in receipt of generous pension benefits which were far in excess of those available to new political office-bearers, the fact that the overwhelming majority of new political office-bearers have been excluded from access to political office under the tri-cameral regime (and thereby from access to the generous benefits of the Closed Pension Fund) by virtue of either their race or their political affiliation or both their race and their political affiliation, and the need to ensure that newcomers to Parliament are not worse off financially than the old members of Parliament. All this is relevant to the consideration of the impact of the discrimination.

[129] Other factors that are relevant in the consideration of the impact of discrimination on old members include the following: its aim was to achieve a worthy and important societal goal of furthering equality in the entitlement to pension benefits, the rules sought to minimize the gap in the pension benefits between old and new members of Parliament. The discrimination was of limited duration. It was to last until 1999 after which every parliamentarian would receive the same pension benefits. The impact of the discrimination was financial, they received less from the new fund compared to new members, but benefited also from a parliamentary fund from which new members were excluded.

[130] It is doubtful whether in fact the respondent and those similarly situated have suffered any financial prejudice at all as a result of the measure. The respondent does not seriously dispute the fact that members of the CPF were entitled to generous benefits. Instead, he has sought to distinguish the various benefits to which individual

members of the CPF are entitled to. The amount of pension benefits to which a member is entitled is no doubt affected by the number of years as a member of the fund concerned. This may therefore result in certain members of the CPF being entitled to less than others in the group. This, in my view, does not detract from the fact that they are all entitled to benefits under the CPF.

[131] In my judgment the cumulative effect of all of this, and in particular, the impact of the discrimination on old members of Parliament, and having regard to the underlying values protected by the equality clause, does not justify the conclusion that the impugned rules constitute unfair discrimination. They were manifestly not directed at impairing the dignity of the old members of Parliament. In my view, it is a kind of discrimination that any citizen may face when there is a need to take into account the different financial circumstances in which individuals are situated. Any burden that is imposed by the impugned rules does not "lead to an impairment of fundamental dignity or constitute an impairment of a comparable serious nature".[16]

[132] There is a small group of old parliamentarians, who were described in argument as the "jammergevalle", and who it is said did not get the generous benefits because they had served less than seven and a half years in the old Parliament. What sets this group apart from the new members is that they were also beneficiaries of the CPF. It was therefore in the same category as old parliamentarians. The purpose of the impugned rules was not to place the new members in the same position in terms of the

[16] Compare *Harksen v Lane* at para 68.

benefits in which they would have been but for lack of prior parliamentary membership. The rules do no more than to recognise that old parliamentarians were entitled to two parliamentary pension benefits while new members were only entitled to one. The rules made this distinction in order to take into account the different circumstances of the old and new members of Parliament in relation to parliamentary pension benefits. Old parliamentary members had a head start in respect of such benefits while the new ones did not. To have treated them equally in these circumstances would have perpetuated the inequality. In my view, the distinction made by the rules was not unfair.

[133] It follows, in my view, that the impugned rules do not constitute unfair discrimination. In the event, the constitutional challenge must fail.

[134] For these reasons I concur in the order proposed by Moseneke J.

Sachs J concurs in the judgment of Ngcobo J.

SACHS J:

[135] Paradoxical as it may appear, I concur in the judgment of Moseneke J on the one hand, and the respective judgments of Ngcobo J and Mokgoro J, on the other,

even though they disagree on one major issue and arrive at the same outcome by apparently different constitutional routes. As I read them the judgments appear eloquently to mirror each other. In relation to philosophy, approach, evaluation of relevant material and ultimate outcome, they are virtually identical. In relation to starting point and formal road travelled, they are opposite. The majority judgment comes to the firm conclusion that the composition of the new Parliament overwhelmingly pointed to members having been disadvantaged by race discrimination and political affiliation, and therefore started and finished its enquiry within the framework of the affirmative action provisions of section 9(2). The two minority judgments baulked at the idea of categorising the new parliamentarians as disadvantaged by discrimination, and started and completed their analysis within the non-discrimination provisions of section 9(3). In my view it is no accident that even though they started at different points and invoked different provisions they arrived at the same result. Though the formal articulation was different the basic constitutional rationale was the same. I agree with this basic rationale. I would go further and say that the core constitutional vision that underlies their separate judgments suggests that the technical frontier that divides them should be removed, allowing their overlap and commonalities to be revealed rather than to be obscured. If this is done, as I believe the Constitution requires us to do, then the apparent paradox of endorsing seemingly contradictory judgments is dissolved. Thus, I endorse the essential rationale of all the judgments, and explain why I believe that the Constitution obliges us to join together what the judgments put asunder.

[136] The main difficulty concerning equality in this case is not how to choose between the need to take affirmative action to remedy the massive inequalities that disfigure our society, on the one hand, and the duty on the state not to discriminate unfairly against anyone on the grounds of race, on the other. It is how, in our specific historical and constitutional context, to harmonise the fairness inherent in remedial measures with the fairness expressly required of the state when it adopts measures that discriminate between different sections of the population. I agree with Mokgoro J that the main focus of section 9(2) of the Constitution is on the group advanced and the mechanism used to advance it, while the primary focus under section 9(3) is on the group of persons discriminated against. I do not however regard sections 9(2) and 9(3) as being competitive, or even as representing alternative approaches to achieving equality. Rather, I see them as cumulative, interrelated and indivisible. The necessary reconciliation between the different interests of those positively and negatively affected by affirmative action should, I believe, be done in a manner that takes simultaneous and due account both of the severe degree of structured inequality with which we still live, and of the constitutional goal of achieving an egalitarian society based on non-racism and non-sexism.

[137] In this context, redress is not simply an option, it is an imperative. Without major transformation we cannot 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[1] At the same time it is important to ensure that the process of achieving equity is conducted in

[1] The Preamble to the Constitution.

such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action. Thus while I concur fully with Moseneke J that it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token I believe it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2).

[138] The illogic can best be cured if the frontier between sections 9(2) and 9(3) is dismantled rather than fortified. If the emphasis is on establishing an egalitarian continuum rather than defining cut-off points it becomes possible to avoid categorical or definitional skirmishing over precisely what is meant by persons or categories of persons disadvantaged by discrimination. Once this is done one can see that though on the surface the majority and minority judgments appear to represent quite distinct ways of reasoning, they are in fact united by the same underlying constitutional logic. In my view, it is not by happenstance that they achieve the same outcome. They use the same historical and philosophical premises, give weight to virtually identical material factors and make their evaluations on the same principled bases. It is not the body of the argument which is different, but the manner in which it is clothed; should it wear the apparel of section 9(2), or should it present itself in the dress of section 9(3)?

[139] If sections 9(2) and (3) are read in conjunction and in a comprehensive and contextual way in the light of the egalitarian constitutional values and goals as set out above, section 9(3) ceases to be viewed as a stand-alone provision and falls to be interpreted in the light of the constitutional vision established by section 9(2). Section 9(2), for its part, ceases to function in a categorical or definitional way with dramatic consequences for the evaluation to be made. Section 9(2) should be seen as an integral and overarching constitutional principle established by section 9, rather than as a discreet element within it that serves as an autonomous and sealed off launching-pad for state action. It would, in my view, do a disservice to section 9(2) to treat it as a fantastical constitutional device for leaping over the gritty hurdles of hard social reality and escaping from basic equality analysis. It is not a magic analytical slipper which, if no toes protrude, converts the wearer into a sovereign princess unrestrained by any notions of fairness and beyond the bounds of ordinary constitutional scrutiny.

[140] As Moseneke J trenchantly makes clear section 9(2) is not agnostic on the question of fairness. It confronts the issue of discrimination in an unambiguous, head-on manner which provides express direction. It gives properly devised affirmative action programmes a clear constitutional nod. They do not constitute unfair discrimination. They do not fall foul of the prohibition against such discrimination, not because they are exempt, but because they are not unfair. So understood, the section leaves no doubt that the more snugly a race-based measure fits into section 9(2), the more difficult it will be to challenge its constitutionality. Conversely, the less comfortable the fit, the less impervious the measure will be to attack. It is not a

question of all-or-nothing, but one of purpose, context and degree. To my mind, where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.

[141] The overall effect of section 9(2), then, is to anchor the equality provision as a whole around the need to dismantle the structures of disadvantage left behind by centuries of legalised racial domination, and millennia of legally and socially structured patriarchal subordination. In this respect it gives clear constitutional authorisation for pro-active measures to be taken to protect or advance persons disadvantaged because of ethnicity, social origin, sexual orientation, age, disability, religion, culture and other factors which have operated and continue to operate to disadvantage persons or categories of persons.

[142] The section functions in a manner that gives a clear constitutional pronouncement on issues which have divided legal thinking throughout the world in relation to problems concerning equal protection under the law. The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and substantive point of view, and not a purely formal one. As this Court has frequently stated, our Constitution rejects the notion of purely formal equality, which would require the same treatment for all who find themselves in similar situations. Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to

countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender. The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers.

[143] It also means that where disadvantage was imposed because of race, then race may appropriately be taken into account in dealing with such disadvantage (the same would apply to gender, disability, language and so on). It accordingly makes it clear that properly designed race-conscious and gender-conscious measures are not automatically suspect, and certainly not presumptively unfair, as the High Court held.

[144] Remedial action by its nature has to take specific account of race, gender and the other factors which have been used to inhibit people from enjoying their rights. In pursuance of a powerful governmental purpose it inevitably disturbs, rather than freezes, the status quo. It destabilises the existing state of affairs, often to the disadvantage of those who belong to the classes of society that have benefited from past discrimination.

[145] Yet, burdensome though the process is for some, it needs to be remembered that the system of state-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole. For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings.

[146] It follows from the above analysis that I do not believe it is necessary or appropriate to engage in agonising analysis over whether strictly speaking the new

parliamentarians constituted a category of persons disadvantaged by unfair discrimination. A substantive approach to equality eschews preoccupation with formal technical exactitude. It is algebraic rather than geometric, relational rather than linear. Its rigour lies in determining in a rational, objective way the impact the measures will have on the position in society and sense of self-worth of those affected by it. The critical factor is not sameness or symmetry, but human dignity, a quality which by its very nature prospers least when caged. In a matter like the present it should accordingly not make any significant difference whether one starts one's analysis from the vantage point of those former disadvantaged, or of those who have been advantaged. Nor should there be a Chinese wall between the two. It follows that reading sections 9(2) and 9(3) together, the outcome should be the same, whatever the technical point of departure.

[147] Even if section 9(2) had not existed, I believe that section 9 should have been interpreted so as to promote substantive equality and race-conscious remedial action. Other legal opinions might have been different. Section 9(2) was clearly inserted to put the matter beyond doubt. The need for such an express and firm constitutional pronouncement becomes understandable in the light of the enormous public controversies and divisions of judicial opinion on the subject in other countries. Such divisions had become particularly pronounced in the United States. The intensity of the debate in the Supreme Court was eloquently captured by Marshall J in *The City of Richmond v Croson Co.*[2] The majority[3] in that matter held that the USA was a colour-blind and race-neutral country, so that affirmative action programmes based on race

[2] *Richmond v J.A. Croson Co.* 109 S.Ct. 706 (1989).

[3] The court by a 5-4 majority struck down a programme designed to ensure that black contractors, coming from 50% of the population would increase their share of municipal contracts from less than 1% to 30%, unless an objector could show that no such contractor was available to do the job adequately.

should be subject to the same strict scrutiny applied to overtly discriminatory and racist practices. Challenging this view and underlining the distinction between measures taken to enforce racism and those taken to overcome it, he wrote:

> "Racial classifications 'drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism' warrant the strictest judicial scrutiny because of the very irrelevance of these rationales.(reference omitted). By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove*: 'Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization …such programs should not be subjected to conventional "strict scrutiny"- scrutiny that is strict in theory, but fatal in fact.' (reference omitted).
>
> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity."[4]

[148] Our Constitution pre-empted any judicial uncertainty on the matter by unambiguously directing courts to follow the line of reasoning that Marshall J relied on,[5] and that the majority of the US Supreme Court rejected. In South Africa we are

[4] Above n 2 at 551.

[5] With the support of Brennan and Blackmun JJ.

far from having eradicated the vestiges of racial discrimination. In the present matter, for the reasons given in all the judgments, the High Court was clearly wrong in utilising an approach steeped in the notions of formal equality. It was this inappropriate vision that led it to presume unfairness and strike down the pension scheme at issue. I have no doubt that our Constitution requires that a matter such as the present be based on principles of substantive not formal equality, and that the critiques in the majority and minority judgments of the High Court's approach are well founded. Where I differ from my colleagues is in preferring to treat sections 9(2) and 9(3) as overlapping and indivisible rather than discreet.

[149] Applying section 9 in an holistic manner to the present matter, and in particular integrating sections 9(2) and 9(3), leads me to the conclusion that in most if not all cases like the present, the very factors that would answer the question whether a measure was designed to promote equality under section 9(2), would serve to indicate whether it was unfair under section 9(3). Thus, a measure taken for improper or corrupt motives would not pass muster under either section, even if done under the guise of advancing the disadvantaged. Similarly, a scheme that was so lacking in thought and organisation as seriously to threaten the very functioning and survival of the enterprise involved, would lack rationality, and could not be said to advance or be fair to anybody, let alone the disadvantaged. A more difficult problem could arise where a measure advances the interests of one disadvantaged group as against another; the present case does not require an attempt to deal with the historical, social and legal issues involved. More relevant to the present matter is where the measure advances

the disadvantaged but in so doing disadvantages the advantaged. As the majority of this Court pointed out in *Walker*,[6] members of the advantaged group are not excluded from equality protection:

> "The respondent belongs to a group that has not been disadvantaged by the racial policies and practices of the past. In an economic sense, his group is neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past. . . .The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected."[7]
>
> . . .
>
> "No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups."[8]

[150] At the same time the judgment pointed out:

> 'Courts should, however, always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.'[9]

[151] Although the majority judgment in *Walker* expressly did not examine the implications of the affirmative action provision in the interim Constitution, the above words are articulated in open-ended language and underline the Court's commitment

[6] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

[7] Id at para 47- 48.

[8] Id at para 81.

[9] Id at para 48.

to the values of non-racialism. Clearly they do not allow section 9(2) to be interpreted in a way which says: provided the measure affecting the advantaged persons (whites, men, heterosexuals, English-speakers) is designed to advance the disadvantaged, the former can be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged.

[152] Serious measures taken to destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain, clearly promote equality (section 9(2)), and are not unfair (section 9(3)). Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere. Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged. That is what promoting equality (section 9(2)) and fairness (section 9(3)) require. Yet some degree of proportionality, based on the particular context and circumstances of each case, can never be ruled out. That, too, is what promoting equality (section 9(2)) and fairness (section 9(3)) require.

[153] Applying the above approach to the present matter, I have no doubt that the scheme under attack comfortably clears the promoting equality/fairness bar. There is nothing to suggest that it was adopted with improper motives, or that it was unduly punitive or manifestly and grossly disproportionate in its impact. The fact that the same remedial purpose could have been achieved in other and possibly better ways would not be enough to invalidate it.

[154] The survivors of the old Parliament had benefited from an extremely generous, one-off scheme which had been negotiated on their behalf at Kempton Park. It remained intact as a guarantee that their agreement to accept the new democratic constitutional dispensation would not have the result of leaving them economically high and dry. The majority of the new generation of members of Parliament had been excluded by law from standing for office under the old dispensation. Others of this generation had refused to be part of a racist and oppressive regime, indeed had resisted it, often at great personal cost. I see nothing discriminatory, unfair or antithetical to the achievement of equality, in their taking special steps in these particular circumstances to ensure for themselves a reasonable measure of financial security. Indeed, the measure emphasises the needs of those who at a relatively advanced age were entering Parliament for the first time. In a period of dramatic historical transition from one parliamentary dispensation to a completely different one, these were special measures adopted to deal with real economic problems facing the overwhelming majority of the new members. At the same time the old parliamentarians lost nothing. Neither their purse nor their dignity was assailed. They

were not being punished for having been part of the old apartheid set-up. They were simply being excluded from some special benefits that were given on objectively justifiable grounds to the new parliamentarians. I accordingly agree with the neat manner in which Ngcobo J evaluates the position in this regard.

[155] I would just wish to add that for the new scheme to have distinguished on grounds of race or previous political affiliation between individual persons in this large and diverse new generation of members of Parliament, would have been divisive and invidious. The one-off boost to their pension entitlements was, in my view, appropriately accomplished on the basis of a broad sweep which included the new generation as a whole.

[156] Had there been a suggestion of special benefits being paid simply because of past political affiliation, then serious questions of equal protection would have arisen. The reward of the generations that fought for the new democratic dispensation was to achieve the right to stand for office in a new constitutional democracy. It was not a cash bonus for having backed the winning side, to be smuggled in under the guise of affirmative action. Similarly, if there had been an issue of hand-outs given simply on the basis of race, section 9 would clearly have been engaged. In reality, however, Parliament chose none of these paths. It adopted a measure that met objective criteria, served an important remedial governmental objective and was substantially related to the achievement of that objective. The measure promoted equality and was fair. The egalitarian principles of section 9 were upheld and, indeed, advanced by it.

[157] Basing myself heavily on the reasons in the other judgments, but formatting them in a different way, I accordingly agree that the decision of the High Court to invalidate the pension scheme must be set aside, and support the order made by Moseneke J.

For the applicants:	G Marcus SC and M Chaskalson instructed by Moodie and Robertson.
For the respondent:	EW Fagan and PBJ Farlam instructed by Du Toit Binedell Inc.
For the *amicus curiae*:	A Louw instructed by Rooth & Wessels Inc.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/04

RICHARD GORDON VOLKS NO	Appellant
versus	
ETHEL ROBINSON	First Respondent
WOMEN'S LEGAL CENTRE TRUST	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE MASTER OF THE HIGH COURT	Fourth Respondent
Together with	
CENTRE FOR APPLIED LEGAL STUDIES	Amicus Curiae

Heard on : 20 May 2004

Decided on : 21 February 2005

JUDGMENT

SKWEYIYA J:

Introduction

[1] This appeal and confirmatory proceedings concern the interpretation and constitutionality of section 2(1), read with section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act) which, in substance, confers on surviving spouses

the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves. The first respondent (Mrs Robinson) contends that the survivor of a stable permanent relationship between two persons of the opposite sex who had not been married to each other during their lifetime, but nevertheless lived a life akin to that of husband and wife, should be afforded the same protection that is afforded to the survivor of a marriage under the provisions of section 2(1) of the Act.

[2] The central question for consideration in this matter is whether the protection which the Act affords to a "survivor"[1] should be withheld from survivors of permanent life partnerships. The High Court (Cape Provincial Division) found that the exclusion of the surviving partner of a permanent life partnership from the ambit of the Act was unconstitutional.[2] The present proceedings follow from that order.

Factual background

[3] Mrs Robinson was in a permanent life partnership with the late Mr Shandling, an attorney and senior partner at CK Friedlander Shandling Volks (the law firm), from 1985 until the latter's death in 2001. They were never married and no children were born of their relationship. During the lifetime of the deceased, they had jointly occupied a flat situated in Cape Town on a continuous basis from early 1989 until the

[1] Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act) defines "survivor" as "the surviving spouse in a marriage dissolved by death."

[2] *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C) at 299J; 2004 (6) BCLR 671 (C) at 682I.

deceased's death. She remained in occupation of the flat until the end of December 2002.

[4] The deceased had previously been married to Edith Freedman (Mrs Shandling), in 1950. Three children were born of their marriage, two sons, Martin and Adrian, and a daughter, Lauren. Mrs Shandling passed away on 27 January 1981 due to lung cancer. The couple's children, now majors, have established families of their own in the United States of America.

[5] The description by Mrs Robinson of their relationship is, in broad terms, accepted by the appellant (Mr Volks). She states that to a large extent the deceased had supported her financially. He gave her R5000 per month in order to cover household necessities and would deposit money into her account whenever she needed it. He also provided her with petrol money from the law firm's account and paid for her car maintenance. She was accepted as a dependant on his medical aid scheme from January 2000. During the relationship she worked intermittently as a freelance journalist and artist. This employment brought in some small income which she used on general living expenses, gifts for the deceased and personal expenses. She also worked on a voluntary basis at Fine Music Radio as a newsreader, programme compiler and presenter.

[6] Once a year, the deceased would travel to the United States to visit his three major children and grandchildren and on one occasion she accompanied him.

Whenever there were social functions at the law firm or at the radio station they would accompany each other. They were accepted as a couple and had many mutual friends. The deceased suffered from bi-polar disorder/manic depression, and over the years she had nursed him through illness and taken him to hospital.

[7] In terms of the deceased's will, Mr Volks, a partner in the law firm, was appointed as the executor of the deceased estate. The balance in the estate for distribution to Mrs Robinson, his three children, his domestic worker, and three staff members of the law firm, was R413 665.37. The bequest to Mrs Robinson constituted a Toyota motor vehicle, the contents of the flat which they occupied in Cape Town, other than those items that were chosen by and reserved for his three children, and a sum of R100 000. In terms of the will, Mrs Robinson was entitled to remain in the house for a period not exceeding nine months.

[8] In April 2002 Mrs Robinson sought legal advice from the Women's Legal Centre (the Centre) about her rights to claim maintenance from the deceased estate. After consulting with Mr Volks in his capacity as the executor, the Centre advised her that the residue in the estate was minimal and that she should not pursue her claim. In June 2003 she received a copy of the Final Liquidation and Distribution Account, which reflected a residue of R248 533.87. In accordance with the deceased's will, the residue would devolve upon his three children.

[9] During August 2003 the Centre wrote letters to Mr Volks and to the fourth respondent, the Master of the High Court (the Master), advising them of their client's claim. The appellant's attorneys rejected the claim on the basis that Mrs Robinson was not a "spouse" for the purposes of the Act.[3]

[10] After this response, Mrs Robinson launched a two-part application in the High Court. Part A sought an urgent interdict preventing Mr Volks from winding up and distributing the assets in the estate, pending the determination of the constitutional challenge to the Act, which relief was sought in Part B of the application. The application for the interdict was not opposed and was granted by the High Court.

[11] The application relating to the constitutional challenge was set down for a later date subject to the filing of an amended notice of motion, further papers and heads of argument. The Women's Legal Centre Trust (the Trust) filed an application to intervene in this application. That application was not opposed and the Trust was admitted as the second applicant in the proceedings. Both Mrs Robinson and the Trust relied upon the provisions of section 38 of the Constitution for standing. They

[3] The letter of refusal stated:

> "*prima facie* it would appear that the deceased and your client considered their position during the lifetime of the deceased and elected not to enter into a marriage in accordance with the laws of South Africa. That election, included implicitly, if not expressly, the choice not to have the automatic consequences of the laws of marriage apply to their relationship. The provisions contained in the Last Will of the deceased dated 24th December 1999 are consistent with that election."

alleged that they were acting in their own interests; on behalf of partners in permanent life partnerships; and in the public interest.[4]

The contentions of the parties in the High Court

[12] In an amended notice of motion, Mrs Robinson and the Trust sought an order declaring that she was the "survivor" of the late Mr Shandling for the purposes of the Act, and therefore entitled to lodge a claim for maintenance under the Act. In the event that it was found that she did not qualify as a "survivor" for the purposes of the Act by virtue of not being "the surviving spouse in a marriage dissolved by death", they sought an order declaring that the exclusion of the survivor of permanent life partnerships from the provisions of the Act was unconstitutional. They contended that this exclusion violated the provisions of sections 9(3)[5] and 10[6] of the Constitution, in that it discriminated unfairly on the ground of marital status, and infringed her right to dignity. In this regard they submitted that the definition of the words "survivor", "spouse" and "marriage" in the Act should include a reference to survivors of permanent life partnerships.

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[4] Section 38 of the Constitution confers standing and provides as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are ─
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[5] Section 9 of the Constitution is set out in para 47 below.

[6] Section 10 reads as follows:

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

[13] In relation to the declaration of invalidity sought, Mr Volks argued that the reading-in of words to the Act was unacceptable. He argued that the entire structure of the Act was premised on the concept of marriage and protects surviving spouses of such a marriage. Thus reading-in, in the form sought, did not deal properly with these provisions, nor did they fit in with the structure of the Act.

[14] Mr Volks argued that in the event that the court found that the Act was inconsistent with the Constitution and invalid, it would not be just and equitable for an order to apply to permanent life partnerships in respect of which the partner had already died. He argued for an order which would only have prospective effect. He argued that a retrospective order would not sufficiently protect the freedom and dignity of the deceased. He also argued that the relief sought by Mrs Robinson and the Trust may affect other legislation like the Administration of Estates Act.[7]

[15] He argued further that Mrs Robinson chose to live with Mr Shandling without entering into a marriage although there was no legal or other impediment to marrying. There was therefore no reason in law or in principle why the laws of marriage should be imposed upon the deceased, his estate, and his heirs. He argued that it would constitute an infringement of the deceased's freedom and dignity to have the consequences of marriage imposed in circumstances where there was a clear choice not to enter into a marriage relationship. As evidence of this choice on the part of the

[7] Act 66 of 1965.

deceased, he referred to a statement that Mr Shandling made to him that "if he were ever single again he would not marry". Mr Volks also relied on the fact that he referred to Mrs Robinson as "my friend" in his will, whereas he referred to his deceased wife, Mrs Shandling, as "my wife".

[16] Mr Volks also contended that Mr Shandling, in terms of his will, had made a choice as to how his assets would be disposed of. He did this with an understanding that the laws of marriage would not apply to his estate. His freedom and dignity would be violated if his choice as to how to dispose of his assets were to be overridden by a court permitting a claim for maintenance against his estate. Indeed his right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution would be infringed.

[17] In short, he argued that the deceased's freedom and dignity would be violated if his fundamental life choices, not to marry and to dispose of his property as he wanted, were to be overridden by a court permitting a maintenance claim against his estate. He submitted that different considerations may have applied if the deceased had died intestate, but that this was not the case. For these reasons, he urged that even if the Act were thought to involve discrimination, the discrimination was not unfair. Alternatively, the discrimination, if unfair, would be justifiable under section 36(1) of the Constitution.

[18] In response, Mrs Robinson submitted that for all intents and purposes they had lived their lives as a married couple, and that she was at all times prepared to marry Mr Shandling. In any event, she went on to state that the fact that they were not married is not a material consideration which a court should have regard to in determining whether she was entitled to maintenance under the Act. In determining this question she argued for the court to consider the nature of their relationship, and cited the following criteria:

> "a) our commitment to a shared household;
> b) the financial and other dependence between us;
> c) the duration of our relationship;
> d) the roles we played in our relationship in relation to each other."

[19] In reply to the argument on choice in relation to property disposition, she argued that if they were married and he had disinherited her or had left insufficient means for her maintenance, she would have been entitled to claim maintenance under the Act. She also contended that the Act was intended to provide for vulnerable widows or persons in her position where testators did not properly provide for their dependants.

The decision of the High Court

[20] The High Court noted that there are significant differences between a marriage and a permanent life partnership. In this regard the court stated:

> "Apart from the profound religious significance attached to the institution of marriage, there are important definitional differences. For example, upon the

> conclusion of a marriage ceremony, the relationship between the two parties has immediate legal significance. In the case of a domestic life partnership, the determination of the nature of the relationship can only take place after a lengthy period of time, only after the lapse of which period, the criteria enunciated above by both Goldblatt [2003 (120) *SALJ* 610 at 625] and L'Heureux-Dubé J [*Nova Scotia (Attorney General) v Walsh* 2002 SCC 83 at paras 126-36] can be shown to exist. In this case, the enquiry requires the benefit of evidence which illustrates that the relationship is of a permanent nature, at which stage, it can be concluded that the parties are involved in a domestic life partnership."[8] (references inserted)

[21] Based on the nature of the relationship between Mrs Robinson and the late Mr Shandling, the High Court concluded that it was clear

> "that, well before Mr Shandling's death, a life partnership existed between the two and that they regarded themselves as being involved in a permanent and intimate life partnership."[9]

[22] Adopting the equality test formulated in *Harksen v Lane NO and Others*,[10] the High Court found that the Act differentiated between married spouses and unmarried cohabitants on the listed ground of marital status and therefore unfair discrimination was presumed. It held that there were no justificatory grounds for the unfair discrimination, and concluded that Mrs Robinson's right to equality had been unfairly eroded.

[8] Above n 2 SALR at 298E-G; BCLR at 681F-H.

[9] Id SALR at 299A; BCLR at 682B.

[10] 1998 (1) SA 300 (CC) at para 54; 1997 (11) BCLR 1489 (CC) at para 53.

[23] The High Court stated that it was trite that one of the core commitments of our constitutional society was the recognition of the dignity of difference, which accords respect to the existence of domestic partnerships and those who live in them. The court stated that:

> "If there were clear evidence that parties expressly, by choice, decided to eschew any possible financial benefits which flowed from a marriage and, for this reason (or notwithstanding this position), chose to live within the context of a domestic life partnership, there may be an argument, . . . that a surviving partner such as [Mrs Robinson] could not successfully launch a constitutional challenge to the Act."[11]

The court concluded that, in this case

> "there is little beyond the speculation of [Mr Volks] that a conscious choice was made by [Mr Shandling] and [Mrs Robinson] to live in terms of a relationship in which none of the benefits of marriage now sought were to apply."[12]

[24] Relying on certain factual information in an article by Goldblatt[13] to the effect that for a range of reasons domestic partnerships were a significant part of South African family life, Davis J stated:

> "To ignore the arrangement and impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned."[14]

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[11] Above n 2 SALR at 299E-F; BCLR at 682E-F.

[12] Id SALR at 299F-G.

[13] Goldblatt "Regulating Domestic Partnerships ─ A Necessary Step in the Development of South African Family Law" (2003) 120 *SA Law Journal* 610.

[14] Above n 2 SALR at 299I; BCLR at 682H.

He therefore held that the breach of both the rights to equality and dignity could not be justified.

[25] The High Court made an order in the following terms:

> "1. It is declared that: The omission from the definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid.
>
> 2. The definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving partner of a life partnership'.
>
> 3. The omission from the definition in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:
>
> ' "Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
>
> ' "Marriage" for the purposes of this Act shall include a permanent life partnership.'
>
> 4. Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the existing definition:
>
> ' "Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
>
> ' "Marriage" for the purposes of this Act shall include a permanent life partnership.'
>
> 5. The order in paras 1, 2, 3 and 4 above shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date of this order."[15]

[15] Above n 2 SALR at 302E-I; BCLR at 684G-5B.

Proceedings before this Court

[26] At the hearing counsel for Mr Volks informed the Court that they had decided, after consultation with him, to withdraw the appeal and opposition to the confirmation proceeding in so far as this related to the equality challenge. In other words, Mr Volks conceded the correctness of the unconstitutionality of the provision in issue, as found by the High Court. It is unfortunate that the Court was not informed of this before the date of hearing. It is also regrettable that we were not able to hear full argument from any party supporting the constitutionality of the provision. It would also seem that the heirs have not been informed of this decision.

[27] However it is incumbent upon this Court to fully consider the question of constitutionality, despite the abandonment of the appeal.

[28] Mrs Robinson and the Trust, in their heads of argument, sought confirmation of the order in its entirety. However, in oral argument counsel indicated that they were of the view that if words were to be read-in, they would require that the Act be extended to cover partners only where there was a reciprocal duty of support present, not dissimilar from the reading-in remedy ordered by this Court in *Satchwell*.[16]

[29] The third respondent, the Minister of Justice and Constitutional Development (the Minister), and the Master had issued a notice of intention to abide the decision of the High Court. Yet, in this Court they submitted heads of argument and made oral

[16] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

submissions challenging the confirmation of the remedy given in the High Court. They argued for judicial restraint in light of the current law reform process being explored in this area by the South African Law Reform Commission (the Commission). They also argued that the order should not be retrospective or, if it were to be, that it should be limited so as to alleviate what may amount to an insurmountable administrative burden on the Master, given that it is the Master's office which is tasked in most instances with the administration, winding up and distribution of deceased estates.

[30] The Centre for Applied Legal Studies (CALS) argued in favour of confirmation. Much of their argument was directed at the vulnerability of women in cohabitation relationships. They also argued for a remedy which would extend the Act to cover polygynous cohabitation relationships, where for instance the male partner was still married during the duration of his cohabitation with another.

Further evidence

[31] CALS seeks to persuade us to accept certain additional evidence aimed largely at demonstrating the vulnerability of women in existing relationships between unmarried cohabitants, and of the fact that few women have the choice about whether they should marry. The admission of additional evidence is regulated by the provisions of rule 31 of the rules of this Court.[17] Subsection 1 provides as follows:

[17] Government Gazette 25643 GN R 1603, 31 October 2003.

> "(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts -
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

[32] In the case of *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others,*[18] the Court considered the predecessor to rule 31[19] and held:

> "That Rule permits a duly admitted amicus 'to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record'. However, this is subject to the condition that such facts 'are common cause or otherwise incontrovertible' or 'are of an official, scientific, technical or statistical nature, capable of easy verification'. This Rule has no application where the facts sought to be canvassed are disputed. A dispute as to the facts may and, if genuine, usually will demonstrate that they are not 'incontrovertible' or 'capable of easy verification'. Where this is so, the material will be inadmissible."[20] (footnote omitted)

[33] The whole of the report tendered by the amicus cannot be considered to consist merely of evidence of a statistical or incontrovertible nature, or which is common cause. It is apparent that the conclusions and solutions offered are not

[18] 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC).

[19] Rule 30 of the old rules in Government Gazette 6199 GN R 757, 29 May 1998.

[20] Above n 18 at para 8.

incontrovertible.[21] Furthermore, Mr Volks does not accept that the evidence sought to be introduced is necessarily incontrovertible or uncontroversial. Indeed the report in its own words notes:

> "As is evident from our methodology, our findings are *not representative* but simply indicate trends which confirm our *general assumptions about cohabitation*."[22] (my emphasis)

In the executive summary the study was defined as "qualitative primary research amongst poor 'African' and 'Coloured' communities".[23]

[34] Moreover, the entire study consisted of interviews with only 68 people in eight sites. This non-representative sampling, which was not quantitative but qualitative and was conducted in only eight poor communities, cannot be said to be statistical or scientific evidence capable of easy verification, nor can it be said to be incontrovertible. A more representative study might well lead to different conclusions.

[35] The evidence is not directly relevant to the issue before us. That issue is whether the protection afforded to survivors of marriage under section 2(1) of the Act

[21] South African Law Reform Commission Discussion Paper 104, Project 118: Domestic Partnerships at viii, where the Commission suggests the concept of registering cohabitation as a means to recognising them, a solution which is not advocated in the CALS Report.

[22] Goldblatt et al "Cohabitation and Gender in the South African Context – implications for law reform: A research report prepared by the Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand", November 2001 at 24 at para 2.2.

[23] Id executive summary at ii.

should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us. It cannot be admitted.

The history and purpose of the Maintenance of Surviving Spouses Act 27 of 1990

[36] This Act has its own unique history which is relevant to its goal or object. In *Glazer v Glazer, NO*[24] the Appellate Division refused to extend the principle applied in *Carelse v Estate De Vries*,[25] that a father's estate was liable to support his children, to cases of a spouse requiring support to enable her to claim maintenance from her deceased husband's estate.[26]

[37] The Act emanates from the recommendations of the Commission's report: "Review of the Law of Succession: The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse" (Project 22), submitted in August 1987. The Commission was of the view that the institution of a legitimate portion would not be the appropriate solution to the problem, and recommended instead that a claim for maintenance be given by operation of the law. It is regrettable that it took as many as three years before the recommendations of the report were given effect to.

[24] 1963 (4) SA 694 (A).

[25] (1906) 23 SC 532.

[26] Above n 24 at 706H-707B.

[38] In terms of section 2(1) of the Act a surviving spouse will, in so far as he is not able to provide therefor from his own means and earnings, have a claim against the deceased spouse's estate "for the provision of his reasonable maintenance needs until his death or remarriage." "Own means" of the surviving spouse includes

> "any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse".[27]

The claim by the surviving spouse will be dealt with in accordance with the Administration of Estates Act.[28]

[39] The purpose of the provision is plain. The challenged law is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The challenged provision is aimed at eliminating this perceived unfairness and no more. The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a benefit that either of them would acquire from the state or a third party on the death of the other. It seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married. It says to them:

[27] Section 1 of the Act.

[28] Above n 7.

"If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations."

Interpretation

[40] Before evaluating the constitutional challenge, it is necessary to interpret the relevant provisions of the Act in the light of its history. Section 2(1) of the Act provides:

> "If a *marriage* is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or *remarriage* in so far as he is not able to provide therefor from his own means and earnings." (my emphasis)

Mrs Robinson and the Trust argued both in the High Court and in this Court that the Act could be interpreted so as to include heterosexual cohabitants. However, for the reasons considered below, I agree with the conclusion of the High Court that the Act is not reasonably capable of being so interpreted.

[41] It is patent from the definition in the Act that, "survivor" means "the surviving spouse in a marriage dissolved by death." It would seem that the only possible meaning for "marriage" when viewed in the context of the Act is one recognised either by the law or by a religion.[29] This is evident both from the use of the words "spouse" and "marriage" dissolved by death.

[29] See in general *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[42] Furthermore, in *Satchwell*[30] this Court was very definitive in its interpretation of the term "surviving spouse" in the Judges Remuneration and Conditions of Employment Act,[31] and stated:

> "There is no definition of the word 'spouse' in the provisions under attack. In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. . . . The context in which 'spouse' is used in the impugned provisions does not suggest a wider meaning, nor do I know of one. Accordingly, a number of relationships are excluded, such as same-sex partnerships and *permanent life partnerships between unmarried heterosexual cohabitants.*"[32] (my emphasis)

[43] In addition, section 2(1) refers to the provision of maintenance until "death or remarriage". This would be illogical if the phrase "surviving spouse" included survivors of permanent life partnerships, who generally may not have been previously married and could therefore not get remarried.

[44] As noted by this Court in the *Hyundai*[33] case:

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and

[30] Above n 16.

[31] Act 88 of 1989.

[32] Above n 16 at para 9.

[33] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

> precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[34] (footnotes omitted)

[45] I find that an interpretation of the Act that would include permanent life partnerships would be "unduly strained" and manifestly inconsistent with the context and structure of the text. The Act is incapable of being interpreted so as to include permanent life partners.

Equality challenge

[46] The basis of the High Court's finding of unconstitutionality is that the Act excludes permanent life partners from its protection and thereby violates the anti-discrimination provision in section 9(3) of the Constitution.

[47] Section 9 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.

[34] Id at para 24.

(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."

[48] In the *Harksen*[35] case this Court laid out the general approach to equality analysis and said:

"(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).[36] 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

[35] Above n 10.

[36] The equivalent of section 9(1) of the 1996 Constitution.

> 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).[37]
>
> (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)."[38]

[49] The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former. We are not concerned with the exclusion of survivors of gay and lesbian relationships, nor are we concerned with survivors of polygynous relationships.

[50] Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination.

[37] The equivalent of section 9(3) of the 1996 Constitution.

[38] The equivalent of section 36 of the 1996 Constitution.

[51] In determining whether discrimination is unfair one must consider the differences between the two groups. Although there is no right to marry and to found a family contained in Chapter 2 of the Constitution marriage as an institution is recognised therein. This is clear from the provisions of section 15(3)(a)(i) of the Constitution.[39] The constitutional recognition of marriage is an important starting point for determining the question presented in this case.

[52] Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society.[40] In this regard O'Regan J notes in *Dawood*[41] that:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that

[39] Section 15 guarantees the right to freedom of religion, belief and opinion and provides:

> "(1) Everyone has the right to freedom of conscience, religion, thought, belief, and opinion.
> (2) Religious observances may be conducted at state or state-aided institutions, provided that:
> (a) those observances follow rules made by the appropriate public authorities;
> (b) they are conducted on an equitable basis; and
> (c) attendance at them is free and voluntary.
> (3) (a) This section does not prevent legislation recognising ─
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[40] See *Daniels v Daniels; Mackay v Mackay* 1958 (1) SA 513 AD at 532E, where Hoexter JA referred to marriage as "the most important unit of our social life, the family." See also in *Belfort v Belfort* 1961 (1) SA 257 AD at 259H, where the same judge states that marriage "is the very foundation of the most important unit of our social life, the family."

[41] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

> marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[42]
>
> (footnotes omitted)

[53] Marriage is also an internationally recognised social institution.[43]

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[42] Id at paras 30-1.

[43] The concept of marriage as a civil right has been advanced by some American courts in a variety of circumstances, for example, *Skinner v. Oklahoma* 316 US 535, 541 (1942); *Perez v. Lippold* 198 P.2d 17, 20-1 (1948). See also *Loving v. Virginia* 388 US 1 (1967), where Chief Justice Warren speaking for the majority of the Supreme Court included language describing marriage as one of the basic civil rights of man.

See further Noonan, who in "The Family and the Supreme Court" (1973) 23 *Catholic University Law Review* 255 at 273 comments as follows on the *Loving v. Virginia* case:

> "The vital personal right recognized by *Loving v. Virginia* is not the right to a piece of paper issued by a city clerk. It is not the right to exchange magical words before an agent authorized by the state. It is the right to be immune to the legal disabilities of the unmarried and to acquire the legal benefits accorded to the married. Lawful marriage in the society's hierarchy of values recognized by *Boddie v. Connecticut* and in the host of laws yet unchallenged – the tax law, the common law of property, the law of evidence – is a constellation of these immunities and privileges. To say that legal immunities and legal benefits may not depend upon marriage is to deny the vital right. To say that Equal Protection requires the equal treatment of the married and the unmarried in all respects is to deny the hierarchy of values of our society."

In addition, Article 23(2) of the International Covenant on Civil and Political Rights provides that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognised"; and Article 18 of the African [Banjul] Charter on Human and Peoples' Rights provides that "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

[54] From this recognition, it follows that the law may distinguish between married people and unmarried people. Indeed, this Court in *Fraser*[44] noted:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[45]

The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people.

[55] Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.

[56] The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely

[44] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[45] Id at para 26.

attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died.

[57] It must be borne in mind that the legislature, by enacting the law, in fact qualified the right to freedom of testation. It said that freedom of testation would be limited to the extent that where marriage obliged the parties to it to maintain each other, freedom of testation ought not to result in the termination of the obligation upon death. The question we have to answer is whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants.

[58] In his judgment Sachs J envisages two categories of people within this broad class of unmarried cohabitants against whom the disputed law is unfairly discriminatory.[46] The first category is the people who by written instrument or by necessary implication agree to live together, to maintain each other and to give each other support of every kind. It is contended that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the

[46] Dissent of Sachs J at paras 213-4; 218.

marriage certificate.[47] That is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement. The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation.

[59] The second category referred to by Sachs J is the relationship in which the deceased male partner refused to marry the woman who cared for him, put everything into the relationship and gave her heart and soul to it, bringing up a number of children born of the relationship between them in the process.[48] I have sympathy for surviving partners who fall within this category. The conduct of the male partner is unconscionable in these cases. There is a strong argument that partners ought to be obliged to maintain each other during their lifetime in certain circumstances.

[47] Id at para 220.

[48] Id at para 219.

[60] I conclude that it is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable.

The right to dignity

[61] It was also contended that the failure to make provision for the people in the class to which Mrs Robinson belongs offends the dignity of members of that class. Section 10 of the Constitution provides:

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

[62] I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

Vulnerability and economic dependence

[63] Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries.[49] Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners.

[64] Much of the argument and many of the passages of the judgment of Sachs J express concern for the plight of vulnerable women in cohabitation relationships. This concern arises because women remain generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage. The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for.

[49] Freeman and Lyon *Cohabitation without Marriage* (Gower Publishing Company Limited, Hants, England 1997) at 19-20, describe the position of women in England in the following terms:

> "The position of women in society today is closely related to their role within the family. An understanding of woman's oppression accordingly requires a description and analysis of the position of women in today's privatised family. As Mary McIntosh rightly has observed, 'ultimately the very construction of men and women as separate and opposed categories takes place within, and in terms of, the family'. Women are expected to be dependent on men. Their role is geared to the household. They are responsible for child care, as well as for the care of the aged and handicapped. Their domestic labour is seen as non-productive, not real work. Women, particularly married women, have to be housewives: if they do not carry out the service roles depicted here they are 'bad' housewives, but housewives nevertheless. Furthermore, as Kate Millett noted, 'sex role is sex rank'. 'As long as woman's place is defined as separate, a male-dominated society will define her place as inferior'." (footnotes omitted)

[65] I agree that the women in this category suffer considerably. But it is not the under-inclusiveness of section 2(1) which is the cause of their misery. The plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetimes. I accept that laws aimed at regulating these relationships in order to ensure that a vulnerable partner within the relationship is not unfairly taken advantage of are appropriate.

[66] In the case of the very poor and the illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures. It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners. Unfortunately the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way.

[67] Both dissenting judgments make it plain that there are many ways in which these relationships can be regulated. It is not for us to decide how this should be done. In any event, this case is not concerned with the provision that should be made to ensure that partners in relationships other than marriage treat each other fairly during their lifetime. That does not mean, however, that fairness in the case of people who

are married will be the same as fairness between parties to a permanent life partnership. It is up to the legislature to make provision for this.

[68] As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind arose by operation of law during the lifetime of that person. I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically.

Costs

[69] Neither Mr Volks nor Mrs Robinson and the Trust sought costs in this Court. However, Mrs Robinson and the Trust argued that the Minister and the Master, who had originally abided the decision of the High Court, but who at a very late stage sought to tender evidence and argument in this Court, should be ordered to pay the costs of the appellant on a punitive scale. They argued that the effect of their late intervention would have caused additional costs to Mr Volks which would inevitably be drawn from the estate. However, Mr Volks abides the decision of this Court in regard to this latter issue and does not seek a costs order against the Minister and the

Master. There can be no doubt that it is regrettable that they did not intervene in the proceedings earlier. However, no postponement was occasioned by their late intervention, and generally it is helpful to the Court for the state's attitude to constitutional challenges to legislation to be before it. Although the desirability of having that information before the Court cannot excuse non-compliance with its rules, I am of the view that in this case it would be inappropriate to make the costs order sought by Mrs Robinson and the Trust against the Minister and the Master. In the circumstances, I conclude that no order should be made as to costs in this matter.

Order

[70] I make the following order:

(a) The order of the High Court declaring section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 inconsistent with the Constitution is not confirmed.

(b) The appeal is upheld.

Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, Van der Westhuizen J and Yacoob J concur in the judgment of Skweyiya J.

NGCOBO J:

[71] Section 2(1) read with section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Act), confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are unable to support themselves. The question presented in this case is whether this right should also be conferred upon survivors of permanent life partnerships between two persons of the opposite sex who were not married to each other but nevertheless lived a life that was akin to that of husband and wife. The High Court (Cape of Good Hope Division) took the view that it should. It therefore concluded that the exclusion of survivors of such partnerships from the protection of the Act is unconstitutional. The present proceedings are a sequel.

[72] Mrs Robinson, the first respondent, is a survivor of a permanent life partnership. Her deceased partner is Mr Shandling, who was a senior partner at a Cape Town law firm. Mrs Robinson took the view that survivors of such a relationship are entitled to the protection afforded to surviving spouses by the Act. She lodged a claim for maintenance under the Act against the estate of the deceased. The executor of the estate of the deceased, the appellant, rejected the claim, taking the view that such survivors do not fall within the ambit of the protection afforded by the Act. The rejection of the claim prompted, amongst other things, a constitutional challenge directed at the provisions of the Act.

[73] The High Court found that the provisions of the Act are incapable of being construed in a manner that would bring survivors of permanent life partnerships within the ambit of the Act. The problem, the High Court appears to have found, lay in the definition of the word "survivor" in section 1 of the Act, which did not include persons involved in permanent life partnerships. This exclusion, the court found, unfairly discriminated against survivors of permanent life partnerships on the basis of marital status. It therefore concluded that section 2(1) read with the definition of "survivor" in section 1 of the Act is unconstitutional in that it contravenes sections 9 and 10 of the Constitution. It is this conclusion that is now in issue before this Court.

[74] 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.
> (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."

And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[75] That the Act differentiates between survivors of marriages and survivors of permanent life partnerships is patent. The provisions of the Act are aimed at providing maintenance and support for survivors of marriages. The legitimacy of this governmental purpose cannot be gainsaid. Nor can it be doubted that the differentiation that the Act makes is rationally connected to that purpose. The next question is whether the differentiation between survivors of marriages and survivors of permanent life partnerships constitutes unfair discrimination.

[76] For the purposes of this judgment, I am prepared to accept that the differentiation involved here constitutes discrimination. The differentiation is on the ground of marital status, a ground listed in subsection 9(3) of the Constitution. That being the case, the discrimination is presumed to be unfair under subsection 9(5). The ultimate question for determination therefore is whether the provisions of section 2(1) read with section 1 of the Act do in fact discriminate unfairly against survivors of permanent life partnerships.

[77] The proper approach to the equality analysis is that set out in the *President of the Republic of South Africa and Another v Hugo*[1] and *Harksen v Lane NO and Others*[2] cases.

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[1] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 32-50.

[78] The nature of unfairness contemplated by the provisions of section 9 of the Constitution has been considered by this Court, albeit in the context of section 8 of the interim Constitution, the predecessor to section 9. In the *Hugo* case, this Court held that:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[3]

[79] Dignity is an underlying consideration in the determination of unfairness. Thus in the *Harksen* case, this Court held that "[t]he 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."[4] While legislation may make distinctions, those "distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity"[5] cannot be tolerated. In the final analysis, it is the impact of discrimination on the survivors of permanent life

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[2] 1998 (1) SA 300 (CC) at paras 41-69; 1997 (11) BCLR 1489 (CC) at paras 40-68. See also *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 24.

[3] Above n 1 at para 41.

[4] Above n 2 at para 51 of the SALR and para 50 of the BCLR.

[5] *Egan v Canada* (1995) 29 CRR (2d) 79 at 105, cited with approval by this Court in the *Hugo* case above n 1 at para 41.

partnerships that is the determining factor regarding the unfairness of the discrimination in this case.[6]

[80] The starting point in determining the fairness or otherwise of the discrimination involved in this case is the Constitution itself. Although our Constitution contains no express provision protecting the institution of marriage, it nevertheless recognises the right freely to marry and to raise a family. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*, this Court commented as follows on the absence of an express provision protecting the right to family life or the right of spouses to cohabit:

> "The omission of such a right from the Constitution was challenged during the first certification proceedings on the basis that such a right constituted a 'universally accepted fundamental right' which in terms of Constitutional Principle II had to be entrenched in the Constitution. The Court observed from its survey of international instruments that States are obliged in terms of international human rights law to protect the rights of persons freely to marry and raise a family. However, it also observed that these obligations are achieved in a great variety of ways in different human rights instruments.
>
> . . .
>
> The Court therefore concluded that the new constitutional text, although it contained no express clause protecting the right to family life, nevertheless met the obligations imposed by international human rights law to protect the rights of persons freely to marry and to raise a family."[7] (footnotes omitted)

[6] Above n 4.

[7] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 28. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 97.

[81] There can be no doubt that our Constitution recognises the institution of marriage. This much is apparent from section 15(3)(a)(i) of the Constitution which in substance makes provision for the recognition of "marriages concluded under any tradition, or a system of religious, personal or family law." This Court too has recognised the importance of marriage as an institution. One need only refer to the *Dawood* case, where this Court said the following concerning the institution of marriage:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[8] (footnotes omitted)

[8] *Dawood* id at paras 30-1.

[82] The constitutional recognition of the right freely to marry and the institution of marriage is consistent with the obligations imposed on our country by international and regional human rights instruments which impose obligations upon states to respect and protect marriage. The African [Banjul] Charter on Human and Peoples' Rights, 1981[9] recognises the importance of marriage and the family. Article 18(1) provides that the "family shall be the natural unit and basis of society." The relevant part of article 18 provides that:

> "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."[10]

[83] Under article 23(4) of the International Covenant on Civil and Political Rights, 1966 (ICCPR),[11] States Parties are required to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." Article 23 of the ICCPR provides that:

> "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[9] Adopted on 27 June 1981 by the Eighteenth Assembly of the Heads of State and Government of the Organization of African Unity and entered into force on 21 October 1986.

[10] The importance of the family in the context of the African Charter is also apparent from the duties which individuals have under the Charter. These duties appear, for example, in article 27(1) which provides that "[e]very individual shall have duties towards his family and society . . . ."; and article 29(1) which provides that "[t]he individual shall also have the duty [t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need".

[11] Adopted by General Assembly resolution 2200A (XX1) of 16 December 1966 and entered into force on 23 March 1976.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

[84] So too does article 16 of the Universal Declaration of Human Rights, 1948[12] provide that:

"(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[85] These regional and international instruments underscore the importance of marriage as an institution and the right freely to marry. They underscore the duty of states like ours, which are signatories to these instruments, to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage *and at its dissolution*."[13] Therefore, both the Constitution and international instruments impose an obligation on our country to protect the institution of marriage.

[12] Adopted and proclaimed by General Assembly resolution 217A (III) of 10 December 1948.

[13] Article 23(4) of the ICCPR. The emphasis is mine.

[86] It seems to me to follow from this recognition of the institution of marriage that the law may, in appropriate circumstances, distinguish between married people and unmarried people. This much was recognised by this Court in *Fraser v Children's Court, Pretoria North, and Others*,[14] where the Court observed:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[15]

[87] Once it is accepted that marriage is a constitutionally recognised institution in our constitutional democracy, it follows that the law may legitimately afford protection to marriage. And in appropriate circumstances the law may afford protection to married people which it does not accord to unmarried people. This seems to me to be the logical consequence of the recognition of the institution of marriage. But there are other considerations that are relevant to the determination of the fairness or otherwise of the discrimination involved in this case.

[88] One of the factors that is relevant to the determination of unfairness is the purpose sought to be achieved by the impugned provisions. The purpose of the provisions of the Act is manifestly not directed at impairing the dignity of the survivors of permanent life partnerships. It is primarily directed at ensuring that surviving spouses who are in need of maintenance and who are unable to support

[14] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[15] Id at para 26.

themselves, do get maintenance. One of the invariable consequences of marriage is a reciprocal duty of support. During the subsistence of the marriage, the deceased spouse is under a duty to support and maintain the surviving spouse. What the provisions of the Act merely do is to ensure that this duty continues after the death of one of the spouses. It does this by transferring this duty to the estate of a deceased spouse.

[89] It is not without significance that indigenous law, which is part of our law, also protects widows. Under indigenous law, the duty to maintain and support the widow survives the death of the husband. Thus upon the death of a husband, the duty to maintain and support the widow falls upon *indlalifa*. This duty remains with *indlalifa* regardless of whether the deceased husband left enough assets from which to maintain and support the widow. Recently, I had occasion to observe that:

> "The perpetuation and preservation of the family unit and succession to the position and status of the deceased therefore lie at the heart of succession in indigenous law. Like his predecessor, *indlalifa* becomes the nominal owner of the family property, and is required to administer it on behalf of and for the benefit of the family. *Indlalifa* acquires the duty to maintain and support the widow and minor children. In dealing with family property, *indlalifa* has to consult the widow who had the right to restrain him from dissipating family assets. When there are insufficient assets to maintain the family, *indlalifa* had to use his own resources to provide maintenance."[16] (footnotes omitted)

[16] *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC) at para 172.

[90] It is therefore plain that the impact of the provisions of the Act on surviving spouses is to protect their right to receive maintenance and support from the deceased spouse by transferring the duty to support and maintain onto the estate of a deceased spouse. It is true that surviving partners of permanent life partnerships are not afforded this protection. But, although this may constitute a disadvantage, it does not take away the right of a surviving partner of a permanent life partnership from receiving a sum of money from the estate of a deceased partner. Indeed, the provisions of the Act do not prevent partners in a permanent life partnership from leaving sums of money to each other in their respective wills, which can be used for maintenance. We know for example that the deceased in this case left Mrs Robinson a sum of money in his will.

[91] There is a further consideration that is equally relevant. The law places no legal impediment to heterosexual couples involved in permanent life partnerships from getting married. All that the law does is to put in place a legal regime that regulates the rights and obligations of those heterosexual couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not. The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship. This would include the acceptance that the duty to support survives the death of one of the spouses.

[92] The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

[93] The other consideration is that marriage is a matter of choice. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage. It is more than a piece of paper. As this Court observed in the *Dawood* case:

> "The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[17]

[94] People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a

[17] Above n 7 at para 31.

marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.

[95] Another consideration that is relevant is the difficulty of establishing the existence of a permanent life partnership. The point at which such partnerships come into existence is not determinable in advance. In addition, the consequences of such partnerships are determined by agreement between the parties. Unless these have been expressly agreed upon, they have to be inferred from the conduct of the parties. What happens at the dissolution of such partnerships is far from clear. All of this points to the need to regulate permanent life partnerships. This does not mean that a law designed to regulate marriages is unconstitutional simply because it does not regulate permanent life partnerships.

[96] The provisions of the Act may have denied the surviving partners of permanent life partnerships the protection it affords to surviving spouses, but it cannot be said that it fundamentally impairs their rights of dignity or sense of equal worth. The impact of the discrimination upon the surviving partners is, therefore, in all the circumstances not unfair. It follows that the provisions of the Act are not inconsistent

with sections 9 and 10 of the Constitution. In the event, the order of invalidity made by the High Court cannot be confirmed.

[97] For these reasons I concur in the order proposed in the judgment of Skweyiya J.

Chaskalson CJ, Langa DCJ, Moseneke J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

MOKGORO AND O'REGAN JJ:

[98] We have had the opportunity of reading the judgments in this matter prepared by Skweyiya J and Sachs J. We are unable to agree with the order proposed by Skweyiya J. We agree with the conclusion reached by Sachs J but for different reasons which we set out in this judgment.

[99] The crisp constitutional issue we have to decide is whether section 2(1) of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Act) read with the definition of "survivor" in section 1 of that Act constitutes unfair discrimination and is inconsistent with the Constitution as found by the Cape High Court (the High Court).[1] Section 2(1) provides that:

[1] *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C); 2004 (6) BCLR 671 (C).

> "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

The word "survivor" is defined in section 1 of the Act as "the surviving spouse in a marriage dissolved by death". The High Court found that this narrow definition of "survivor" rendered the provision discriminatory to the extent that it did not afford a maintenance claim to the surviving partner of a permanent life partnership. The High Court accordingly made an order reading in the following words to the definition of survivor in section 1 – "and includes the surviving partner of a life partnership" as well as two further orders reading in definitions of "spouse" and "marriage".[2] We must decide whether to confirm that order.

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[2] The order made by the High Court read as follows:

> "1. It is declared that: the omission from the definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid.
>
> 2. The definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, is to be read as if it included the following words after the words 'dissolved by death';
> 'and includes the surviving partner of a life partnership'.
>
> 3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:
> '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> '"Marriage" for the purposes of this Act shall include a permanent life partnership'.
>
> 4. Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the existing definition;
> '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> '"Marriage" for the purposes of this Act shall include a permanent life partnership'.
>
> 5. The order in paragraphs 1, 2, 3 and 4 above shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date of this order."

[100] The facts of the case have been set out in the judgments of both Skweyiya J and Sachs J. To recap in brief, Mrs Robinson and Mr Shandling (the deceased), who had both been previously married, formed a relationship in which they lived together from 1985 until his death in November 2001. The relationship thus lasted sixteen years. They did not marry although there was no legal impediment to marriage. For the last twelve years of Mr Shandling's life, they lived in a flat owned by a Shandling family trust. Their relationship was monogamous and Mrs Robinson characterised the relationship as a "permanent life or domestic partnership". The applicant in this Court, Mr Volks, the executor of Mr Shandling's deceased estate (the executor) did not dispute the characterisation of the relationship as a "permanent life partnership".

[101] In his will, Mr Shandling referred to Mrs Robinson as his "friend". He also mentioned his former wife whom he referred to as "my wife Edith Rose". He bequeathed certain of his assets, totalling approximately one third of his estate, to Mrs Robinson. The residue of his estate was left to his three children in different proportions. In addition to the bequests made in her favour, Mrs Robinson applied to the executor for her to be treated as a surviving spouse for the purposes of section 2(1) of the Act, which would entitle her to maintenance. That application was refused by the executor on the grounds that she did not fall within the terms of section 2(1) as she had not been married to Mr Shandling.

[102] Mr Shandling was a senior partner in a firm of attorneys in Cape Town while Mrs Robinson worked intermittently as a freelance journalist and artist. Mrs

Robinson averred that Mr Shandling supported her financially during the subsistence of their relationship and paid all household expenses. Mrs Robinson was also added as a dependant to Mr Shandling's medical aid from 2000.

[103] Mrs Robinson states that Mr Shandling had been diagnosed as suffering from bi-polar disorder before their relationship commenced and that she nursed him through the mood swings that are characteristic of this disorder. She also nursed him in his final illness. It is quite clear from the evidence given by Mrs Robinson, and not disputed by the executor, that Mr Shandling and Mrs Robinson lived together for sixteen years, supporting one another both financially and emotionally and that both considered the relationship to be a permanent one. The High Court found on the facts that Mr Shandling and Mrs Robinson had entered into a permanent and intimate life partnership.

[104] In deciding whether this finding is correct, we consider the following factors to be determinative in this case: the length of the period of cohabitation which was sixteen years, the fact that Mr Shandling paid Mrs Robinson an allowance to cover household expenses and was generally responsible for the payment of all the costs of running the household, the fact that Mr Shandling had declared Mrs Robinson to be his dependant for the purposes of medical aid, the undisputed close and intimate relationship between them, and the fact that Mrs Robinson nursed Mr Shandling through bouts of ill-health. In our view, these facts make it plain that both Mr Shandling and Mrs Robinson considered themselves to constitute a permanent life

partnership in which they undertook duties of mutual support and care for one another. It is also clear, however, that they chose not to marry. We must assume that it was Mr Shandling who chose not to marry as Mrs Robinson says that she was at all times willing to be married. We cannot ascertain Mr Shandling's reasons for not marrying from the affidavits before us. In our view, however, the fact that they did not marry does not mean that they had not established a permanent life partnership.

[105] Section 9(3) of our Constitution prohibits discrimination on the grounds of marital status. It provides:

> "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."

[106] The institution of marriage is an important social institution which has extensive legal consequences under the two legal regimes which regulate marriage in South Africa, the common law and African customary law. The social importance of marriage has been recognised by this Court in several cases. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*,[3] for example, this Court held:

[3] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

> "The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[4]

The celebration of a marriage thus confers extensive legal duties and rights upon the parties to the marriage as a matter of law. As a matter of social relations, it often results in the founding of a family which provides essential human companionship, mutual support and security to the members of that family. However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

[107] The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages,[5] though this has begun to change.[6]

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[4] Id at para 31. See also *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at paras 13 and 22; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 19.

[5] Marriages in terms of African customary law were referred to as "black customary unions" in section 35 of the Black Administration Act, 38 of 1927 and were not recognised as legal marriages. Accordingly, a widow of a customary marriage was held not to have a claim in delict for the loss of support caused by the death of her husband. See *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A). The position was different in customary law, see *Vakubi Ngqongqozi and Another v Noselem Nyalambisa and Others* 4 NAC 32 (1919). See the comment by Dlamini "Claim By Widow of Customary Union for Loss of Support" (1984) 101 *SA Law Journal* 34.

Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages[7] though this too is now altering.[8] The prohibition of discrimination on the ground of marital status was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection. It is thus a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination.

[108] Where relationships which are socially and functionally similar to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status will arise. In this case, we have concluded that the cohabitation relationship of Mrs Robinson and Mr Shandling was a relationship that constituted a permanent life partnership in which the parties had undertaken mutually to support one another, both financially and otherwise. We concluded, therefore, that their relationship was socially and functionally similar to marriage. To the extent that the law regulates its consequences differently from that of marriage, the law will be prima facie discriminatory. The question that then arises is whether that discrimination is unfair. In each case where it is shown that a relationship that is socially and functionally similar to marriage is treated differently from marriage, a careful contextual analysis will be necessary to determine whether the discrimination is indeed unfair.

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[6] See the Recognition of African Customary Marriages Act, 120 of 1998.

[7] These marriages were historically not recognised as valid marriages because they were potentially polygynous. See *Ismail v Ismail* 1983 (1) SA 1006 (A).

[8] See, for example, *Ryland v Edros* 1997 (2) SA 690 (C); 1997 (1) BCLR 77 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

[109] It will be helpful to start by considering the legal rules governing marriage. Before we do so, however, it is important to note that the rules governing marriage both under common law and under African customary law have been the subject of intense debate in the last few decades. The focus of that debate has been a realisation that many of the rules of marriage in both systems were discriminatory on the grounds of gender and sex. Some of the rules were expressly and obviously discriminatory, such as the rule of common law which provided that a woman married in community of property had limited contractual capacity and that her husband, the bearer of the marital power, was entitled to manage their common estate on his own without referring to her at all.[9] Or the rule of customary law which provided that women may ordinarily not inherit property.[10]

[110] Other rules regulating marriage were discriminatory against women, not expressly, but in effect. In particular these rules often failed to acknowledge the division of labour within the household, in terms of which women bore primary and often sole responsibility for the maintenance of the household and caring for children and elderly members of the family. The responsibilities so often borne by women across all South African communities, whether wealthy or poor, and regardless of colour, meant that women were less likely to be able to participate in the labour

[9] For a discussion of the rules regulating marital power before its abolition, see Hahlo *The South African Law of Husband and Wife* 5 ed (Juta, 1985) at 194; see also the discussion in Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (Juta, 1999) at 161ff.

[10] But see *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality Intervening); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

market as successfully as men. (Indeed practices in the labour market as well were often discriminatory, further hampering women's ability to participate.) The effect of the unequal division of labour in the household, and discriminatory practices in the labour market, meant that at the termination of a marriage, whether by death or divorce, women were often more materially vulnerable than men. This was caused by the fact that during the marriage women were often less able than men to accumulate property, and were also less able to compete in the labour market.

[111] The Legislature has sought to remedy this inequality over the last twenty years with a range of legislative enactments governing the regulation of matrimonial property both during the subsistence of the marriage and upon its termination,[11] as well as provisions extending the duty of support that arises on marriage to after the death of one of the spouses (the provision in question in this case),[12] and seeking to improve the procedures whereby the duty of support may be enforced.[13] This brief account of recent developments in the law of marriage makes it plain that marriage itself is an institution which is legally evolving. That evolution reflects and responds to changes in the broader community. The discussion of the rights of marriage that follows is based largely, but not exclusively, on the current common law rules regulating marriage.

[11] See the Matrimonial Property Act, 88 of 1984; Marriage and Matrimonial Property Law Amendment Act, 3 of 1988; General Law Fourth Amendment Act, 132 of 1993.

[12] See the discussion in Hahlo "Widow's Claim to Maintenance out of Deceased Husband's Estate" (1962) 79 *SA Law Journal* 361. In 1969, there was an abortive attempt to enact a remedial provision, the Family Maintenance Bill. See also Hahlo "The Sad Demise of the Family Maintenance Bill 1969" (1971) 88 *SA Law Journal* 201.

[13] See generally the Maintenance Act, 99 of 1998; See also *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[112] Marriage, as presently constructed in common law,[14] constitutes a contract between a man and a woman in which the parties undertake to live together,[15] and to support one another.[16] Marriage is voluntarily undertaken by the parties, but it must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of a marriage are set out in the Marriage Act.[17] A marriage must be conducted by a marriage officer,[18] to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself or himself that there are no legal obstacles to the marriage.[19] Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed form.[20] Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open.[21] Both parties must be present[22] as well as at least two competent witnesses.[23] A particular

[14] See, however, the recent judgment of the SCA in *Fourie and Another v Minister of Home Affairs and Another (Lesbian and Gay Equality Project Intervening)* SCA 232/2003, 30 November 2004, as yet unreported in which a majority of the court issued a declarator to the effect that "marriage is the union of two persons to the exclusion of all others for life." This was decided shortly before judgment was handed down in this matter.

[15] The duty to live together forms part of the *consortium omnis vitae* "which obliges spouses to live together, afford each other reasonable marital privileges, and be faithful to each other" (Van Heerden et al above n 9 at 172).

[16] Voet 25.3.8; *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 788H.

[17] Act 25 of 1961.

[18] Section 11(1) of the Marriage Act. Sections 2-9 of the Act govern the appointment of marriage officers. All magistrates are marriage officers *ex officio* (see section 2(1) of the Marriage Act).

[19] Section 23 of the Marriage Act.

[20] Section 12 of the Marriage Act.

[21] Section 29(2) of the Marriage Act.

[22] Sections 29(2) and (4) of the Marriage Act.

[23] Section 29A(1) of the Marriage Act.

formula for the ceremony is provided in the Marriage Act,[24] but other formulae, such as religious rites, may be approved by the Minister.[25] Once the marriage has been solemnised, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register.[26] A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded.[27] These formalities make certain that it is known to the broader community precisely who gets married and when they get married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates, as we shall now describe.

[113] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessaries which include food, clothing, medical and dental services.[28] The law sees the spouses as life partners and jointly and severally responsible for the maintenance of their common home. This obligation may not be excluded by antenuptial contract.

[24] See section 30(1) of the Marriage Act.

[25] Id

[26] See section 29A(1) of the Marriage Act.

[27] See section 29A(2) of the Marriage Act.

[28] See the general discussion in Sinclair *The Law of Marriage* Volume 1 (Juta, 1996) at 442-452; and Van Heerden et al above n 9 at 235ff.

[114] Another invariable legal consequence of the marriage is the right of both parties to occupy the joint matrimonial home. This obligation is clearly based on the premise that spouses will live together. The party who owns the home may not exclude or evict the other party from the home. Limited exceptions to this rule have been created under the Domestic Violence Act.[29]

[115] The way in which the marriage affects the property regime of the parties to the marriage is variable at common law. The ordinary common law regime is one of community of property including profit and loss in terms of which the parties to a marriage share one joint estate which they manage jointly. Historically, of course, our common law provided that the power to manage the estate ("the marital power") vested in the husband. This rule was altered by statutory intervention in 1984.[30] Major transactions affecting the joint estate must now be carried out with the concurrence of both parties.[31]

[116] Marriage also produces certain invariable consequences in relation to children. Children born during a marriage are presumed to be children of the father. Both

[29] Act 116 of 1998. See in particular subsections 7(1)(c) and (d). Note also that the Domestic Violence Act provides remedies to cohabiting partners. Section 1 of the Act defines "domestic relationship" to include people who "(whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other" (section (b) of the definition).

[30] See section 11 of the Matrimonial Property Act, 88 of 1984. The abolition of the marital power was only extended to marriages between African people in 1988 – see the Marriage and Matrimonial Property Amendment Act, 3 of 1988. Both these statutes only abolished the marital power prospectively. In 1993 the General Law Fourth Amendment Act, 132 of 1993 abolished the marital power in all marriages which had been solemnised before the 1984 and 1988 Matrimonial Property Acts had come into force. See also the full discussion in Sinclair above n 28 at 126-130.

[31] See subsections 15(2) and 15(3) of the Matrimonial Property Act, 88 of 1984. Joint estates must now be administered in terms of chapter III of the Act.

parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not.

[117] Because of the social importance of marriage in our community, the law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestrated, the estate of the other spouse also vests in the Master in certain circumstances,[32] the law of evidence creates certain rules relating to evidence by spouses against or for one another,[33] and the law of delict recognises damages claims based on the duty of support.[34] The rules that govern marriage have developed over a long period of time. More recently, as pointed out in the judgment of Sachs J, Acts of Parliament which attach benefits to marriage, also confer them upon cohabitants who are not married, variously referred to in legislation as "life partners", "partners" and "cohabitants".[35]

[32] See, for example, section 21(1) of the Insolvency Act, 24 of 1936, and the consideration of that provision by this Court in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC). Interestingly, section 21(13) provides that the word "spouse" in section 21 is to be read to include "a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another".

[33] Section 195 of the Criminal Procedure Act, 51 of 1977 provides, subject to certain exceptions, that the spouse of an accused is a competent, but not compellable, witness for the prosecution. Section 196 provides that the spouse of an accused is a competent witness for the defence, but may not be compelled to give evidence by a co-accused of the accused spouse. Interestingly, section 195(2) of the Criminal Procedure Act provides that for the purposes of evidence in criminal proceedings "marriages" include customary law marriages and marriages concluded under any system of religious law, but not cohabitation.

[34] The aquilian action entitles a spouse whose spouse has been killed or injured by the wrongful act of a third party to recover damages for the patrimonial loss suffered. A claim for loss of the non-material aspects of *consortium* does not lie. See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Marine and Trade Insurance Co Ltd v Mariamah and Another* 1978 (3) SA 480 (A).

[35] See paras 175-176 of the judgment of Sachs J.

[118] From the above, it is clear that marriage is an institution of great legal significance. This significance arises both from the important social role that marriage plays in our society and from its public and formal character which make it a reliable criterion for the conferral of obligations and rights. We are unable to agree with Skweyiya J to the extent that he suggests that in determining whether discrimination on the grounds of marital status is unfair or not, one can take the view that it is not unfair to discriminate between relationships to which the law attaches the obligations of support and cohabitation and those relationships to which the law does not attach such consequences. In our view, this approach defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status. For if it does not constitute unfair discrimination to regulate marriage differently from other relationships in which the same legal obligations are not imposed upon the partners to that relationship by the law, marriage will inevitably remain privileged. We do not consider this would serve the constitutional purpose of section 9(3), and its prohibition of unfair discrimination on the grounds of marital status.

[119] It has become apparent that more and more people in South Africa live together without being married.[36] In the 2001 Census, 2.3 million people described themselves as "living together like married partners" although they were not married. This constitutes approximately 8% of the adult population. However, although cohabitating partners have received some piecemeal attention by Parliament over the

[36] Sinclair above n 28 at 270 records that the number of people living together as cohabitants had grown from 463 000 in 1970 to 1,2 million people in 1991.

last ten years,[37] no comprehensive legislative regulation of the consequences of cohabitation has yet taken place. The South African Law Reform Commission, however, has been engaged in researching the matter and has prepared a comprehensive discussion paper on it.[38]

[120] Of course, the circumstances of cohabitants can vary significantly. Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners. Moreover, one cohabiting relationship may change its joint character and purpose so that partners who may originally not intend to be living together as permanent life partners may over time alter that intention and intend to live together as permanent life partners.

[121] Often cohabitation will be a long-term arrangement between two people. Because such relationships are similar to marriage, and because they will be based on many of the same social practices that underpin marriage, many of the gender inequalities that are attendant upon marriage, and described above,[39] will also be attendant upon these relationships. It is quite likely that after a long period of

[37] See the examples given in the judgment of Sachs J at paras 175-176.

[38] See South African Law Reform Commission Discussion Paper, Paper 104, Project 118, "Domestic Partnerships".

[39] See paras 109-111.

cohabitation, in which the parties have lived together, and even raised children jointly, the person in the relationship, often, but not necessarily the woman, who has been responsible for the maintenance of the household and caring for children will be more vulnerable in relation to material and financial matters than the other partner. The termination of the cohabitation relationship whether by death or separation will often prejudice that person in the absence of any equitable regulation of the property affairs of the partners upon termination.

[122] Some cohabitation relationships, such as that between Mrs Robinson and Mr Shandling, play a role very similar to marriage in our society. However, because they are not formally celebrated in a manner that is capable of easy proof or ascertainment, attaching legal consequences automatically to such relationships may be less practicable. To resolve this problem some societies have provided for the registration of cohabitation relationships in a manner similar to marriage.[40]

[123] There are thus differences between marriage and cohabitation even where cohabitation plays a similar social function to marriage. These differences mean that the mere fact that the law regulates marriage relationships differently from cohabitation relationships does not mean that the law, to the extent that it discriminates on the grounds of marital status, will constitute *unfair* discrimination. To determine whether the law does constitute unfair discrimination requires us to

[40] See, for example, the Netherlands Act of 16 July 1997, Staatsblad 1997, 324 and Act of 17 December 1997, Staatsblad 1998, 600, as cited in the Discussion Paper above n 38. See also the discussion in the South African Law Reform Commission Discussion Paper above n 38 at 72-80; the Law Commission in the United Kingdom has made a similar proposal for the United Kingdom which has not yet been adopted, see the South African Law Reform Commission Discussion Paper at 90-91.

follow the approach to unfairness established by this Court in a series of cases.[41] Three things need to be considered: (a) the position of complainants in society and whether they have previously suffered from patterns of disadvantage; (b) the nature of the provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or has caused them some other harm of a comparably serious nature.

[124] Although discrimination against cohabiting partners has not been equal to the discrimination relating to race and gender, cohabiting partners have been excluded from legal recognition as we have described above. Moreover, cohabiting partners have been and still are the subject of stigma and disapproval in our community, though this stigma is on the wane in some sectors of our society. A further important factor in this case is that the group of cohabiting partners under consideration are those who, upon the death of their partner, are unable to provide for their own reasonable maintenance needs from their own resources. We are, by definition therefore, concerned with survivors of a cohabitation relationship in financial need. We conclude for these reasons that the cohabiting partners under consideration in this case are a vulnerable group. We turn now to consider the circumstances of cohabiting partners under our law at present.

[41] See, for example, *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 41-43; *Harksen* above n 32 at paras 51-54 of the SALR and paras 50-53 of the BCLR.

[125] At present our law makes no express provision for the regulation of the affairs of cohabiting partners upon termination of their relationship. In several other jurisdictions, the law of implied or constructive trusts has been used to re-allocate property rights between partners at the termination of a cohabitation relationship to achieve equity.[42] This remedy is not available in our law, given the different legal basis of the law of trusts in South African law.[43] However, the common law rules governing universal partnership may in some circumstances assist the partners at termination. A universal partnership is a contract in which the parties agree to put in common all their property, both that which they presently own and that which they are to acquire in the future.[44] In *Ally v Dinath*,[45] the court held that a universal partnership like other contracts could be tacitly concluded. Establishing that a contract has been concluded tacitly is of course not straightforward.[46]

[42] See the discussion in Sinclair above n 28 at 274-277; see also Neave "Living Together – The Legal Effects of the Sexual Division of Labour in Four Common Law Countries" (1991) 17 *Monash University Law Review* 14 at 17.

[43] See Cameron et al *Honoré's South African Law of Trusts* 5 ed (Juta, 2002) at 110.

[44] There are in fact two types of universal partnership known in our law, the *societas universorum bonorum* and the *universorum quae ex quaestu veniunt.* See *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955. The former is an agreement in terms of which the parties agree to pool all their existing and future property, and the latter is an agreement in which the parties agree to pool all property they receive during the term of the partnership. We are referring to the *societas universorum bonorum* in the text.

[45] 1984 (2) SA 451 (T) at 454F-455A.

[46] There is some doubt as to the precise test to be met in establishing the existence of a tacit contract. See the approach set out in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292B, but see the comments in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165H and also *Mühlmann v Mühlmann* 1984 (3) SA 102 (A). Not much turns on this uncertainty for our purposes.

[126] Another legal remedy that may be available to assist a cohabiting partner on the termination of the relationship arises from the law governing unjustified enrichment.[47] One partner may be able to show that the other partner has been enriched during the existence of the relationship by tangible improvements made to the property of the one partner by the other.[48] It might even be that the enrichment action could be developed to accommodate other forms of contributions made by partners to one another during the subsistence of their relationship. However, the law has not yet developed in this direction. The scope of the law of unjustified enrichment need not be further considered.

[127] Accordingly, at present, there are only a few common law rules which may have the potential to regulate the rights of parties upon the termination of a cohabitation relationship, no matter how longstanding that relationship. These remedies do not as presently recognised provide a comprehensive, certain and coherent set of principles to protect cohabitants. Moreover, there are no express statutory provisions at all to regulate the affairs of cohabitants upon termination of their relationship by the death of one party. Accordingly, at termination by the death of one of the parties, the surviving partner is left without effective legal recourse, unless she or he can formulate a claim based on the principles of the common law described above. This situation arises, despite the fact that it is clear that the

[47] See the discussion in Sinclair above n 28 at 277-78.

[48] In *Nortje v Pool NO* 1966 (3) SA 96 (A) it was held that where tangible improvements which increase the market value of the property are made by one person to the property of another, a claim in unjustified enrichment will lie. The same case held that there was no general claim for unjustified enrichment in our law. See, however, *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) where the court held that *Nortje's* case does not necessarily exclude the further extension of liability for unjustified enrichment.

relationship of cohabitation was one in which the parties had undertaken mutual duties of support and one in which patterns of vulnerability and dependence had been established, such that the death of one party may put the other in great difficulty.

[128] The determination whether the discrimination caused by section 2(1) affects cohabiting partners unfairly needs to be understood in the context of the fact that there are no comprehensive, certain or clear legal remedies that can ameliorate the circumstances of the surviving cohabitant upon termination of the relationship by the death of one of the cohabitants. The absence of any other legal remedy coupled with the discriminatory impact of section 2(1) will mean that often surviving cohabiting partners will be left vulnerable and unprotected upon the termination of their cohabitation arrangements by the death of their partner, even where their relationship had subsisted for a long period of time.

[129] Upon termination of a marriage by death, on the other hand, there are a range of rules which govern the rights of the parties. When one spouse dies intestate, the other spouse is entitled to inherit the entire estate if the deceased spouse is not survived by any descendants.[49] If the deceased spouse is survived by a descendant, then the spouse is entitled to inherit either a child's portion of that spouse's estate[50] or a minimum amount established by the Minister for Justice and Constitutional

[49] See section 1(1)(a) of the Intestate Succession Act, 81 of 1987.

[50] A child's portion is calculated by producing a number calculated by identifying the number of descendants and adding one to it to represent the spouse. The cash value of the estate is then divided by that number.

Development from time to time.[51] The amount is currently set at R125 000.[52] Of course, the provisions of the Intestate Succession Act apply only if the deceased spouse does not make a will.

[51] See section 1 of the Intestate Succession Act which provides:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and—
>
> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
>
> (c) is survived by a spouse as well as a descendant—
>
> (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
>
> (ii) such descendant shall inherit the residue (if any) of the intestate estate;
>
> (d) is not survived by a spouse or descendant, but is survived—
>
> (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
>
> (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
>
> (e) is not survived by a spouse or descendant or parent, but is survived—
>
> (i) by—
>
> (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or
>
> (bb) descendants of his deceased parents who are related to the deceased through both such parents; or
>
> (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),
>
> the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or
>
> (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;
>
> (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."

[52] The amount was published in *Government Gazette* 11188 GN 483, 18 March 1988.

[130] In addition to the provisions regulating succession, section 2(1) of the Act provides that a spouse in financial need may claim maintenance from the estate of his or her deceased spouse until his or her death or remarriage. As both Sachs J and Skweyiya J note in their judgments, this provision was enacted in 1990 to amend the situation then prevailing under the common law. At that time, the common law held that the duty of support between spouses did not survive the death of one spouse. Accordingly, a spouse had no claim against the estate of his or her deceased spouse, even when in dire financial need, and if the estate would have been able to provide maintenance.[53]

[131] There is a significant difference, therefore, between the way in which the law regulates the rights of spouses who survive a marriage, and the manner in which it regulates the rights of partners who survive a cohabitation relationship. There can be no doubt that there is a range of ways in which the rights of partners surviving cohabitation relationships could be regulated. There are many different examples to be found in other legal systems.[54] In particular, the Legislature may be minded to regulate different forms of cohabitation differently. For example, it may conclude that registered cohabitation relationships will be more comprehensively regulated than other forms of cohabitation. The various possibilities are canvassed extensively in the Law Reform Commission report referred to earlier.[55] It is unnecessary and premature

[53] *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 707B-D.

[54] See, for example, the Canadian Maintenance and Custody Act, RS, 1989, c 160; see also the New South Wales Property (Relationships) Act of 1984; see also the law in the Netherlands, above n 40; see also section 160 of the Tanzanian Law of Marriage Act 1971 as cited in Sinclair above n 28 at 297n108.

[55] Above n 38.

in our view to consider the full range of forms of regulation that may be considered by the Legislature and to consider their constitutionality for as yet there is no statutory regulation.

[132] From the foregoing it becomes plain that cohabiting partners are a vulnerable group, and that in the absence of any other forms of legal regulation, the fact that they are excluded from the provisions of section 2(1) can have a grave impact on the interests of cohabiting partners. That impact will be particularly grave where the partnership is a permanent life partnership in which partners have undertaken reciprocal duties of support, where the surviving partner is in need, and there has been no equitable distribution to the surviving partner from the estate of the deceased partner. It is our conclusion that, in the absence of any regulation in such circumstances, the effect of limiting the scope of section 2(1) to married spouses only will constitute unfair discrimination within the meaning of section 9(3) of the Constitution.

[133] Were there some regulation to provide equitable protection to cohabitants who have been in relationships which can be said to perform a similar social function to marriage, the provisions of section 2(1) may not have constituted unfair discrimination. Given however that there is no regulation to ensure some equitable protection for cohabitants, particularly those who have been in long-term relationships where patterns of dependence have been established, the failure of section 2(1) to apply to such relationships constitutes, in our view, unfair discrimination.

[134] It should be emphasised that this conclusion does not mean that the Legislature is required to regulate cohabitation relationships in the same way that it regulates marriage. In particular, the Legislature need not extend the provisions of section 2(1) to all cohabitation relationships. As indicated earlier, marriage is a particular form of relationship, concluded formally and publicly with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the Legislature is entitled to take this into account when it regulates cohabitation relationships. However, cohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability which in the light of the substantial and increasing number of people in cohabitation relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on the grounds of marital status.

[135] The unfairness of the discrimination in this case lies not primarily in the fact that cohabiting partners are not afforded equivalent rights to marriage as stipulated in section 2(1) of the Act, but in the fact that neither section 2(1) nor any other legal rule regulates the rights of surviving partners to cohabitation relationships which were socially and functionally similar to marriage, when those relationships are terminated by death and where that surviving partner is in financial need. In our view, given that section 2(1) of the Act and other legal provisions extensively regulate the rights of spouses in the event of the termination of a marriage by death, but there are no statutory provisions at all regulating the rights of cohabitants upon the termination of

their relationships by death, the law discriminates against surviving partners of cohabitation relationships who are in financial need.

[136] We have concluded that the discrimination is unfair. The next question that arises is whether that unfair discrimination can be said to be reasonable and justifiable within the contemplation of section 36 of the Constitution.[56] The purpose of the legislation is to alter the common law rules governing marriage to protect the surviving spouse from penury upon the death of the other spouse. In our view, this is an important purpose. However, that purpose can be achieved without excluding surviving partners of cohabitation relationships in which duties of support had been mutually undertaken, whether tacitly or expressly, and where those surviving partners are in financial need, from similar protection. It is not clear why marriage only need be protected. The need to provide protection to such surviving partners is all the more acute in the light of the prevailing common law principle that provides that such partners would not be able to enter into legally enforceable contractual obligations to support one another after the termination of their partnership by the death of one of them. The law prohibits contracts between individuals which seek to regulate their

[56] Section 36(1) reads as follows:

> "Limitation of rights.—(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, 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."

affairs or relationships posthumously.[57] To the extent that the purpose of providing legal protection to a surviving spouse but not to a surviving cohabitant might be to preserve the religious attributes of marriage, this cannot be an acceptable purpose in terms of our Constitution. While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective. We conclude therefore that the unfair discrimination is not justifiable within the terms of section 36.

Remedy

[137] It is necessary to consider the appropriate remedy. Section 172(1)(a) of the Constitution requires a court when deciding a constitutional matter to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency.[58] Section 172(1)(b) also permits a court to make an order that is just and equitable. The difficulty we face in this case is that, for the reasons given earlier in this judgment, the discrimination we have found may be cured by the Legislature in

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[57] *Pacta successoria*, as they are called, are prohibited in terms of our common law. There is no uniform view on whether such contracts are merely unenforceable (see *Salzer v Salzer* 1919 EDL 221; *Van Jaarsveld v Van Jaarsveld's Estate* 1938 TPD 343) or contrary to public policy and therefore invalid (*Nieuwenhuis v Schoeman's Estate* 1927 EDC 266). For a general discussion see the discussion in Christie *The Law of Contract in South Africa* 4 ed (Butterworths, 2001) at 415-6. It is not necessary to engage in this debate here and it is sufficient, for the purposes of this case, simply to highlight that such contracts are not enforceable in South African law.

[58] Section 172(1) of the Constitution reads as follows:

> "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; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

a variety of ways and that those ways need not be identical to the manner in which marriages are currently regulated. To cure the unfairness of the discrimination identified in this case the Legislature should make provision to ensure that on the termination of a longstanding cohabitation relationship by death, an equitable arrangement is reached in relation to the financial position of the survivor so that the dependence or vulnerability of the survivor which has arisen through the relationship of cohabitation is appropriately redressed. This equitable arrangement could be achieved, either by an equitable distribution of the property of the cohabitants,[59] or by rules relating to maintenance. The Legislature is in the best position to determine the precise nature of that regulation. We accordingly consider that the order of constitutional invalidity should be suspended to give the Legislature an opportunity to cure the constitutional defect.

[138] All this may be so, yet section 172(1) nevertheless obliges us to capture the scope of the unconstitutionality as precisely as we can. It may be that if the context were to change, what would constitute "unfair discrimination" may also change. We are, however, constitutionally obliged to formulate an order of invalidity as precisely as we can in the light of the circumstances that currently obtain. If the Legislature were not to take steps to cure the defect within the time stipulated and also not seek an extension of the suspension of the order, the order of invalidity would come into

[59] See section 2(g) of the Canadian Matrimonial Property Act, RS 1989 and the discussion thereof in *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 (SCC).

effect. It is important for this reason too that the scope of the unconstitutionality be as carefully drawn as possible.

[139] In the light of the reasoning on the merits above, we consider that the unconstitutionality in section 2(1) lies in the definition given to "spouse" in section 1 of the Act. In our view, were that definition to be read to include "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate", the unconstitutionality would be cured. It should be emphasised that, were this order to come into operation, a partner would only be able to claim maintenance in the circumstances contemplated by section 2(1). The surviving partner would have to show that he or she was not able to provide for his or her reasonable maintenance needs from his or her own means and earnings.

[140] It should be noted that this definition limits the scope of the relief to a narrow class of cohabitation relationships only – those that are permanent heterosexual life partnerships in which the parties have undertaken reciprocal duties of support.[60] It was argued by the respondents and the amicus in this Court that basing the relief only on parties who have expressly or tacitly undertaken duties of support, which was also

[60] This case is concerned with heterosexual cohabitation relationships only. It does not concern gay and lesbian life partnerships. The result of a constitutional challenge to section 2(1) of the Act on the basis of unfair discrimination on the ground of sexual orientation may be different to the challenge launched in this case.

the approach adopted by this Court in *Satchwell*'s case,[61] was not correct because family law should not be governed by contractual principles and the common law should instead be developed to give rise to an automatic legal duty of support between the parties to permanent life partnerships. The difficulty with this submission is that the development of the common law as proposed by the amicus was not relief sought in this litigation. The relief sought in this case was a declaration of constitutional invalidity in respect of section 2(1) of the Act. Developing the common law as proposed by the amicus is quite different relief which it would be inappropriate to grant on appeal, in circumstances where it is has not been considered by any other court. Accordingly, the submission made by the amicus must fail.

[141] In our view, the proposed order identifies the relationships which perform most closely a similar social function to marriage and the relief should not extend beyond them, though of course it is open to the Legislature to regulate other cohabitation relationships. Moreover, we limit the relief to circumstances in which a partner in such a relationship has not been afforded any equitable distribution from his or her partner's estate. We do this because we consider that even where a life partnership performs a similar social function to marriage, it is not constitutionally necessary for the Legislature to regulate that partnership in the same way as it regulates a marriage. The key issue for the Constitution is to ensure that some provision is made equitably to regulate the circumstances of a cohabiting partner upon the death of the other

[61] Above n 4.

partner. In the circumstances of this matter, it is prudent to leave the Legislature as free as constitutionally possible to determine the appropriate form of regulation.

[142] In this case, as it happens, Mrs Robinson was provided for in Mr Shandling's will. That will recognised her contribution to the partnership and her potential financial vulnerability upon the death of Mr Shandling by leaving to her approximately one third of his estate. In our view, this constitutes an adequate equitable division of the property of Mr Shandling, such as not to entitle Mrs Robinson to any further relief within the terms of the order we propose. In these circumstances, we do not consider it appropriate to make an order for interim relief. In our view, this is an area which should best be regulated by the Legislature and it would be difficult and perhaps inadvisable to seek to provide an interim regime pending the Legislature's intervention.

[143] We would therefore agree with Sachs J, though for different reasons, that the applicants have established that section 2(1) of the Act is unfairly discriminatory in that neither it nor any other provision of the law regulates the rights of surviving partners of cohabitation relationships. We would put the Legislature on terms to resolve this. Given the complexity of the task, we consider that two years is an appropriate period to give the Legislature to cure the defect in the current legislation.

[144] Neither the applicant nor the respondents sought costs against one another. The respondents did seek costs against the Minister for Justice and Constitutional

Development on an attorney and client basis in the light of the fact that she abided the outcome of the litigation in the High Court and then sought to lodge evidence in this Court and oppose the relief. Given that this judgment is not supported by a majority of the members of this Court who heard the matter, it is not necessary for us to consider whether it would be appropriate to award costs on the basis sought by the respondents.

[145] We have had an opportunity, since writing this judgment, to read the judgment prepared by Ngcobo J. We cannot agree with it. In our view, the approach he adopts privileges marriage relationships in a manner that cannot be consistent with the express constitutional prohibition of unfair discrimination on the grounds of marital status. For these reasons, we propose the following order, which confirms in substance the order of the High Court, but subjects the order to a period of two years' suspension.

The Order

1. It is declared that the omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the words "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate" at the end of the existing definition is unconstitutional and invalid.

2. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, is to be read as if it included the following words after the words "dissolved by death" –

> "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate."

3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid –

> "Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;
>
> "Marriage" for the purposes of this Act shall include a permanent heterosexual life partnership.

4. Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 is to be read as though it included the following at the end of the existing definition –

> "Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;

"Marriage" for the purposes of this Act shall include a permanent heterosexual life partnership.

5. The orders contained in paragraphs 1, 2, 3 and 4 are suspended for a period of 2 years from the date of this order to enable the Legislature to take steps to cure the constitutional defects identified in this judgment.

6. Any party may approach this Court, on notice to all other parties, for an extension of the period of suspension provided for in paragraph 5 of this order before the period of suspension elapses.

7. Should the Legislature choose not to enact legislation as contemplated in paragraph 5, the order of invalidity that shall come into operation two years after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

SACHS J:

Introduction

[146] This case raises complex social and legal questions about the interaction between freedom of choice and equality in intimate relationships.

[147] The problem does not lie in defining the technical legal question to be answered: does the fact that the Constitution prohibits unfair discrimination on the ground of marital status, mean that the exclusion of the survivor of a committed, permanent and intimate life partner from the benefits of the Maintenance of Surviving Spouses Act[1] (the Act) amounts to unfair discrimination against her?

[148] Similarly, it is not difficult to illustrate the practical issues involved: to take a not unusual situation, should a person who has shared her home and life with her deceased partner, borne and raised children with him, cared for him in health and in sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?

[149] The source of the complexity appears to lie elsewhere. In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue

[1] Act 27 of 1990. Section 2(1) of the Act provides:

> "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

Section 9(3) of the Constitution provides that:

> "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." [My emphasis].

before us is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.

[150] Thus the judgment of Skweyiya J, which has majority support, holds that the issue is whether it amounts to unfair discrimination to impose a duty upon the deceased estate to maintain a surviving spouse on the one hand, and not, on the other to impose that duty upon the deceased estate where the deceased bore no such duty by operation of law during his or her lifetime to maintain the partner in a heterosexual partnership. The answer, the judgment decides, is that such discrimination is not unfair.

[151] I find myself in disagreement with the judgment both as to the approach utilised and to the conclusion reached, and totally so. This is not because I would challenge the legal logic used, which appears to be impeccable within the framework adopted. It is because I would locate the issue in a completely different legal landscape. I do not accept that it is appropriate to examine the entitlements of the surviving cohabitant in the context of what the common law would provide during the lifetime of the parties. To do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the Act, unmarried

survivors could have a legally cognisable interest which founds a constitutional right to equal benefit of the law.

[152] In my view, the question of the fairness of excluding such survivors from such benefits falls to be assessed not in the narrow confines of the rules established by matrimonial law, but rather within the broader and more situation-sensitive framework of the principles of family law, principles that are evolving rapidly in our new constitutional era. By its very nature, the quality of fairness, like that of mercy and justice, is not strained. The enquiry as to what is fair in our new constitutional democracy accordingly does not pass easily through the eye of the needle of black-letter law. Judicial dispassion does not exclude judicial compassion; the question of fairness must be rigorously dealt with, but in a people-centred and not a rule-centred way.

[153] The issues raised are novel. A wide range of jurisprudential perspectives are implicated. Because I differ fundamentally with the majority with regard to the point of departure and the context of the enquiry I have found it necessary to set out my views at some length. The first part of this judgment seeks to delineate and establish the jurisprudential setting in which I believe the issues should be located. The second part sets out my reasons for holding that the Act does in fact discriminate unfairly against survivors of committed life partnerships.

PART ONE

ESTABLISHING THE LEGAL LANDSCAPE

(i) The philosophical context: freedom of choice and equality

[154] Respect for human autonomy undoubtedly implies that the law must honour the choices that people make, including the decision whether or not to marry. A central argument advanced in the appellant's written submissions, and, I believe, the philosophical premise underlying the majority judgment (as well as the basis for the judgment of Ngcobo J, which I have had the opportunity to read), is as follows: By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life. These are powerful considerations.

[155] Sinclair[2] indicates her respect for such an argument, which implies that freedom of choice demands that cohabitation be preserved as an alternative to marriage and not simply become a different type of marriage. She goes on, however, to negate this contention. On the premise that two people set up a home together, live in a stable, permanent, affective relationship that emulates marriage, and intend to deal fairly with one another, the law's objective, she states, should be to achieve equity between the parties.[3] This, she adds, should be accomplished both during the currency of the

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[2] Sinclair *The Law of Marriage*: *Based on H.R. Hahlo: The South African Law of Husband and Wife* vol 1 (Juta, 1996) at 292.

[3] Id at 297-8.

partnership and after the death of one of the partners. She cites Rhode who points out that a balance must be struck

> "between liberty and equality in intimate associations, between flexibility and certainty in legal rules, and between tolerance for diversity and encouragement of stability in family life . . . . The tradeoff between liberty and equality becomes less stark if liberty is defined not as freedom to do what we want when we want, but rather as freedom to form relationships of mutual trust and commitment, relationships that presuppose some obligations of honesty and fair dealing. Flexibility and certainty are more readily reconciled if we do not demand a single framework for all intimate associations, but rather search for legal guidelines that will distinguish casual from committed relationships. In the absence of explicit agreements, criteria such as the duration of the relationship, the degree of the parties' financial interdependence, and, most importantly, the presence of children, could help provide some consistency across cases."[4]

[156] In my view this balanced, flexible and nuanced approach accords well with the multi-faceted character of our new constitutional order. Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.

[4] Rhode *Justice and Gender* 139 quoted in Sinclair (above n 2) at 298n109.

[157] It is instructive to look at the manner in which the Canadian Supreme Court has grappled with the relevance of choice in relation to cohabitation. In *Miron*[5] the majority[6] found that, while in theory the individual is free to choose to marry or not to marry, in practice the reality may be otherwise. It noted further that since the object of the legislation in question was to sustain families when one of their members was injured in an accident, this should be the focus of the issue, rather than what the marital status of the claimant was.[7] The court stated that:

> "If the issue had been viewed as a matter of defining who should receive benefits on a basis that is relevant to the goal or functional values underlying the legislation, rather than marriage equivalence, alternatives substantially less invasive of *Charter* rights might have been found."[8]

Accordingly, the exclusion of unmarried partners from an accident benefit which was available to married partners, violated the Charter. In the result, the definition of 'spouse' had to be read so as to include cohabiting partners. Writing as part of the majority in that case L'Heureux-Dubé J challenged the assumption that most unmarried persons living in a relationship of some interdependence and duration are indeed exercising a 'free choice'.

> "This silent and oft-forgotten group constitutes couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not . . . . It is small consolation, indeed, to be told that one has been

[5] *Miron v Trudel* [1995] 2 SCR 418.

[6] Of five against four.

[7] Above n 5 at 420-1.

[8] Id at 421.

> denied equal protection under the *Charter* by virtue of the fact that one's partner had a choice."[9]

[158] By way of contrast, in the more recent case of *Walsh*[10] the court decided[11] that merely choosing to cohabit was insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities,[12] and therefore the exclusion of cohabiting partners from sharing in the division of matrimonial property by the Nova Scotia Matrimonial Property Act did not violate the Charter.

[159] The judgment of Bastarache J emphasises how context-related the significance of choice will be. Because of its relevance to the matter before us I quote extensively from it:

> "This Court has recognized both the historical disadvantage suffered by unmarried cohabiting couples as well as the recent social acceptance of this family form. As McLachlin J noted in *Miron* . . .
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> > 'There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter.

[9] Id at 471-2.

[10] *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325.

[11] By a majority of eight to one.

[12] Above n 10 at para 54.

> Nevertheless, the historical disadvantage associated with this group cannot be denied.'

Since *Miron, . . .* significant legislative change has taken place at both the federal and provincial levels. Numerous statutes that confer benefits on married persons have been amended so as to include within their ambit unmarried cohabitants. Nevertheless, social prejudices directed at unmarried partners may still linger, despite these significant reforms. In light of those social prejudices, this Court recognized in *Miron,* that one's ability to access insurance benefits was not reducible to simply a matter of choice. L'Heureux-Dubé J., in her concurring judgment, reasoned as follows, at para.102:

> 'To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry or, alternatively, not to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called "non-traditional" relationships, however, I dare say that notions of "choice" may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between "choice" or "no choice". Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.' [Emphasis in original.]

Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.

> To ignore [the] differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state. Examination of the context in which the discrimination claim arises . . . involves a consideration of the relationship between the grounds and the claimant's characteristics or circumstances."[13] [Reference omitted.]

[160] The point is made even more explicitly in *Walsh* by Gonthier J, who draws a sharp distinction between re-arrangement of property relations, on the one hand, and providing spousal support, on the other. Referring to the Maintenance and Custody Act which provides for maintenance, and is dependent on the need of the applicants and their capacity to provide for themselves and each other, he states that:

> "It is true that in *M.v.H.*, [1999] 2 S.C.R. 3, at para. 177, I recognized that there is 'a growing political recognition that cohabiting opposite-sex couples should be subject to the spousal support regime that applies to married couples because they have come to fill a similar social role.' However, I want to underline the fundamental difference between spousal support, based on the needs of the applicant, and the division of matrimonial assets. While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need.
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> . . . .
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> The division of matrimonial assets and spousal support have different objectives. One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children."[14]

[13] Id at paras 41-4.

[14] Id at paras 203-4. It is not necessary to consider whether in South African circumstances, where welfare provisions are extremely limited, employment opportunities restricted and the common law has as of yet taken only tentative steps to encompass the equivalent of the notion of a constructive or resulting trust as the basis for

[161] It is relevant that the distinction drawn by Gonthier J was not based on whether payment of a benefit to an unmarried cohabitant was to be made by the state or to come out of the deceased's estate, and thereby possibly affect the entitlement of heirs. It focused on the special importance to be attributed to need and spousal support after a life-long conjugal relationship with the deceased has come to an end. As a result, on his approach claims for spousal support could legitimately compete with inheritance rights. No general marriage equivalence is required to establish the specific right to spousal support. What matters is the functional value of the legislation based on acknowledgment of a similar social role to that served by marriage.

[162] The jurisprudential importance of context in deciding whether a distinction between married and unmarried persons can fairly be made, has also been underlined by this Court. In *Fraser,*[15] which dealt with a provision that excluded unmarried fathers from the category of persons whose consent had to be sought for adoption, Mohamed DP stated:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the

granting a share of the family home to the survivor, and the doctrine of unjustified enrichment has not been developed to provide appropriate relief, the decision in *Walsh* is consistent with our law. See also Goldblatt who contends that the existing matrimonial property regimes should serve only as a guide to courts, which should be given a broad discretion to redistribute property on the basis of equity, taking into account the various material and non-material contributions of the parties, the form of the partnership and any other factor which the legislature or the courts consider to be useful. In the case of intestate and testate succession, a domestic partner should be entitled to his/her share of the partnership estate. In the case of intestate succession, the deceased's partner should also be entitled to a spouse's share of the deceased estate. Goldblatt "Regulating domestic partnerships — A necessary step in the development of South African family law" (2003) 120 *SA Law Journal* 610 at 625.

[15] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

> protection of the institution of marriage is a legitimate area for the law to concern itself with. *But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies.*
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> . . . .
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> *It is . . . evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional*."[16] [My emphasis.]

By analogy, I believe that a de-contextualised approach to the status of unmarried survivors of intimate life partnerships inevitably leads to very unfair anomalies. The survivor of an empty shell marriage will have a claim while the survivor of a caring and committed life partnership that produced a real family, would be left destitute.

(ii)The socio-legal context: patriarchy and poverty

[163] In *Fraser* this Court stressed the need for a nuanced and balanced consideration of our society in which the demographic picture will often be quite different from that on which 'first world' western societies are premised. As Mohamed DP pointed out:

> "The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the 'first-world' countries described."[17] [Footnote omitted.]

[16] Id at paras 26 and 43.

[17] Above n 15 at para 44.

This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality.[18] The need to take account of this context is as important in the area of gender as it is in connection with race,[19] and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.

[164] It should be remembered that many of the permanent life partnerships dissolved by death today would have been established in past decades, when conditions were even harsher than they are now, and people had far less choice concerning their life circumstances. Thus, in respect of most of the significant transactions potentially affecting present-day claims for maintenance, the social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family. It would have been he who effectively decided whether he and his partner should

[18] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[19] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) and *Hugo* id.

register their relationship in terms of the law. If she refused to do what he wanted, he could have been the one to threaten violence or expulsion, with little chance of the law intervening.[20] Because he would in many cases have been the party to go out to work while she stayed at home to look after the children and attend to his needs, it would have been he who accumulated assets, and he who had the proprietary right to determine how they were to be disposed of after his death.

[165] It should be remembered too that the migrant labour system had a profoundly negative effect on family life. An essential ingredient of segregation and apartheid, it involved the deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns.[21] The chaotic, unstable and oppressive legal universe in which the majority of the population were as a consequence compelled by law and policy to live had a severe impact on the way many families were constituted and functioned. Repeal of the racist laws which sustained the system, and entry into the new constitutional era, opened the way to fuller lives for those whose dignity had been assailed, and gave them renewed opportunity to take responsibility for their lives. Yet it did not in itself correct the imbalances inside the family or eliminate the desperate poverty that is still so prevalent.

[20] See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

[21] See Sachs *Protecting Human Rights in a New South Africa* (Oxford University Press, 1990) chapter 6 at 64-78.

[166] Sinclair states that because there is exiguous welfare to protect the victims of breakdown of intimate relationships, neither public law nor private law, on its own, is adequate, and a combination of responses from both is called for.[22] Dealing specifically with the failure of the state to provide protection for the vulnerable parties in cohabiting families, she concludes:

> "[T]here are no easy solutions to the problem of poverty. Both intervention to regulate and refraining from doing so manifest choices made by the state about the plight of its people. Not intervening, in the context of cohabitation, manifests a choice to allow substantial suffering to continue unalleviated. Far from a liberal, enlightened stance, this choice would permit the strong to remain strong and the weak and vulnerable to be removed from the consciousness of the law in the name of respect for individual autonomy."[23] [Footnote omitted.]

(iii) The historical and jurisprudential context: from matrimonial law to family law

[167] In a case like the present it is vital to draw a distinction between matrimonial law and family law. The difference between the two is helpfully analysed in a Discussion Paper recently issued on the question of domestic partnerships by the South African Law Reform Commission[24] (the SALRC Paper). The SALRC Paper points out that many of the features of marriage which are assumed to have been present from time immemorial are actually of more recent origin. What is clear,

[22] Above n 2 at 301.

[23] Id at 302.

[24] South African Law Reform Commission 'Domestic Partnerships' Discussion Paper 104 Project 118. (The closing date for comments was 1 December 2003). At the hearing of this matter much attention was paid to whether a report of a survey done by the Gender Research Project of the Centre for Applied Legal Studies on Cohabitation and Gender in the South African Context – Implications for Law Reform, November 2001 should be admitted. I agree with the view that it is generally inappropriate to admit such evidence at a late stage in the proceedings. I accordingly find it unnecessary to go beyond the SALRC Paper as a dependable and public source for relevant factual information.

however, is that marriage in its many forms has enjoyed a uniquely privileged status, while domestic partnerships have been virtually unrecognised.[25] The SALRC Paper observes that opposite-sex partners were a largely invisible group as far as the legal system was concerned: any acknowledgment of their existence tended to be characterised by scathing references to their attempts to 'masquerade as husband and wife'. They were excluded from the rights and obligations which attached automatically to marriage, and it was not even clear whether any agreements which they entered into in order to create parallel rights and obligations, were legally enforceable.[26]

[168] The SALRC Paper notes that over the years, however, there has been an increasing focus on the rights of opposite and same-sex partners, and domestic partnerships have come to be perceived as functionally if not formally similar to marriage. It observes that the increased recognition of intimate relationships outside of marriage started in South African law with the imposition of support obligations created in domestic partnership agreements and continued with the use of principles of unjust enrichment to provide property rights and to extend statutorily defined benefits similar to partnerships.[27]

[25] Id at 3 para 1.2.2.

[26] Id at 3 para 1.2.3.

[27] Id at 4 para 1.2.6.

[169] The SALRC Paper comments that initially the extension was rather grudging and seemed primarily designed to 'pass the buck' from the welfare authorities to the family,[28] and goes on to state:

> "Given South Africa's conservative and Calvinistic background, it is not surprising that acceptance of domestic partnerships occurred at a slower and more reluctant rate than in countries like Canada, Sweden, England and the United States of America. There is, however, mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership."[29] [Footnote omitted.]
>
> . . . .
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> "[L]aw and social policy reforms should aim to provide for both cohabiting couples in general as well as . . . new family types. This must be done whilst acknowledging gender inequality and serious levels of violence against women."[30] [Footnote omitted.]

[170] The SALRC Paper concludes that legal regulation is needed since the existing law contains inadequate mechanisms to address disputes arising from cohabitation relationships. The significant numbers involved mean that the Napoleonic adage that "cohabitants ignore the law and the law ignores them" is no longer acceptable.[31]

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[28] Id

[29] Id at 5 para 1.2.8. The SALRC Paper also notes at 17 para 2.1.8-10 that South African statistics also demonstrate the rising trend in domestic partnerships. Even conservative statistics indicate that a very large number of people live in domestic partnerships in South Africa. Statistical data show that only about 40% of Africans and Coloured women are married. In the 1996 Census the figures for people living together in the different population groups were as follows: African: 1 056 992; Coloured: 132 180; Indian/Asian: 7119; White: 84 027; Unspecified: 8181. Even allowing for imprecision, the Paper states, we must recognise that there are large numbers of people in dependence-producing relationships who are ignored by the law.

[30] Above n 24 at 26 para 2.2.34.

[31] Id at 17 para 2.1.10. A similar point is made in a report by the Law Commission of Canada which calls for recognition and support for all close personal adult relationships. Entitled "*Beyond Conjugality*", it states that:

> "[M]arriages still constitute a predominant choice for opposite-sex conjugal unions. Nevertheless, opposite-sex cohabitation – whether as an alternative to marriage, as a prelude to marriage or as a sequel to marriage – is a growing phenomenon that now has widespread social acceptance.

Where a domestic partnership has created responsibilities for, and expectations of, the parties, the law should play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict.[32]

[171] Academic opinion also strongly favours recognition by the law of domestic partnerships.[33] Thus Goldblatt states that families need to be understood in terms of the functions that they perform rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.[34] She contends that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down. The lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrangements. She concludes that a domestic partnership is but one amongst many

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> . . .
> The state cannot create healthy relationships; it can only seek to foster the conditions in which close personal relationships that are reasonably equal, mutually committed, respectful and safe can flourish.
> . . .
> There are many instances where the law imposes rights and responsibilities on the basis of a particular kind of relationship, rather than examining the nature of that relationship. In other words, rights and responsibilities are imposed on the basis of the status rather than the function of a relationship." See http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp [Last visited 25 January 2005]. Executive Summary, 21 December 2001.

[32] Goldblatt above n 14 at 617.

[33] Incomplete research I have done indicates the last writer to oppose recognition of cohabitation was Hahlo in 1985. See Hahlo 'Cohabitation, Concubinage and the Common Law Marriage' in Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (Juta, 1983) at 262-3. See too Hahlo *The South African Law of Husband and Wife* 5 ed (Juta, 1985) at 35-42.

[34] Above n 14 at 616-7.

different types of family and should be included within the definition of family for the purposes of family law.[35]

[172] The new way of looking at family law represents an emphatic shift from what the SALRC Paper refers to as a definitional approach to conjugal rights and responsibilities, towards a functional one. (I believe that it is this shift that lies at the centre of my divergence from the majority judgment). According to the definitional argument, only those who comply with the current definition of marriage are entitled to the rights and obligations attached to marriage, and only a legally valid marriage can create a family worthy of legal protection.[36] The SALRC Paper offers its own reply. Against this argument, it states, one may put what has been referred to as the functional response, which emanates from the argument that marriage changes over time and that the time has come for marriage to be redefined.[37]

[173] The SALRC Paper goes on to say that supporters of the functional argument advocate the definition of marriage according to the function that it serves and argue that other relationships can also fulfil the functions that are traditionally conceived to be attributes of marriage only.[38] Such an approach looks beyond biology and the legal requirement of marriage by considering the way in which a group of people function. As a result it has been said that

[35] Id at 610-11.

[36] Above n 24 at 164 para 7.1.17.

[37] Id at 165 para 7.1.18.

[38] Id

> "[w]hen supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression. . . . [E]ven married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences."[39]

It is also submitted that it is an

> "unjustified generalisation to contend that unmarried couples . . . are not committed to their relationships . . . . Therefore, to regard marriage as a guarantee that the family created thereby would have certain characteristics is a misrepresentation [as these] characteristics could also be present in other relationships."[40]

[174] The SALRC Paper suggests that conditions in South Africa today require a shift from a purely definitional approach to marriage to a functional approach to the family

> "[b]ecause the exclusive nature of the common-law definition of marriage does not reflect social reality, [and it has thus] become necessary under certain legislation to adopt a functional approach to defining family status, with the result that couples who do not fit the traditional family model may be deemed spouse of one another." [41]

According to the SALRC Paper, the South African courts (and the legislator) should determine whether or not to extend common law and other legal protections to family members on this basis. It asserts furthermore that such an approach will lead to

[39] Id at 174 paras 7.1.51-7.1.52.

[40] Id at 174 paras 7.1.52-7.1.53.

[41] Id at 177 para 7.1.63.

greater fairness, will bring law in line with reality and is more likely to harmonise the law with the values underlying the Constitution.[42]

(iv) The legislative context

[175] Recent legislation has given extensive, if ad hoc, recognition to conjugal relationships outside of marriage. The acknowledgment of domestic partnerships can be traced in the pre-constitutional era to the Insolvency Act of 1936. It is noteworthy that the Constitution itself accepted this type of family unit by providing that a detained person, including a sentenced prisoner, has the right to communicate with, and be visited by, that person's spouse or partner.[43] Since 1994 a flurry of statutes has recognised domestic partnerships. These include the Medical Schemes Act of 1998, the Prevention of Domestic Violence Act of 1998, the Housing Act of 1997, the Compensation for Occupational Injuries and Diseases Act of 1997 and the Basic Conditions of Employment Act of 1997.[44]

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[42] Id at 178 para 7.1.64.

[43] Section 35(2)(f)(i).

[44] The following is an incomplete overview of the statutes indicating the legislator's acknowledgment of domestic partnerships:

The Insolvency Act 24 of 1936. Section 21(13) provides that the word "spouse" not only means wife or husband in the legal sense, but includes wife or husband by virtue of marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

The Independent Media Commission Act 148 of 1993. Section 6(1)(f) prohibits a person from being appointed or remaining a commissioner if such a person or his or her spouse, partner or associate holds an office in or with or is employed by any person or company, organization or other body, which has a direct or indirect financial interest in the telecommunications, broadcasting, or printed media industry.

The Pensions Fund Act 24 of 1956. Although section 1 (as amended by section 6 of the Pensions Fund Amendment Act 22 of 1996) does not expressly define a domestic life partner as a "dependant" in relation to a member, it does make provision for persons who are factually (but not legally) dependent on the member for maintenance. It may as a result be inferred that a person whose life partner was a member of the fund may be included as a dependant for the purpose of the Act.

The Special Pensions Act 69 of 1996. The definition of "spouse" in section 31(2)(iii) of the Act refers to "the partner . . . in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years".

The Constitution of the Republic of South Africa. Section 35(2)(f)(i), dealing with the rights of arrested, detained and accused persons, provides that such person has the right to communicate with and to be visited by his or her spouse or partner.

The Lotteries Act 57 of 1997. Section 3(7)(a)(ii), states (inter alia) that a person shall not be appointed or remain a board member if such person through his spouse or life partner (inter alia) has or obtains a direct or indirect financial interest in any lottery or gambling or associated activity. Section 3(8) states that a member of the board or his or her spouse or life partner, may not for a period of 12 months after the termination of membership of the board take up employment or receive any benefit from persons making certain applications in terms of this Act.

Compensation for Occupational Injuries and Diseases Amendment Act 130 of 1993. Section 1 states that a "dependant of an employee" includes, if there is no widow or widower, "a person with whom the employee was at the time of the employee's death living as husband and wife".

Basic Conditions of Employment Act 75 of 1997. Section 27(2)(c)(i) provides that an employer must provide an employee, at the request of the latter, three days paid leave, which the employee is entitled to take in the event of the death of the employee's spouse or life partner.

The Housing Act 107 of 1997. Section 8(6)(e)(ii)(aa) (prior to its repeal) provided that a "spouse" included a person with whom the member lived as if they were married or with whom the member habitually cohabited.

The South African Civil Aviation Authority Act 40 of 1998. Section 9(4) states that if a member of the Board, or his or her immediate family member, life partner or business associate, has any direct or indirect financial interest in any matter to be dealt with at any meeting of the Board, that member must then (inter alia) disclose the interest, not attend board meetings during consideration of the matter and may not take part as a member of the Board in the consideration of the matter. Section 11(5)(b) states that the Chief Executive Officer or his or her spouse, immediate family member, life partner or business associate, may not hold any direct or indirect financial interest in any civil aviation activity or the civil aviation industry without approval or unless such approval is open to public inspection.

The Employment Equity Act 55 of 1998. Section 1 which defines "family responsibility" includes "responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support".

The Domestic Violence Act 116 of 1998. In section 1 a "domestic relationship" is defined as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage, although they are not married to each other.

The Medical Schemes Act 131 of 1998. Section 24(2)(e) states that the Council shall not register a medical scheme unless it is satisfied that the medical scheme will not unfairly discriminate directly or indirectly against any person on arbitrary grounds which include marital status.

The Road Traffic Management Act 20 of 1999. Section 10(2) also states that where a member of the board or (inter alia) his or her life partner has any direct or indirect financial interest in any matter to be dealt with at a meeting of the board then that member should comply with all the provisions under that section and section 15 (9) states that a chief executive officer or (inter alia) his or her life partner, may not hold any direct or indirect financial interest in any road traffic activity without approval or unless such approval is open to public inspection.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Section 1 refers to "family responsibility" in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support.

[176] Of special importance are the Employment Equity Act of 1998 (the Employment Act) and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (the Equality Act). These were adopted by Parliament to give legislative expression to the need to achieve equality in South Africa. Covering as they do a wide range of activities and situations, they represent particularly strong legislative acknowledgment of the status of domestic partnerships. Thus, the Employment Act provides in section 1 that the definition of "family responsibility" includes "responsibility of the employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support."

[177] Similarly the Equality Act provides in its definition section that "family responsibility" means "responsibility in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support." The Act goes on to state that "'marital status' includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship." A key element of this definition is the acknowledgment of a relationship involving a commitment to reciprocal support. Though one does not use legislation to interpret the Constitution, the

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The Estate Duty Act 45 of 1955 as amended by section 3 of the Taxation Laws Amendment Act 5 of 2001. Section 1 provides that a 'spouse' in relation to any deceased person, includes a person who at the time of the death of such deceased person was the partner of such person in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent.

existence of express legislative purposes aimed at extending the ameliorative reach of the law, must be a factor to be considered in terms of evolving notions as to what is fair and unfair.

[178] The fact that many if not all statutes adopted in recent times dealing with the rights of conjugal partners expressly include non-married partners within their ambit, is indicative of a new legislative approach consistent with new values, and as the SALRC Paper suggests, with the spirit, purport and object of the Constitution. As was said in *Daniels*:[45]

> "The fact that many statutes adopted in recent times dealing with married persons expressly include parties to Muslim unions under their provisions is indicative of a new approach consistent with constitutional values. The existence of such provisions in other statutes does not imply that their absence in the Acts before us has special significance. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both last amended before the era of constitutional democracy arrived. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by the Acts, accordingly, cannot be interpreted so as to exclude them contrary to the spirit, purport and objects of the Constitution."[46]

[45] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[46] Id at para 27. [The statutes] include (See *Daniels* id) [Civil Proceedings Evidence Act 25 of 1965 (s 10A recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (s 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Pension Funds Act 24 of 1956 (s 1(b)(ii): definition of "dependant"); Special Pensions Act 69 of 1996 (s 31(b)(ii): definition of "dependant"); Government Employees Pension Law Proclamation 21 of 1996 (s 1(b)(ii): definition of "dependant" and Schedule 1 item 1.19, definition of "spouse"); Demobilisation Act 99 of 1996 (section 1(vi)(c): definition of "dependant"); Value-Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognise religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); Transfer Duty Act 40 of 1949 (s 9(1)(f) read with the definition of "spouse" in section 1 exempts from transfer duty property inherited by the surviving spouse in a religious marriage); and Estate Duty Act 45 of 1955 (s 4(q) read with the definition of "spouse" in section 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage).

[179] The increased legislative recognition being given to cohabitation suggests that cohabitation has achieved a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage. Unlike marriage, the legal response to cohabitation is not dictated by general laws. In practice it will depend upon the qualitative and quantitative nature of the cohabitation and the particular legal purpose for which it is being claimed, or denied, that a couple is cohabiting. A distinction will usually be drawn, for example, between short-term and long-term cohabitation, between the casual affair and the stable relationship, between relationships which have resulted in the birth of children and those which have not, and between couples who live together and couples who do not. Marriage law in this respect is different: you are either married with all the legal consequences that follow, or you are not. Your life circumstances are irrelevant. The consequences are to that extent invariable. By way of contrast, Parry[47] observes it is not perhaps surprising that the legal response to relationships outside marriage has been as variable as the relationships themselves. [48]

[180] Finally, government policy is clearly committed towards dealing with families in functional rather than definitional terms. Thus the Department of Population and Welfare Development defines family as follows:

> "Family: Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the

[47] Parry *The Law Relating to Cohabitation* 3 ed (Sweet and Maxwell, 1993). He was referring to the law in England, but in this respect the South African situation has not been much different.

[48] Id at 3.

> primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security."[49]

Conclusion

[181] The SALRC Paper, the thrust of legislation and academic opinion all point in the same direction. It is towards establishing a new legal landscape consistent with the values of diversity, tolerance of difference and the concern for human dignity expressed in the Constitution. The emphasis shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships. The problem at the heart of this case is that although the law has advanced rapidly in granting recognition to cohabitants in relation to public life and in respect of third parties, it has done little, if anything, to regulate relationships amongst themselves.

[182] One further introductory point needs to be made. At the hearing of the present matter none of the parties argued in principle against granting recognition to maintenance claims by cohabitant survivors. The intervention by the state was limited to seeking to ensure that the remedy does not have the effect of pre-empting comprehensive and thought-through legislative reform in the area.

PART TWO

[49] The Department of Population of Welfare Development, Draft White Paper (1996) 156, as quoted in Du Plessis and Pete *Constitutional Democracy in South Africa 1994 - 2004* (Butterworths, 2004) at 72.

FRAMING AND RESOLVING THE LEGAL QUESTION

(i) The origin and purpose of the Act

[183] It is in the above context that I turn to the question of whether the exclusion of non-married members of intimate life partnerships from the benefits of the Act constitutes unfair discrimination against them. It is convenient to begin the enquiry by examining the circumstances in which the Act was passed. Its genesis explains its object, which was to overcome a perceived source of injustice stemming from limitations of the common law.

[184] The decision of the Appellate Division in *Glazer v Glazer N.O.*[50] established that under the common law (as interpreted in 1963) no duty to support a disinherited surviving spouse rested on the deceased spouse's estate. In the course of his judgment, Steyn CJ said:

> "It is one thing to hold a divorced guilty husband liable for the maintenance of an innocent wife. To grant a needy widow a share in her husband's deceased estate or maintenance out of the assets in his estate, merely because she is indigent and without regard to other circumstances which may have influenced him in deliberately making no provision for her, is a somewhat different matter. The recognition of the obligation in the one case would not tend to prove the existence of a right in the other case."[51]

Pleas were long made for legislative intervention to overcome the harsh effects of implacably subordinating a widow's rights to her deceased husband's freedom of

[50] 1963 (4) SA 694 (A).

[51] Id at 705.

testation. They finally bore fruit in the form of the Act. The Act emanated from the recommendations of the South African Law Commission[52] to the effect that the institution of a legitimate portion[53] would not be the appropriate solution to the problem, and that a claim for maintenance should be given to the surviving spouse by operation of law. Rejecting the notion that the testator would not have disinherited the widow without good reason and that considerations of morality should play a role, the Commission stressed that the only consideration should be that of need.[54]

[185] It is convenient to set out once again the provisions of section 2(1) of the Act. They read:

> "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

In terms of section 1 of the Act "survivor" is defined as "the surviving spouse in a marriage dissolved by death."

[52] South African Law Commission Report, "Review of the Law of Succession: The Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse" Project 22 (August 1987).

[53] That is, a portion of the estate secured for the widow or other defined members of the family that cannot be disposed of by will.

[54] Above n 52 at 34. See also Keyser "Law of Persons and Family Law" in 1990 *Annual Survey of South African Law*.

[186] In *Daniels* this Court recently observed that although linguistically gender-neutral, in substantive terms the Act[55] benefited mainly widows rather than widowers. The Court went on to say:

> "The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property."[56] [Footnotes omitted.]

The Court stressed that the Act be seen as a measure intended primarily to rescue widows from possible penury. I would add that the survivor's need for maintenance is particularly acute if she finds herself penniless at a time of emotional bereavement accompanied by a dramatic change in life circumstances. To the extent, then, that the widow has a claim against the estate at least for her basic needs to be satisfied, the choice by the deceased not to provide for her by will (or simply the consequences of his failure to make a will) is to be overridden or disregarded.

(ii) The nature of the constitutional enquiry

[187] It is against this particular legal background, and within the broad legal landscape delineated in Part One of this judgment, that the question in this matter must be asked: given the manifest remedial purposes of the Act and the constitutional requirement of ensuring equal protection and benefit of the law, must the Act's ambit

[55] Together with the Intestate Succession Act 81 of 1987.

[56] Above n 45 at para 22.

be extended to cover survivors of permanent life partnerships that have not been consecrated by marriage?

[188] In what the SALRC Paper referred to as the Calvinistic and conservative atmosphere of the pre-constitutional era, the answer to this question would have been simple. People living in extra-marital unions would have been condemned at worst as living in sin, and at best as being irresponsible. They would have been disentitled from claiming any benefit whatsoever under the law. Today, however, we are not bound by the original intent of the legislators. We are living in an open and democratic society in which pluralism and diversity are acknowledged,[57] different forms of family life are tolerated by society and recognised by the law, and the right to equality is listed before any other right in our Constitution.

[189] Section 9(1) of the Constitution states that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

This provision is given further texture by section 9(3) which provides:

> "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."

[57] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

Section 9(5) goes on to say that:

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

The Constitution accordingly declares that everyone has the right to equal protection and benefit of the law, and expressly forbids unfair discrimination on the ground of marital status. So the legal issue before us is whether the non-inclusion of unmarried cohabitants under the Act violates their constitutional right not to be discriminated against on the ground of marital status.

[190] The restriction of the benefit to married survivors only, clearly differentiates them from unmarried survivors who share with them the status of bereavement and need after the death of their intimate life partner. All that distinguishes them is their marital status: the one group was married, and the other was not. This Court has held that once there is differentiation on one of the listed grounds, there is discrimination.[58] The only issue remaining, then, is whether the discrimination is fair.

(iii) The framework of the enquiry

[191] In considering the fairness of the Act it becomes vital to decide what the framework of the enquiry should be. In my view, the very nature of the equality enquiry requires a framework of reference that goes beyond the classificatory

[58] See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 35, where the argument (by myself) that at least some degree of prejudice or disadvantage had to be shown in order to establish discrimination, was rejected by the majority of the Court, which held that once there is differentiation on one of the listed grounds, discrimination is to be presumed.

landscape established by the impugned measure itself. As Wilson J pointed out in the Canadian case of *R v Turpin*:

> "[I]t is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context . . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[59]

The larger socio-legal context has already been described. I will now examine the larger constitutional and legal context. In particular, I will give the reasons why I believe that the context for the analysis should be that of family law, and not just that of matrimonial law.

[192] The point of identifying differentiation on the grounds of marital status is to save from unfair treatment those families that cannot invoke the protections provided by matrimonial law. By implication, the enquiry must shift from the relatively precise, circumscribed and rule-governed terrain of matrimonial law to the wider and evolving fields of family law. It is important to note that the present case does not involve any attack on the rules and principles of matrimonial law. Indeed, the challenge is not to any malevolence in the Act, but to the limits of its beneficence.

[193] Supporting the need for enlarging the scope of family law, Goldblatt underlines in a helpful analysis that families need to be understood on the basis of the functions

[59] *R v Turpin* (1989) 39 CRR 306 at 335-6. See *Harksen* above n 18 at para 123.

that they perform, rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.[60] The question asked is: where a domestic partnership has created responsibilities for, and expectations of, the parties, should the law play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict?[61]

[194] Goldblatt states further that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down.[62] A domestic partnership is but one amongst many different types of family and should be included within the definition of family for the purpose of family law. These relationships produce a sense of responsibility and commitment and create dependence between the parties. It also implies that the partners intend the relationship to be stable and enduring.[63]

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[60] Above n 14 at 616-7.

[61] Id at 617. Goldblatt adds that the notion of separation of public and private spheres is advanced to justify non-intervention on the basis that the realm of the family should be seen as private (at 616). It is argued that the law should not intervene in this private sphere save to protect freedom as to whether to marry or not, with the consequences that follow, and freedom of testation. (It was this approach that underlay the reasoning of Steyn CJ in *Glazer* (above n 50*)*. Goldblatt argues, however, that such a libertarian ideology should not be allowed to perpetuate inequality by giving the powerful the opportunity to remain outside the law's reach with regard to domestic relationships. She contends, correctly in my view, that the lack of legal protection afforded to domestic partnerships increases the vulnerability of the groups living within such arrangements (at 611).

[62] Above n 14 at 610-11.

[63] Id at 611.

[195] Goldblatt notes that more than a million South Africans are in non-marital relationships with their intimate partners. These 'domestic partnerships' play a crucial role in meeting the financial, emotional, reproductive and other needs of their members. There are many reasons why people, often across race and class divides, cohabit without marrying. One of the main reasons for the prevalence of such relationships in South Africa is the extent of migrancy in our country.[64] She observes that many men marry in the rural areas and form domestic partnerships in the urban areas which are often lengthy and committed.[65]

[196] The issue in the present matter, then, is not whether it is fair for the state to single out married partners for claims of maintenance, as opposed, say, to siblings or parents or life-long friends of the deceased. Nor is it to decide whether widows are entitled to special consideration not accorded to other persons who might be alone, elderly and in need. It is, first, to examine the specific purpose that the Act is intended to serve in the context of the overall objectives of family law. Then it is to determine whether in substantive terms the committed life partner of the deceased bears the same relationship to the deceased in every respect as a married partner, save for not having gone through the formalities of marriage. Finally, it is to decide if such person in such circumstances can fairly be excluded from that benefit.

(iv) Marital status as a ground of unfair discrimination

[64] Id at 610.

[65] Id

[197] In considering the question of fairness I do not believe that a mechanical application of the presumption of unfairness provided by section 9(5) of the Constitution takes the matter very far. Rather, analysis should begin with identification of the specific kinds of marginalisation and exclusion which led to the identification of marital status as a constitutionally outlawed ground of unfair discrimination.

[198] These would include the directly discriminatory practices of the past, such as penalising women for being married (e.g. women teachers and civil servants who automatically lost their employment on marriage on the basis that they could not hold down a job and look after their husbands and children at the same time); or penalising women for not being married (e.g. for bringing disgrace on an institution, neighbourhood, building or workplace by having a child 'out of wedlock'); or treating married women as losing the autonomy they formerly had as single women, because from marriage onwards they required their husband's consent for various legal transactions. Alternatively, certain posts, such as ambassadorships, were as a matter of practice reserved for married people only. In addition, there were indirect forms of disadvantage affecting people not living as a married couple. Thus single parents, widows and widowers could be denied housing, or suffer from tax or social security disadvantages or be refused mortgages because they did not fit the format of the married and male-headed-couple household.

[199] Two points need to be noted. First, it is women rather than men who in general suffered disadvantage because of their status of being married or not married. Any investigation of unfairness resulting from marital status would accordingly have to take account of the manner in which patriarchy resulted in elements of structured advantage and disadvantage being associated with the status of being and not being married.

[200] The second is that by the time the Constitution was adopted, legal disabilities associated with being married had been eliminated from the common law. Nevertheless, marital status was expressly identified in section 9(3) as one of the grounds of potential discrimination. This would seem to suggest that it was included precisely to protect the rights of people who were vulnerable not because they were married, but because they were not married. It is not easy to see why, if it was not regarded as a prototypical source of unfair discrimination in our society, marital status was itemised in section 9(3) in the first place. By implication its inclusion problematises the vulnerability of the unmarried, and directs constitutional attention to the specific difficulties they face. The obvious classes of people requiring protection against unfair discrimination in this category would be single parents, divorcees, widows, gay and lesbian couples and cohabitants.

[201] Once more it will be instructive to look at the manner in which the Canadian Supreme Court has approached the question. In *Miron,*[66] where the applicants

[66] Above n 5.

challenged an accident compensation statute on the grounds that it provided for the needs of married dependents only, McLachlin J held as follows:

> "Exclusion of unmarried partners from accident benefits available to married partners under the policy violates s. 15(1) of the *Charter*. Denial of equal benefit on the basis of marital status is established in this case, and marital status is an analogous ground of discrimination for purposes of s. 15(1). First, discrimination on that basis touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1). Persons involved in an unmarried relationship constitute an historically disadvantaged group, even though the disadvantage has greatly diminished in recent years. A third characteristic sometimes associated with analogous grounds, namely distinctions founded on personal, immutable characteristics, is also present, albeit in attenuated form. While in theory, the individual is free to choose whether to marry or not to marry, in practice the reality may be otherwise. Since the essential elements necessary to engage the overarching purpose of s. 15(1) — violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making — are present, discrimination is made out."[67]

[202] The point was reinforced in the same matter by L'Heureux-Dubé J, who stated that the question whether or not persons in relationships analogous to marriage have typically suffered historical disadvantage is not clear-cut, partly because the modern phenomenon of common law cohabitation as an alternative to marriage is a comparatively recent one. She went on to observe that the subgroups within the ground of marital status that have typically suffered the most historical disadvantage and marginalisation are individuals who are single parents, or are divorced or separated. The mere fact that the common law spouses are not in the first group that

[67] Id at 420.

comes to mind when considering historical disadvantage does not mean, however, that such relationships have escaped completely from societal opprobrium.[68] She concluded that in fact

> "non-traditional relationships outside of marriage have in the past generally been frowned upon and considered undesirable by large portions of society. Only recently have they come to be increasingly accepted. That they have become more accepted does not mean, however, that they are now accepted without reservation into the mainstream of society.
>
> . . . .
>
> I therefore have no difficulty concluding that persons in opposite-sex relationships analogous to marriage have suffered, and continue to suffer, some disadvantage, disapproval and marginalization in society, and are therefore somewhat sensitive to legislative distinctions having prejudicial effects."[69]

[203] South African society has indeed become far more tolerant than it once was towards different ways of creating families, including cohabitation not formalised in marriage. Yet there can be no doubt that many prejudices of the past linger on, particularly against women who are seen as not conducting their lives in a manner befitting their culture or religion. A certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples. By the very nature of their unconventional relationship they are regarded as either immoral, irresponsible or defiant. This will be irrespective of the actual degree of commitment, seriousness and stability of their family relationships.

[68] Id at 469.

[69] Id at 469-70.

[204] It is important to stress at this point that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred contract which constitutes the only acceptable gateway to legitimate sexual intimacy and cohabitation. Nor is it to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. Clearly their entitlement as part of their religious belief to criticise what they regard as misconduct remains unchallenged. The question, rather, is whether the state should be bound by such concerns. Going further, it is whether the state is required or entitled by these, or by more secular considerations, to give exclusive recognition for purposes of spousal maintenance to married survivors only. In seeking to answer this question, I will consider why the state gives pre-eminence to the institution of marriage, examine the constitutional values that marriage both embodies and promotes, and then ask whether these require that marriage be given absolute status under the Act.

(v) The institution of marriage

[205] In *Satchwell*[70] this Court acknowledged the role of marriage in society in the following terms:

> "In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The

[70] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

> formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance."[71]

As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides the religious and social importance of marriage, marriage as an institution was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.[72] The SALRC Paper adds that marriage is also important in regulating the legitimacy of children and the financial relationship between the parties on breakdown of the relationship.[73]

[206] As this Court said in *Dawood*,[74] "[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most, people . . . ." I would add that our painful history provides additional reasons why the institution of marriage should receive support. In the pre-democratic era the racist policies of the state involved disgraceful use of the law in ways that showed profound disrespect for the marriages of the majority. Thus the migrant labour system, administered under racist laws and enforced by racist courts, deliberately targeted the self-sufficiency and autonomy of rural African families,

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[71] Id at para 22.

[72] Above n 24 at 161-2 para 7.1.9.

[73] Id at 162.

[74] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 37.

forcing married men to live in what were called bachelor quarters in the towns. Prohibitions on inter-racial marriage and the refusal of the law to recognise Hindu and Muslim marriages prevented people from marrying persons of their choice and from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs. A host of laws permitted gross intrusion by police and state officials into the intimate lives of the majority, who as a result were compelled to live in chaotic social and legal circumstances. Special support for marriage today accordingly helps heal the ravages of the past. It promotes social stability and supports dignity by giving state recognition to fundamental choices people make about their lives.

[207] Formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and property, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. And, since the economically advantaged party is usually the man, the result in general terms is that the solemnisation of marriage tends to favour gender equality rather than the reverse.

[208] There can accordingly be no doubt that the institution of marriage is entitled to very special recognition and protection by the law. The issue, however, is not whether

marriage should in many respects be privileged. Clearly it has to be. The question is whether it must be exclusive.

[209] For convenience, I will refer to the principle of restricting claims under the Act to married survivors only, as the 'exclusivity principle'. The first constitutional issue, then, is whether the exclusivity principle is compatible with the prohibition of unfair discrimination on the grounds of marital status. If it is held to be unfair, the next matter for decision is whether such unfairness is justifiable under section 36 of the Constitution.[75] It is not easy to separate the question of fairness from that of justification, since each involves elements of proportionate balancing, and inevitably there will be overlap between them. Nevertheless I will deal with each in turn, on the basis that the focus of fairness is on the impact on the interests of those affected, while the emphasis in the case of justification is on the public interest.

(vi) The fairness of limiting the benefits of the Act to married persons only

[75] Section 36 (1) states the following:

> "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."

[210] Any consideration of the fairness of the exclusivity principle must take account of this Court's emphasis on the need to recognise diversity of family formations in South Africa. In the *First Certification* case[76] the Court stated that:

> "Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms."[77]

In *Dawood*[78] O'Regan J said that:

> "[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[Footnote omitted.]

Ackermann J made similar statements in *National Coalition (2)*,[79] dealing with the rights of same-sex life partners:

> "It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. *Sinclair and Heaton*, after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

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[76] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[77] Id at para 99.

[78] Above n 74 at para 31.

[79] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 47.

> 'But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition" and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society.'" [Reference omitted.]

Similarly, Skweyiya J in *Du Toit*[80] emphasised:

> "[F]amily life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."[Reference omitted.]

[211] In each of the above matters there was a specific legal issue which prompted a general observation about the need to adopt a flexible and evolutionary approach to family life.[81] I do not think it is appropriate to cherry-pick statements from the above cases simply on the basis that they appear to be favourable to any particular outcome in the present matter. Though all highlight the importance of the courts not being

[80] *Du Toit and Another v Minister of Welfare and Population Development and Others* (*Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 19.

[81] Thus, in the *First Certification* case the question was whether the failure of the Bill of Rights expressly to include a right to marry and constitute a family was inconsistent with one of the principles binding on the Constitutional Assembly. In *Dawood* the reminder about diversity and not entrenching particular forms of family, was expressed. *National Coalition (2)* and *Du Toit* were both concerned with same-sex couples who, in terms of the common law definition of marriage and in terms of the Marriage Act 25 of 1961, were not able to get their unions recognised as marriages even if they so wished. The same jurisprudential movement away from giving legal recognition only to registered marriages was reflected in *Daniels*, which dealt in part with the Act which is being considered in the present matter.

bound by traditional views of how families should properly be constituted, none deals expressly and directly with the issue of the rights of unmarried heterosexual life partners. Indeed, each case underlines how important its specific social, historical and legal context is.[82]

[212] The one unifying theme lurking in the evolving approach to all the different forms of family units being created is that the general purpose of family law is to promote stability, responsibility and equity in intimate family relations. In this context it is significant that the specific objective of the Act is to furnish a preferred claim to a survivor who is not otherwise provided for and finds herself in need. In the present matter, hardship on its own, even if associated with the status of not being married, would not in itself be sufficient to establish unfairness. The Constitution does not seek to take to its bosom and respond to all the inequities to be found in our

[82] Thus the cases concerning the rights of same-sex partners can be distinguished from the present one on the basis that gay and lesbian couples could not marry, even if they wished to do so. At the same time, these cases established that difficulties of proving that such unions constituted permanent life partnerships, could be overcome, and gave guidance as to how this should be done. In *Daniels*, on the other hand, there was no legal impediment to persons who were Muslim from formalising their marriages under the Marriage Act, which they could do either by following up their religious ceremonies with a civil one, or else by being married by an Imam who was recognised as a marriage officer. The exercise of choice not to regularise the unions under the Marriage Act had to be understood in the context of the hegemonic exclusion from recognition of Muslim marriages effected by the common law as applied by the courts in the pre-constitutional era. There was thus no reason for interpreting the word "spouse" in the Act (as well as in the Intestate Succession Act) so as not to include them. In that matter, then, the fact that they chose not to formalise their marriages under the Marriage Act did not debar them from claiming maintenance under the Act (or a share of the estate under the Intestate Succession Act). I will go no further than suggesting that the cases provide three indications of indirect relevance to the issues before us. The first is that, while pronouncing emphatically on the need not to straight-jacket families in conventional forms, this Court has expressly refrained from taking any position for or against the recognition of heterosexual unmarried life partnerships. The second is that in relation to questions of how to prove the existence of permanent life partnerships, one may say that in the case of a non-formalised union, where there is a judicial will, there will be a judicial way, and problems of proof will be overcome. The third is that a choice not to formalise one's relationship under the Marriage Act will not inevitably and of itself extinguish a claim by a survivor to maintenance under the Act (*Daniels* above n 45). It is the context that must be decisive, and in particular the social, political and legal factors which are said to have produced the discriminatory treatment resulting in unfairness.

society. Not every unfairness in life becomes unfairness in law. In order for unfairness in a constitutional sense to be established, there must be a specific link between the survivor's intimate relationship with the deceased, her state of need, the overall appropriateness in the circumstances of debarring her from being able to claim maintenance, and the resulting impact on her dignity of re-inforcing the negative type-casting of her as an unworthy person because she was not married.

[213] The critical question accordingly must be: is there a familial nexus of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased had been married? I believe that there are in fact at least two circumstances in which, applying this test, it would be unfair to exclude permanent, non-married life partners from the benefits of the Act.

[214] The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. The unfairness of the exclusion would be particularly evident if the undertakings had been expressed in the form of a legal document. Such a document would satisfy the need to have certainty, at least inasmuch as it establishes a clear commitment to provide mutual support within their respective means and according to their particular needs. Like a marriage certificate, the document would thus both prove the seriousness of the commitment and at the same time satisfy the need for certainty.

[215] What should be central, however, is the serious content of the mutual commitment and not the particular form in which it is expressed. Thus the undertaking could be inferred from conduct that clearly established a relationship acknowledging a mutual duty of support. In *Satchwell*[83] Madala J pointed out that:

> "[H]istorically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value.
>
> . . . .
>
> The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty exists or not will depend on the circumstances of each case."[84]

These sentiments were directed specifically at the situation of same-sex couples. I believe that a similar approach would be apposite in the case of cohabitants. What *Satchwell* establishes is that one can infer as a matter of fact whether a duty exists, not from any principle of the common law, but from the actual life circumstances of the parties in each case.

[216] Unless the purpose of the Maintenance Act is to stigmatise unmarried life partners as being beyond the pale, I can see little reason in fairness why the

[83] Above n 70.

[84] Id at paras 22 and 25.

responsibility for maintenance should not survive the death of a partner where either by express or by tacit agreement, each has undertaken as part of their relationship to support the other within his or her means. If anything, the element of voluntarism and autonomy is particularly strong in these circumstances. Resistant to acknowledging the need to respect such undertakings are notions in society of 'living in sin' and 'bohemianism', reminiscent of stereotypical notions imposed by the intransigent 'Calvinist and conservative' public morality of yesteryear. Whether consciously expressed or unconsciously held, these are inappropriate for an open and democratic society that acknowledges diversity of lifestyle and bases itself on respect for human dignity, equality and freedom.

[217] In considering the claims of manifestly meritorious survivors any eagerness to uphold mainstream respectability must accordingly cede to the need to acknowledge the reality of committed, if heterodox, family relationships. The issue should not be seen exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves, but as one of the integrity of the family relationship. Conventional condemnation of such relationships, though less powerful than it used to be, is a dangerous backcloth against which to consider fundamental rights. The danger lies precisely in the apparently natural and commonsensical character of regarding marriage as normal and anything outside of it as deviant, thoughtless, bizarre or objectionable.

[218] Secondly, I am of the view that responsibility for maintenance can arise not only from express or tacit agreement but directly from the nature of the particular life partnership itself. The critical factor will be whether the relationship was such as to produce dependency for the party who, in material terms at least, was the weaker and more vulnerable one (and who, in all probability, would have been unable to insist that the deceased enter into formal marriage). The reciprocity would be based on care and concern rather than on providing equal support in material or financial terms.

[219] One thinks of the woman who bore children fathered by the deceased, looked after them in infancy, saw them through school, cared for the home, attended to the needs of the deceased and nursed him through sickness and the infirmities of old age. While he earned and accumulated assets, she nurtured the family and remained penniless. Because of the way in which our patriarchal society has allocated roles and responsibilities, it will not have been unusual for the deceased to have accumulated assets and paid towards the upkeep of the home, while the survivor contributed what she had to offer, namely, her care and sweat equity. The deceased might in fact have resisted requests by her that they get married in terms of their religion or before a magistrate. Yet whether or not she can show that she sought marriage and he did not, the crucial fact remains that there is a direct relationship between her present need and her past relationship with the deceased. In the words of the Equality Act, what matters is whether in the relationship there was a commitment to reciprocal support.

[220] In the not uncommon circumstances mentioned above the nexus between the survivor and the estate is so strong that I do not think any meaningful distinction can be drawn between what is legally unfair and what is socially and morally unfair. It must be borne in mind that the claim is not being brought to establish unfairness under the common law, or even to show that the common law itself is unfair. The issue is whether the statute, interpreted in the light of the common law as it stands, impacts unfairly on a class of persons because of their marital status. Had the purpose of the Act been primarily to promote marriage as an institution, it might not have been unfair to exclude unmarried people from its reach. The purpose of the Act, however, was to provide a statutory claim against the estate for recently bereaved widows in need. The key ingredients are the familial relationship, intimacy and need. Taking them in combination, in the circumstances of the very typical example given above, I conclude that to exclude the survivor simply because she has no marriage certificate, is not only socially harsh, it is legally unfair.

[221] Maintenance by its nature is concerned with survival. Relegation to poverty, coupled with the imputation of having been a lawless interloper in the life of the deceased, severely affronts the dignity of the survivor. The indignity is all the greater where the relationship with the deceased was marked by intense mutuality of concern and freely given reciprocal support.[85] Where legal formulae function in a

[85] The disrespect is intensified if the only question asked relates to who contractually undertook to provide money or goods. Contributions are made according to ability and in response to need. In *Satchwell* what was at issue was a potentially sizeable claim for a survivor's pension chargeable against the public purse. In these circumstances the need to establish reciprocity of spousal-like undertakings of support was particularly strong. In the case of a claim based on subsistence needs against the very estate that the survivor contributed to through years of devoted support, the material interdependency should be seen as part of a broad mutual undertaking to provide the kind of reciprocal support that binds intimate partners together.

stereotypical manner that is impertinent to those affected, serious equality issues are engaged. As so often happens in cases where prejudice is habitual and mainstream, the hurt to those affected is not even comprehended by those who cause it, and passes unnoticed by members of the mainstream.

[222] I should add that while it is true that caring for one's family is one of life's great joys, and as such calls for no extra reward, fairness does not inevitably translate into sacrifice. As this Court said in *Baloyi*,[86] the purpose of constitutional law is to convert misfortune to be endured into injustice to be remedied.[87] It would indeed be a perverse interpretation of family law that obliged one to disregard the fact that the circumstances of need in which a typical survivor might find herself, were produced precisely by her selfless devotion to the deceased and their family during his lifetime. I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

[223] The issues are not simple. There is a great social need to promote marriage as an institution which provides stability, security and predictability for intimate family relations. By so doing our society stresses the importance of people taking responsibility for their lives, and showing respect for the fact that they are members of

[86] Above n 20.

[87] Id at para 12.

a law-governed and interdependent community. It encourages self-reliance and self empowerment; helps people escape from a world made up of victimisers and victims into one consisting of free and equal people; and induces the previously disadvantaged and subordinated to advance in life by calling on their inner strengths rather than allowing themselves to fall into dependence on external support.

[224] At the same time it is necessary to acknowledge and respond in a sensitive and practical manner to the fact that people have had to accommodate themselves to harsh and diverse life circumstances over which they may have had little control. Many have been obliged to shoulder burdens heavier than any notion of fairness would tolerate. All measures aimed at redistribution of such uneven loads, whether through family law or welfare law, risk being criticised as being calculated to undermine self-reliance. Yet, while over-paternalism can be disempowering and negate the very objective of achieving equality, what has disparagingly been called the concept of judicial tough love[88] can be unduly insensitive to the actual and overwhelming problems people have had to face in life. The knowledge that the law will intervene to provide basic justice will in fact assist such people to overcome a sense of helplessness and fatalism. That, indeed, is why courts intervene to protect fundamental rights. In so doing they enhance rather than undermine dignity and self-respect.

[88] Roberts *Clarence Thomas and the Tough Love Crowd* (New York University Press, 1995).

[225] The reality against which the Act must be interpreted is that many recently bereaved, elderly, and poor women find themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a state old-age pension to keep them from penury. Thus, while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other. Any consideration of the fairness or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this.

[226] It follows from the above that the exclusivity principle operates unfairly in at least two broadly defined sets of circumstance, neither of which is so far-fetched, hypothetical or unusual as to escape the net of constitutional concern. In each case the unfairness operates both directly and indirectly. In direct terms it treats the unmarried claimants in a way that disrespects the actual commitment they have shown to their families through a lifetime of endeavour, while excluding them from being potential beneficiaries under the Act. Furthermore, it tells the world that there is something unworthy and not respectable about them because they had a family without getting married. Indirectly, it impacts on all persons living in permanent intimate life partnerships outside of marriage. It reinforces the stereotype that, irrespective of the

actual character of their relationship and the reality of their commitment to each other, they are all irresponsible and unconcerned about the need to live in a good family relationship that is infused with love, concern and mutual support.

[227] There might well be other circumstances in which it would be unfair to stigmatise a surviving cohabitant as being unworthy of claiming spousal maintenance. The two examples given, however, are sufficient to establish that the Act is invalid for under-inclusivity. I conclude therefore that the blanket nature of the exclusivity principle results in unfair discrimination in conflict with section 9(3) of the Constitution.

Justifiability

[228] There appear to be two possible arguments based on public interest which could be advanced in favour of justifying retention of the exclusivity principle, in spite of the fact that it operates unfairly.

[229] The first is connected with problems of proof. The argument is that the absence of a marriage certificate makes it difficult to determine whether the life partnership ever existed or whether it continued until the death of the deceased. There are undoubtedly great advantages in terms of certainty that flow from the registration of marriages, and concomitant disadvantages related to difficulties of proof which would result from the proposed recognition for certain purposes of non-formalised cohabitation.

[230] It needs to be remembered, however, that the claim for maintenance stems from the social regard to be given to commitment, intimacy, interdependency and stability in the family. In the case of a married survivor these will be presumed to have existed as a matter of law. However brief, unstable and non-intimate the marriage might have been, the certificate alone would suffice to grant a claim. In the case of the unmarried survivor, on the other hand, the partnership relationship would have to be proved as a matter of fact.

[231] As the SALRC Paper makes clear, the problems of proof are far from insuperable.[89] The many statutes that have encompassed the rights of cohabitants since the achievement of democracy presuppose that appropriate proof can be found. The SALRC Paper shows[90] that there is rich international experience[91] that can be

[89] Above n 24 at 9 para 1.4.7.

[90] Id chapter 6 at 72-158.

[91] The Property (Relationships) Act 1984 (NSW) of New South Wales, Australia provides a useful example of a broad definition coupled with indicators for use by the court. Section 4 of the Act states the following:

"De facto relationships

(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and
(b) who are not married to one another or related by family.

(2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship,
(b) the nature and extent of common residence,
(c) whether or not a sexual relationship exists,
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
(e) the ownership, use and acquisition of property,
(f) the degree of mutual commitment to a shared life,
(g) the care and support of children,
(h) the performance of household duties,

drawn on. In addition it is possible to build on and adapt the factors already enunciated by this Court in relation to problems of proof concerning same-sex committed life partnerships.[92]

[232] In my view, then, such difficulties of proof as exist might be of relevance to the remedy that should be crafted. They do not justify the continuation of unfair treatment to manifestly meritorious survivors who find themselves in need after a lifetime of devotion to the family relationship.

[233] The second and more substantial contention put forward to justify the exclusivity principle is that any departure from it would undermine the institution of marriage, which must be supported at all costs. As this judgment has indicated, the

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(i) the reputation and public aspects of the relationship.

(3) No finding in respect of any of the matters mentioned in subsection (2)(a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship."

[92] In *National Coalition (2)* above n 79 at para 88, the following factors were considered in order to decide whether a same-sex life partnership is permanent: "the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another." The Court noted that "[n]one of these considerations are indispensable for establishing a permanent partnership."

I would add that in the case of heterosexual permanent partnerships proof would generally be easier. There would be a much greater likelihood of children, and not having had to cope with homophobia, the partners would have been freer to associate in public as an intimate couple.

institution of marriage plays a particularly important role in South Africa today and must without doubt be supported by the law. It is not clear to me, however, how marriage is dignified through the imposition of unfairness on those who for one reason or another live their lives outside of it.

[234] The law would continue to privilege marriage, even if partnerships are given limited recognition. The purpose of family law is to promote stability and fairness in family relationships. Marriage is the most widely recognised and most straightforward way of achieving this. The law recognises this fact. Mere production of a marriage certificate is sufficient to establish the degree of commitment and seriousness that the Act requires. No proof need be provided of permanency, intimacy, cohabitation, fidelity or shared lives. The law attributes to marriage all these qualities in irrebutable fashion. It will continue to privilege married survivors. Thus, even if the executors of the estate could show that none of the above qualities existed in fact, the survivor would still be able to lodge a claim for maintenance, simply on the basis that she and the deceased had been married.

[235] Furthermore, whether or not Parliament decides one day to narrow or eliminate the gap between married couples and unmarried life partners, I do not believe that in the interim the institution of marriage can only survive if alternative forms of family organisation are disregarded in all circumstances. Indeed, the element of voluntariness which lies at the heart of marriage is threatened rather than enhanced if

people feel coerced into marrying for fear of adverse consequences if they fail to do so.

[236] It follows that the continued blanket exclusion of domestic partners from the ambit of the Act, irrespective of the degree of commitment shown to the family by the survivor, cannot be justified. The Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships as identified above, from pursuing claims for maintenance.

PART THREE

THE REMEDY

[237] The Minister of Justice and Constitutional Development points out that a law reform process is currently underway which seeks to make a determination on whether domestic partnerships should be protected, and if so, exactly how that protection should be secured. She states that the South African Law Reform Commission is considering proposals for law reform with regard to the following issues:

- whether domestic partnerships should be legally recognised and regulated;
- whether marital rights and obligations should be further extended to domestic partnerships;
- whether a scheme of registered partnerships should be introduced;

- whether marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;
- whether legislation should provide for same-sex marriage; and
- whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

There are various options currently being considered by the South African Law Reform Commission. These may be broadly divided into the following categories:

1.1. Same sex partnerships;

1.2. Registered partnerships; or

1.3. Unregistered partnerships.

The Minister accordingly avers that the backdrop against which relief by this Court must be viewed is that it should not stifle the law reform process that is currently underway.

[238] I find these arguments persuasive. The very factor which gives rise to constitutional concern, namely, the huge variety of non-standard family relationships in South Africa, is the one that makes crafting a remedy in the present matter particularly difficult. Problems of proof arise, and although not insuperable, as the gay and lesbian permanent life partnership cases showed, they pose difficulties. There are problems about de facto polygamy. There are difficulties of overlap and interaction between various statutes, as well as potential impact on the common law.

Third parties stand to be affected. It has implications for inheritance law. Above all, we are concerned with sensitive social issues requiring maximum impact from all concerned. They cry out for democratic debate and legislative solution. I believe that over-ambitious judicial prescription could impede comprehensive legislative reform and retard rather than advance the achievement of fairness in this field.

[239] In these circumstances I believe the best way forward is to follow a non-prescriptive remedial path. I would declare the Act to be unconstitutional to the extent of the inconsistency outlined in this judgment, and suspend the operation of the declaration of invalidity for two years. This would give Parliament a free hand as to how the under-inclusiveness of the Act should best be remedied.

[240] The question then arises as to whether a special order would need to be made to vindicate any entitlement of the applicant in this matter. I believe not. This is not because I have doubts as to whether her relationship was of a kind that merited the protection of the Act. Acceptance of a duty of mutual support was built into the relationship of interdependence between herself and the deceased. This was not a casual affair but a committed, enduring and intensely intimate[93] marriage-like relationship, one that survived over many years all the stresses of the bipolar condition which affected the moods of the deceased. She provided what she had to offer,

[93] As the Canadian Law Commission points out in its report on recognising and supporting close personal adult legal relationships:

> "People value their close personal relationships for the quality of care and support they provide. Intimates usually provide the most meaningful forms of care and support, such as sharing resources to provide food, shelter and clothing, providing personal services and guidance, attending to emotional needs, volunteering information or advice, or using abilities or skills to offer assistance in solving problems." Above n 31.

namely, companionship, management of the household and personal support in every way, while he contributed companionship and a regular allowance for her needs and the needs of the household. Tacitly, if not expressly, a clear duty of mutual support was undertaken. What deprives her of the right to be a claimant now is the fact that reasonable provision has in fact been made for her under the will.

[241] It should be noted, however, that an important part of her objective in bringing the case (with the support of the Women's Legal Centre) was to highlight the marginalisation by the law of women cohabitants in situations similar to hers. I believe that guided by the principles outlined above, the legislature is constitutionally obliged to determine and provide for the circumstances in which permanent life partnerships should qualify for maintenance. In the result, to the extent that in my view the litigation should lead to a declaration of invalidity on the grounds of under-inclusivity, the applicant should have the satisfaction of succeeding in her moral objective, if not in her material one.

[242] Since preparing this judgment I have had the opportunity of reading the judgment by Mokgoro and O'Regan JJ. In succinct terms, and through a close examination of how family law operates in the broad landscape of our legal system today, it captures core aspects of the reasoning which I believe should govern this matter. Though I prefer to locate the issues in a wider context, I align myself with the specific considerations they advance, and concur in the order they propose.

For the appellant:	A Katz SC and P Farlam instructed by CK Friedlander Shandling Volks Attorneys.
For the first and second respondents:	G J Marcus SC and S Cowen instructed by the Women's Legal Centre.
For the third and fourth respondents:	K Pillay instructed by the State Attorney (Cape Town).
For the amicus curiae:	K Pillay instructed by Webber Wentzel Bowens.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 83/08
[2009] ZACC 19

FATIMA GABIE HASSAM	Applicant
versus	
JOHAN HERMANUS JACOBS NO	First Respondent
MASTER OF THE HIGH COURT	Second Respondent
MARIAM HASSAM	Third Respondent
MARIAM HASSAM NO	Fourth Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
with	
MUSLIM YOUTH MOVEMENT OF SOUTH AFRICA	First Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Second Amicus Curiae

Heard on : 19 February 2009

Decided on : 15 July 2009

JUDGMENT

NKABINDE J:

Introduction

[1] Before us is an application for confirmation of a declaration of constitutional invalidity of section 1(4)(f) of the Intestate Succession Act[1] (the Act) made by Van Reenen J in the Western Cape High Court, Cape Town.[2] The declaration has been referred to this Court pursuant to section 172(2)(a) of the Constitution.[3] The impugned provisions were found to exclude widows of polygynous[4] marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Act. In essence, this case concerns the proprietary consequences of a polygynous Muslim marriage within the context of intestate succession.

[2] The pertinent parts of the order of the High Court read:

> "23.2 It is declared that section 1(4)(f) of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution, to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.
>
> 23.3 Section 1(4)(f) of the Intestate Succession Act 81 of 1987 is to be read as though the whole of it was substituted by the following:
>
> 'In the application of sections 1(1)(c)(i) to the estate of a deceased person who is survived by more than one spouse:

[1] 81 of 1987.

[2] Reported as *Hassam v Jacobs NO and Others* [2008] 4 All SA 350 (C).

[3] Section 172(2)(a) provides:

> "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."

[4] "Polygyny" means having more than one wife whereas "polygamy" means having more than one wife or husband see *Concise Oxford English Dictionary* 7ed (Oxford University Press 2005). According to the tenets of Muslim personal law, only men may have more than one spouse, so it is more accurate to speak of polygyny than polygamy. See the helpful discussion of these terms in Bennett *Customary Law in South Africa* (Juta, Cape Town 2004) at 243.

(a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) Notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.'"

Brief facts

[3] The facts relating to this case have been set out in the judgment of the High Court and need not be restated in detail.[5] It suffices, for the purpose of this judgment, to state that the applicant was married to Mr Ebrahim Hassam (the deceased) in accordance with Muslim rites. The deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites without the applicant's knowledge or consent. The deceased died intestate in August 2001. His death certificate shows that he was "never married". The first respondent refused to regard the applicant as a spouse for the purposes of the Act.

[5] Above n 2 at paras 2-4.

[4] The first respondent is cited in his official capacity as the executor of the deceased's estate. He abides by the decision of this Court. The Master of the High Court is the second respondent, while the deceased's second wife is cited as the third and fourth respondent; she is cited both in her personal capacity and in her capacity as the mother and natural guardian of the three minor children born of her marriage with the deceased. Neither opposes the application. The fifth respondent, the Minister for Justice and Constitutional Development (the Minister), filed written submissions and supported the application for confirmation of the order of the High Court. The Muslim Youth Movement of South Africa (the MYM)[6] and the Women's Legal Centre Trust (the Trust),[7] which were admitted as amici curiae, filed helpful submissions and supported the confirmation of the declaration of constitutional invalidity.

Proceedings in the High Court

[5] The applicant approached the High Court and initially sought an order, among other things, entitling her to be recognised as a spouse and surviving spouse of the deceased for the purposes of the Act and the Maintenance of Surviving Spouses Act (Maintenance Act),[8] respectively, and directing the executor of the deceased's estate

[6] The MYM is a registered non-profit organisation involved in welfare and education programmes centred on the mobilisation of the Muslim youth and the greater Muslim community. In particular it has as one of its objectives the protection of women's rights within the Muslim community.

[7] The Trust is a non-governmental organisation which has as its core objective the advancement and protection of human rights of all women in South Africa through litigation. It was admitted as amicus curiae in the proceedings before the High Court.

[8] 27 of 1990.

to give effect to that recognition. She also sought costs in the event the application was opposed.

[6] The executor questioned the validity of the applicant's marriage to the deceased. In particular, he questioned whether their marriage was still extant at the time of the deceased's death. If it was, it was contended that the deceased would have been involved in a "polygamous relationship" with the applicant and Mrs Mariam Hassam. Save for the executor, none of the respondents had placed the validity of the deceased's marriage to the applicant in dispute. The High Court, relying on the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[9] found that the marriage was extant at the time of the deceased's death.[10] No one has challenged this finding and we proceed on the basis that the marriage subsisted at the time of the deceased's death. The applicant also challenged the constitutional validity of section 1(4) of the Act.[11] She maintained that the word "spouse" in that section should include a husband or wife married in terms of Muslim rites regardless of whether the marriage is monogamous or polygynous. By excluding her from the definition of "spouse" because she was party to a polygynous union, the applicant contended that the Act unfairly limits her right to religious freedom and equality before the law.

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[9] 1984 (3) SA 623 (A). See also *Van der Merwe and Another v Taylor and Others* [2007] ZACC 16; 2007 (11) BCLR 1167 (CC); 2008 (1) SA 1 (CC) at fn 39 where the rule was formulated as follows:

> "According to this rule a court in motion proceedings, in determining whether a case is made out, must examine the undisputed averments of the applicant together with the averments of the respondent."

[10] Above n 2 at para 8.

[11] In a notice in terms of Rule 16A of the Uniform Rules of Court in which she had also challenged the constitutional validity of certain provisions of the Maintenance Act. She contended that the term "survivor" in this Act should be read to include a surviving spouse or spouses of a polygynous Muslim union. The High Court did not declare the impugned provisions of the Maintenance Act unconstitutional and little therefore need be said further about it.

[7] The High Court then considered the constitutionality of the impugned provision against the factual backdrop that the applicant was a party to a polygynous Muslim marriage who sought to inherit intestate following the death of her husband. Having had regard to *Daniels v Campbell NO and Others*,[12] the High Court considered whether an interpretation which fails to accord widows in polygynous Muslim marriages the benefits provided for in the Act passes constitutional muster. The High Court held:

> "Marriages concluded under Muslim private law are potentially polygynous as the male in such a union, subject to compliance with the onerous prescripts of the Qur'an, is permitted to marry more than one woman. Unless the concept 'spouse' . . . [is] construed to encompass also widows of polygynous Muslim marriages *the practical effect would be that the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the right accorded them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law) and culture but would also infringe their right to dignity* . . . [D]iscrimination of that kind is presumptively unfair unless valid grounds exist under Section 36 of the Constitution for limiting their rights as regards equality and human dignity."[13] (Emphasis added.)

[8] In concluding, the High Court held that the exclusion of widows of polygynous Muslim marriages from the benefits of the Act would be unfairly discriminatory and in conflict with the equality provisions in the Constitution. The provisions of the Act, the High Court remarked, "save for section 1(4)(f), are readily capable of being

[12] [2004] ZACC 14; 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC). In this case the right to benefit intestate was extended to women in *de facto* monogamous Muslim marriages.

[13] Above n 2 at para 16. The High Court also found that "no governmental purpose that could be advanced by such a differentiation has been raised or appears to be self-evident."

applied to spouses in polygynous marriages in that each spouse would be entitled to a child's portion of the estate, if there are descendants and an equal share if there are none."[14]

In this Court

[9] The applicant's argument was largely devoted to the equality provisions in the Constitution. It was submitted that the facts clearly demonstrate unfair discrimination in respect of widows of polygynous Muslim marriages because a failure to include such widows within the ambit of the Act differentiates in three ways, between—

1. widows married in terms of the Marriage Act[15] and those in polygynous Muslim marriages;
2. widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and
3. widows in polygynous customary marriages[16] and those in polygynous Muslim marriages.

The applicant argued that widows in her position are unfairly discriminated against on the listed grounds of gender, marital status and religion.

[10] Relying on *S v Jordan and Others (Sex Worker Education & Advocacy Task Force and Others as Amici Curiae)*[17] the applicant contended that the failure to

[14] Id at para 20.

[15] 25 of 1961.

[16] In terms of the Recognition of Customary Marriages Act 120 of 1998. See also *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of RSA and Another* [2004] ZACC 17; 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC).

include spouses of polygynous Muslim marriages within the ambit of the Act indirectly discriminates against women in those marriages on the ground of gender. This discrimination stems from the reality that women constitute a particularly vulnerable segment of the population and that, in practice, the Act benefits mainly widows rather than widowers. They submitted further that the Act operates to the detriment of Muslim women but not Muslim men because only Muslim men may have multiple spouses under Islamic Law.

[11] Relying on *Daniels*, the applicant submitted that discrimination occurs on the ground of marital status in instances where legislative protection is withheld from certain relationships. In withholding certain protections provided for in the Act from persons in polygynous Muslim marriages, the applicant submitted that she is being discriminated against on the ground of marital status.

[12] In relation to the ground of religion, the applicant submitted that the exclusion of persons in polygynous Muslim marriages from the ambit of the Act will result in an infringement of sections 15, 30 and 31 of the Constitution. The conclusion of a polygynous Muslim marriage is an element of the right and freedom associated with religious and cultural choices. The failure of the Act to recognise such marriages thus also constitutes discrimination on the ground of religion.

[17] [2002] ZACC 22; 2002 (11) BCLR 1117 (CC); 2002 (6) SA 642 (CC). In that case the Court dealt with the criminal sanction which imposed differential liability on prostitutes as compared to their clients. The majority per Ngcobo J held that the impugned provision was not unconstitutional. The minority, per O'Regan and Sachs JJ, linked this differentiation to a pattern of gender disadvantage and thereby found it to constitute unfair discrimination.

[13] The applicant contended that there is no rational relationship between the differentiation in question and a legitimate governmental purpose proffered to validate it because the scheme in the Act confers benefits and imposes burdens unevenly. These submissions were supported by the Minister, the Trust and the MYM. The applicant further contended that the failure to interpret the word "spouse" so as to include widows whose marriages are celebrated in accordance with Muslim rites infringes the rights to freedom of religion, conscience, belief and opinion, and to the enjoyment of culture under sections 15(1)[18] and 31(1)[19] of the Constitution, respectively.

[14] The MYM's contentions were largely devoted to freedom of religion and culture. It was contended that women in polygynous Muslim marriages still suffer the serious effects of non-recognition. It was argued that this unequal treatment constitutes unfair discrimination on the grounds of religion. The MYM argued further that their non-recognition prejudices widows of polygynous Muslim marriages in that it fails to have regard to their lived reality and to accommodate diversity within a heterogeneous society.

[18] Section 15(1) reads:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

[19] Section 31(1) reads:

> "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[15] As to remedy, the parties contended that an order similar to that made in *Bhe*,[20] which would cater for the recognition of women in polygynous Muslim marriages as spouses for the purposes of intestate succession, would be appropriate.

[16] Before I identify the issues for determination in this matter, it is important to stress what this case is not about.

[17] This case, properly understood, is not concerned with the constitutional validity of polygynous marriages entered into in accordance with Muslim rites. The applicant advanced argument on sections 15, 30 and 31 of the Constitution. In the view I hold

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[20] Above n 16 at para 136. The Court made the following order in relation to the Intestate Succession Act:

> "5. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is declared to be inconsistent with the Constitution and invalid.
>
> 6. Subject to paragraph 7 of this order, section 1 of the Intestate Succession Act 81 of 1987 applies to the intestate deceased estates that would formerly have been governed by section 23 of the Black Administration Act 38 of 1927.
>
> 7. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:
>
> (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
>
> (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and
>
> (c) Notwithstanding the provisions of sub-paragraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.
>
> . . . .
>
> 10. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced."

of the matter, it is not necessary to become entangled in the religious and cultural debates in this matter. It should also be emphasised that this judgment does not purport to incorporate any aspect of Sharia law into South African law.

[18] This Court in *Daniels* dealt with monogamous Muslim marriages for the purposes of the Act, but left open the issue regarding the inclusion of polygynous Muslim marriages. This judgment deals with the latter.

[19] I now turn to deal with the issues raised.

Issues

[20] The following issues arise for consideration:

a) Does the exclusion of spouses in polygynous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution? In particular:

   i. Does the exclusion constitute discrimination?

   ii. If so, does it constitute unfair discrimination?

   iii. If so, is this unfair discrimination justifiable under section 36 of the Constitution?

b) If this exclusion violates section 9(3) of the Constitution, can the word "spouse" in the Act be read to include spouses in polygynous Muslim marriages?

c) If such an interpretation is not possible, what is the appropriate relief?

[21] It is convenient to now deal with the equality analysis and jurisprudence that has developed over the years through the pronouncements of this Court.

Equality jurisprudence

[22] This Court has on numerous occasions dealt with challenges to legislative enactments that were said to infringe the right to equality under section 9 of the Constitution. The resultant jurisprudence has developed into a comprehensive set of principles, which have been applied on numerous occasions and within a variety of contexts.[21] Section 9 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

[21] See in this regard *Van der Merwe v Road Accident Fund and Others* [2006] ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC); *Hoffmann v South African Airways* [2000] ZACC 17; 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC); *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); and *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC). See also *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 27, Moseneke J, as he then was, eloquently described the duty on every court when embarking on an analysis in terms of section 9. He stated that it is—

> "incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution." (Footnote omitted.)

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."

[23] The equality analysis was summarised in *Harksen*[22] as follows:

"(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).

[22] *Harksen* above n 21.

(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)."[23]

The approach to legislative interpretation

[24] Section 39(2)[24] of the Constitution enjoins every court to promote the spirit, purport and objects of the Bill of Rights when, inter alia, interpreting any legislation.[25] South African history, as this Court has stated in *Brink*,[26] is of particular relevance to the concept of equality. In *Daniels*, this Court held that "[d]iscriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution."[27] (Footnote omitted.)

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[23] Id at para 53. Although the Court in *Harksen* was concerned with section 8 of the interim Constitution, that section is the equivalent of section 9 of the Constitution albeit with some difference in wording. In *National Coalition for Gay and Lesbian Equality*, this Court stated that the postulated enquiry does not mean 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." (Above n 21 at para 18.)

This approach was also adopted in *Hoffmann* where this Court, per Ngcobo J, proceeded directly to a section 9(3) analysis because it was clear that the law in question was discriminatory. (Above n 21 at para 20.)

[24] Section 39(1) and (2) provide:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[25] See also in this regard the majority decision in *Daniels* above n 12 at para 43.

[26] *Brink* above n 21 at para 40.

[27] Above n 12 at para 20.

[25] The approach adopted in *Daniels* has been reaffirmed by this Court in a number of its subsequent decisions.[28] Ngcobo J in *Daniels*, correctly observed that apartheid legislation was—

> "construed in the context of a legal order that did not respect human dignity, equality and freedom for all people. Discrimination fuelled by prejudice was the norm. Black people were denied respect and dignity. They were regarded as inferior to other races."[29] (Footnote omitted.)

The prejudice directed at the Muslim community is evident in the pronouncement by the Appellate Division in *Ismail v Ismail*.[30] The Court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding upon all members of our society. Recognition of polygynous unions was seen as a retrograde step and entirely immoral. The Court assumed, wrongly, that the non-recognition of polygynous unions was unlikely to "cause any real hardship to the members of the Muslim communities, except, perhaps, in isolated instances."[31] That interpretive approach is indeed no longer sustainable in a society based on democratic values, social justice and fundamental human rights enshrined in our Constitution. The assumption made in *Ismail*, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.

[28] See for example, *Van der Merwe* above n 21 at para 66 where this Court held, among other things, that "when the constitutional validity of a law is challenged by invoking one or more guarantees in the Bill of Rights contextual analysis is often all important." (Footnote omitted.)

[29] Above n 12 at para 48.

[30] 1983 (1) SA 1006 (AD).

[31] Id at 1024H-1025A.

[26] Contrasting the ethos which informed the boni mores before the new constitutional order with that which informs the current constitutional dispensation, the question remains whether affording protection to spouses in polygynous Muslim marriages under the Act can be regarded as a retrograde step and entirely immoral? The answer is a resounding No. I emphasise that the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidenced by the remarks in *Ismail*.[32]

[27] In assessing the constitutional validity of the impugned legislative provisions in this case, regard must also be had to the diversity of our society which provides a blue print for our constitutional order and influences the interpretation of our supreme law – the Constitution – which in turn shapes ordinary law. Our diversity is also affirmed in the preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act,[33] the aim of which is to facilitate our transition into "a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."[34]

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[32] Id at 1024D-H contrasted with *Bhe* above n 16 at para 116 and *Khan v Khan* 2005 (2) SA 272 (TPD) at para 11.

[33] 4 of 2000.

[34] The importance of diversity was acknowledged by this Court in *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at para 60.

[28] The interpretive approach enunciated by this Court will ensure the achievement of the progressive realisation of our "transformative constitutionalism".[35] This approach resonates with the founding values now informing the assessment of the prevailing boni mores of our society and thus affords the necessary protection to those adversely affected by the exclusion under the Act. Those values have been aptly described by Mahomed CJ in *Amod v Multilateral Vehicle Accident Fund (Commisision for Gender Equality Intervening)*[36] as the "new ethos of tolerance, pluralism and religious freedom".[37]

[29] Having delineated the approach according to which the impugned provision should operate and be understood, I now turn to the determination of the issues.

a) Does the exclusion of spouses in polygynous Muslim marriages from the intestate succession regime as established by the Act violate section 9(3) of the Constitution?

[30] The High Court found that the exclusion of spouses in polygynous Muslim marriages does not pass constitutional muster. I agree. The rights to equality before the law and to equal protection of the law are foundational. The Constitution, as the

[35] See Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146. Our Constitution has been characterised among other things, as a transformative document. The concept of "transformative constitutionalism" has over the past decade found considerable resonance in our jurisprudence. See in this regard *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC) at para 232; *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 9 and 301-2. See in particular *Minister of Finance* above n 21 at para 142, where Sachs J discussed transformative constitutionalism in the context of equality.

[36] 1999 (4) SA 1319 (SCA).

[37] Id at para 20.

jurisprudence of this Court demonstrates, prohibits the breach of equality not by mere fact of difference but rather by that of discrimination.[38] This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference.

[31] The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.

[32] I am satisfied that the Act differentiates between the groups outlined above.

[33] Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed

[38] See *Prinsloo* above n 21 at paras 25-33.

contextually and in the light of our history. It is clear that in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation.[39] The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's Executors v The Master (Natal),*[40] where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".[41]

[34] The effect of the failure to afford the benefits of the Act to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid.[42] Moreover, because the denial of benefits affects only widows in polygynous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect. The grounds of discrimination can thus be understood to be overlapping on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect;

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[39] See *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at para 65.

[40] 1917 AD 302.

[41] Id at 307. See also *Ismail* above n 30 at 1026. See also the similar reasoning to be found in *Daniels* above n 12 per Ngcobo J at paras 52-3; and per Moseneke J, as he was then, in the same judgment at para 108.

[42] See *Brink* above n 21 at para 42.

marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affect by the Act's exclusion.

[35] This conclusion does not mean that the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly.

[36] I hasten to mention that the position of widows in monogamous Muslim marriages has, however, since *Daniels*, been somewhat ameliorated by their recognition as spouses under the Act. However, women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.

[37] By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of

stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.

[38] The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion. These women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife.[43]

[39] It follows therefore that the exclusion of widows in polygynous Muslim marriages from the protection of the Act is constitutionally unacceptable because it excludes them simply on the prohibited grounds. In any event, it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to a widow or widows of a polygynous Muslim

[43] It is not insignificant that South Africa ratified on 17 December 2004 the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which came into operation on 25 November 2005. Article 6 provides for the promotion and protection of the rights of women in polygynous marriages. Available at http://www.african-union.org; http://www.dfa.gov.za/foreign/index.html, accessed on 25 May 2009. This serves to highlight the vulnerability of women in polygynous marriages and their plight will only be ameliorated if they fall within the ambit of the law, which in many instances excludes women in polygynous marriages.

marriage. Discrimination on each of the listed grounds in section 9(3) is presumed to be unfair unless justified.[44]

[40] The question now arises as to whether this unfair discrimination can be justified under section 36 of the Constitution.

[41] In deciding this question regard must be had to the nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves, as well as the impact of the discrimination on those who are adversely affected. In this case, the group discriminated against are women who are a particularly vulnerable group in Muslim communities. These women are severely prejudiced by their exclusion from the protection under the Act. Cachalia[45] generally describes the consequences of non-recognition for those spouses:

> "The consequences of non-recognition are serious, particularly for the wife. Although a couple may regard themselves as married according to the tenets of their religion, the law treats them as strangers. There is therefore no legal nexus between them: there is no joint estate and any nuptial agreement is void; there are no financial obligations between the spouses *inter se* and no claim for loss of support accrues to the dependent spouse on the death of her 'husband'; she has no claim for maintenance on divorce or against her husband's deceased estate; she is effectively disinherited if her husband dies intestate".[46]

[44] Section 9(5) of the Constitution.

[45] Firoz Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" (1993) 56 *THRHR* 392.

[46] Id at 399.

[42] The exclusion of the applicant, and others similarly positioned, from the protection of the Act limits their rights under section 9 of the Constitution. The limitation of their equality rights in the circumstances is unjustifiable. It should be noted that the Minister advanced no justification for the limitation of the right to equality in this instance.

[43] Having found that the exclusion of widows in polygynous Muslim marriages constitutes unfair discrimination, the next question is whether the word "spouse" in the Act is capable of being interpreted as including spouses in such marriages. Logically speaking, if, as the High Court found, the word "spouse" is capable of being so interpreted, that would be the end of the matter. Because of the view I take of the matter, however, it is necessary to consider the issue before dealing with the remedy.

b) Can the word "spouse" in the Act be read to include spouses in polygynous Muslim marriages?

[44] It is convenient to set out the provisions of section 1(1)(a) – (f) in full. It provides:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and—
>
> (a) is survived by *a spouse*, but not by a descendant, such *spouse* shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by *a spouse*, such descendant shall inherit the intestate estate;
>
> (c) is survived by *a spouse* as well as a descendant—
>
> (i) such *spouse* shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by

the Minister of Justice by notice in the Gazette, whichever is the greater; and

(ii) such descendant shall inherit the residue (if any) of the intestate estate;

(d) is not survived by *a spouse* or descendant, but is survived—

(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or

(ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or

(e) is not survived by *a spouse* or a descendant or parent, but is survived—

(i) by—

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or

(bb) descendants of his deceased parents who are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (*aa*), as well as by any of the descendants mentioned in subparagraph (*bb*),

the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by *a spouse*, descendant, parent, or a

> descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."
> (Emphasis added.)

[45] In considering the question above, we cannot turn the clock back to 1987 when the Act was enacted or even to 1917 and 1983 when *Seedat's* and *Ismail* were decided, respectively. At the time of the enactment of the above provisions, the only marriages to which the legislature sought to afford protection were civil marriages recognised under the Marriage Act. We must now consider the meaning of the word "spouse" in the Act in light of its current place and effect in South Africa and particularly its effect on Muslim communities. Although the word "spouse" is not defined in the Act, it ought to be read through the prism of the Constitution.

[46] Marriage, as a social institution, is important to all members of South African society, irrespective of skin colour or religious background. Marriages concluded under Muslim rites are potentially polygynous as a man is permitted, subject to the Qur'anic prescripts, to marry more than one woman.[47] The significance attached to polygynous unions solemnised in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous

[47] See in this regard 'Abdur Rahman I. Doi, *Sharia: The Islamic Law* (Ta Ha Publications, London 1984) at 146, where the author quotes the following Qur'anic verse:

> "If you fear you shall not be able to deal justly with the orphans, *marry the women of your choice, two, or three or four*. But if you fear that you shall not be able to deal justly with them, then only one." (Emphasis added.)

Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.

[47] The shift in legislative policy, as clearly pointed out by the majority in *Daniels*,[48] and judicial policy as is evident in *Bhe*[49] and *Khan*,[50] are also indicative of trends consistent with the constitutional values. The majority in *Daniels* remarked that the existence of such provisions in other statutes does not imply that their absence in the Act and the Maintenance Act has special significance. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by those Acts, the Court held, cannot be interpreted so as to exclude them, contrary to the spirit, purport and objects of the Constitution.

[48] On the approach delineated above, the majority in *Daniels*, per Sachs J, held that the ordinary meaning of the word "spouse" in the Act also encompasses surviving

[48] Above n 12 at fn 40. Examples of this shift include:

> "Civil Proceedings Evidence Act 25 of 1965 (s 10A recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (s 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Pension Funds Act 24 of 1956 (s 1(b)(ii): definition of 'dependent'); Special Pensions Act 69 of 1996 (s 31(b)(ii): definition of 'dependent'); Government Employees Pension Law Proclamation 21 of 1996 (s 1(b)(ii): definition of 'dependent' and Schedule 1 item 1.19, definition of 'spouse'); Demobilisation Act 99 of 1996 (s 1 (vi)(c): definition of 'dependent'); Value Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognises religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); Transfer Duty Act 40 of 1949 (s 9(1)(f) read with the definition of 'spouse' in s 1 exempts from transfer duty, property inherited by the surviving spouse in a religious marriage); Estate Duty Act 45 of 1955 (s 4(q) read with the definition of 'spouse' in s 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage)."

See also section 2(3) of the Recognition of Customary Marriages Act 120 of 1998. It provides that, "[i]f a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages."

[49] Above n 16 at paras 116 and 136.

[50] *Khan* above n 32 at 283C-D where the court stated that, "partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance".

spouses of marriages contracted according to Muslim rites.[51] The Court opted for a broad and inclusive construction of the concept which extended the application of the Act to include the surviving spouse of a monogamous Muslim marriage entered into in accordance with Muslim rites. The Court held that the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad and inclusive construction. It remarked that any other interpretation would result in a violation of the widow's rights to equality in relation to marital status, religion and culture and would therefore violate their right to dignity. In my view, the circumstances of that case, allowed for such an interpretation for it was only due to the religion of the parties that their marriage was without recognition, thus there was no undue strain on the language. On the facts of the present case, to read the word "spouse" so as to include multiple spouses would be a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the Act. Therefore, the word "spouse" as it is used in the Act is not capable of being understood to include more than one partner to a marriage. In consequence, we must read in words to cure the defects.

c) Appropriate remedy

[49] Having concluded that section 1 of the Act constitutes an unjustifiable infringement of section 9(3) of the Constitution, I must now consider an appropriate remedy. The constitutional defect in the impugned provision is manifest. It exists because the word "spouse" in the Act excludes widows to polygynous Muslim

[51] Above n 12 at para 40.

marriages, thus denying them the protection intended for vulnerable women in our society. The dictates of justice and equity require this Court to grant an effective remedy which shall vindicate their rights.

[50] Section 172(1) of the Constitution requires a court, when deciding a constitutional matter within its power, to declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. It further provides that a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

[51] In *S v Bhulwana; S v Gwadiso*[52] this Court stressed that litigants should be granted effective relief and that it is undesirable to restrict the relief to the litigants before a court. It said:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. . . . 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".[53] (Citations omitted.)

[52] People in the position of the applicant cannot be made to wait to be afforded the protection they are entitled to. The failure to regulate their affairs upon intestacy, as

[52] [1995] ZACC 11; 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC).

[53] Id at para 32.

we have seen in this case, does and will continue to have a profoundly detrimental effect on them. This cannot be allowed.

[53] As the text stands now, the word "spouse" is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. The omission of the words "spouses" is therefore inconsistent with the Constitution and those words thus need to be added to the Act so as to cure the defect. Accordingly, I would add the words "or spouses" after each use of the word "spouse" in the Act.

[54] Whilst the declaration of invalidity must be confirmed, albeit in a slightly different manner, the order of the High Court does not entirely remedy the defects in the Act so as to ensure that just and equitable relief is finally granted to those affected and those who might potentially be affected. The extent of the defect appears in the draft order proposed by the parties.[54] The draft requires reading words into the Act to give immediate relief, which has a degree of retrospective effect.

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[54] The draft order reads:

> "1. Paragraphs 23.1.4, 23.2 and 23.3 of the High Court's order are set aside.
>
> 2. It is declared that s 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include the surviving partner in a polygynous Muslim marriage in the protection it affords to a '*spouse*'.
>
> 3. This defect is remedied as follows:
>
> 3.1 The word '*spouse*' in s 1 of the Intestate Succession Act must be read to include the surviving partner in a polygynous Muslim marriage.
>
> 3.2 In the application of ss 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act to the estate of a deceased person who is survived by more than one spouse,
>
> (a) a child's share in relation to the intestate estate of the deceased, shall be calculated by dividing

[55] The question is whether it is just and equitable to make an order of invalidity that should date back to 1994 when the interim Constitution became operative. As the Court stated in *Bhe*,[55] the declaration of constitutional invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice. The appropriate remedy is to grant an order, the retrospective effect of which should be limited to estates that have not yet been finally wound up.

Costs

[56] The High Court ordered that the costs of the application should be paid out of the estate of the deceased. In this Court, the applicant seeks costs of the application. The issue in this matter must be seen against the background of the decisions of this

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the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

(b) subject to paragraph (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

3.3 This order operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order, of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

4. If serious administrative or practical problems are experienced, any interested person may approach this court for a variation of this order."

[55] Above n 16 at para 128.

Court and its judicial policy in *Bhe* and *Daniel*s. Although the Minister stressed that his Ministry had started a process that will lead to law reform in the area that has resulted in this litigation, he did not come to Court to oppose the confirmation of the declaration of invalidity of the impugned provisions. The Minister should, in my view, pay the applicant's costs, including those costs occasioned by the employment of two counsel as well as the applicant's costs in the High Court. This is so because the applicant launched these proceedings to vindicate her constitutional rights. Moreover, she has been wholly successful.

Order

[57] In the result, I make the following order:

1. The application for confirmation is granted.
2. The order made by the Western Cape High Court, Cape Town, on 18 July 2008 is confirmed to the extent set out below.
3. Paragraphs 23.1.4, 23.2 and 23.3 of the order of the Western Cape High Court, Cape Town, are set aside and substituted as follows:

    3.1. It is declared that section 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygynous Muslim marriage in the protection it affords to "a spouse".

    3.2. Section 1 of the Intestate Succession Act 81 of 1987 must be read as though the words "or spouses" appear after the word

"spouse" wherever it appears in section 1 of the Intestate Succession Act.

3.3. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

b) subject to paragraph (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses.

3.4. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

4. If serious administrative or practical problems arise in implementation of this order, any interested person may approach this Court for a variation of this order.

5. The fifth respondent is ordered to pay the applicant's costs of this application and of the application in the Western Cape High Court, Cape Town, including costs occasioned by the employment of two counsel.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Nkabinde J.

For the Applicant:	Advocate W Trengove SC and Advocate K Pillay instructed by de Klerk and van Gend.
For the Fifth Respondent:	Advocate SL Shangisa and Advocate P Matshelo instructed by the State Attorney.
For the First Amicus Curiae:	Advocate K Pillay instructed by the Legal Resources Centre.
For the Second Amicus Curiae:	Advocate G Budlender SC and Advocate S Cowen instructed by the Women's Legal Centre Trust.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 97/07
[2009] ZACC 6

LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD Applicant

versus

NIGEL ATHOL ANDREWS First Respondent

BOPANANG CONSTRUCTION CC Second Respondent

Heard on : 13 May 2008

Decided on : 20 March 2009

JUDGMENT

KROON AJ:

Introduction

[1] This is an application for leave to appeal to this Court against a decision of the Supreme Court of Appeal[1] upholding a judgment of the High Court in Pretoria.[2] In terms of the latter judgment an application by the second respondent to have an

[1] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA).

[2] *Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, Case Nos 27225/04 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.

arbitrator's award made an order of court was granted, and an application by the applicant for the review and setting aside of the award was dismissed.

Factual Background

[2] The applicant, Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), conducts business at Polokwane, Limpopo as an electrical infrastructure contractor. The first respondent, Mr Andrews (the arbitrator), is a quantity surveyor and project manager in Johannesburg. The second respondent, Bopanang Construction CC (Bopanang), carries on business at Witbank, Mpumulanga.

[3] Mphaphuli was the main contractor on a project of Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo. On 16 May 2002 Mphaphuli and Bopanang concluded a written contract in terms of which the latter was engaged as a subcontractor to undertake certain of the work entailed in the project. On 16 January 2003, prior to completion of the work assigned to it, Bopanang vacated the site. Another entity, AA Electrical Ltd, was engaged to complete the work, and also to do certain remedial work. Disputes arose between the parties concerning the execution by Bopanang of the work undertaken by it, and whether either party was liable to make payment to the other.

[4] During April 2003 Bopanang issued summons out of the High Court claiming payment from Mphaphuli in the sum of R656 934,44 in respect of the work done by it (less payments on account). Bopanang also launched an urgent application for a

temporary interdict preventing Eskom from paying out certain moneys to Mphaphuli. These proceedings were settled on the basis that an interim interdict would issue and the dispute between the parties referred to arbitration.

[5] At a preliminary meeting on 21 July 2003 Mphaphuli and Bopanang agreed to appoint the arbitrator to undertake the arbitration and to exchange pleadings. On 1 August 2003 Bopanang submitted its statement of claim in which it claimed payment of the said amount of R656 934,44 (together with interest on the component amounts thereof from various dates), made up as reflected in the invoices annexed to the statement of claim. Attached to and forming part of the statement of claim were the papers filed by Bopanang in the High Court in the application referred to in paragraph 4 above. In those papers Bopanang had confirmed on oath that the invoices constituted an accurate record of the work it had done.

[6] Mphaphuli filed its statement of defence (alleging, inter alia, repudiation of the agreement by Bopanang) together with a counterclaim for moneys allegedly overpaid to Bopanang. Bopanang filed a reply to Mphaphuli's statement of defence and a plea to the counterclaim. A meeting was held between the parties and the arbitrator on 7 October 2003. The arbitrator was furnished with copies of all the pleadings that had been filed.

[7] On 16 October 2003 the parties finalised the terms of the reference to arbitration in a written agreement. Its relevant terms were as follows:

"ARBITRATION AGREEMENT

Whereas [Bopanang] instituted an arbitration action against [Mphaphuli] in terms whereof [Bopanang] claimed payment of an amount of R656 934,44; interest on the amount of R143 395,53 at 0.5% per week from 6 October 2002; interest on the amount of R208 937,54 at 0.5% per week from 21 April 2003; interest on the amount of R304 601,37 at 0.5% per week from 21 April 2003 and costs of suit;

And whereas [Mphaphuli] opposed the action and inter alia claimed payment of whatever amount appears to have been overpaid by [Mphaphuli] to [Bopanang];

And whereas the parties have reached an agreement regarding the finalisation of the arbitration proceedings and the mandate to be given to the Arbitrator, Mr Nigel Andrews;

Now therefore the parties agree as follows:

1. PURPOSE OF ARBITRATION

The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by [Mphaphuli] or ESKOM; the value of the work that has been done by [Bopanang]; the effect of any defects, if any, and the rectification thereof; any and all payments made to [Bopanang]. Therefore a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator.

2. AWARD OF ARBITRATOR IS FINAL AND BINDING

The final award made by the arbitrator as described in clause 1 above shall be final and binding on the parties.

3. PAYMENT TO BE MADE IN TERMS OF AWARD OF ARBITRATOR

Any payment to be made by any of the parties in terms of the award made by the arbitrator shall be due and payable to the other party within 21 calendar days of the date of the written award made by the arbitrator.

4. PROVISION OF DOCUMENTATION

The parties record that the arbitrator has already been provided with a bundle of documentation forming part of [Bopanang's] Particulars of Claim. In addition hereto, each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 [sic].

5. REQUEST FOR ADDITIONAL DOCUMENTATION

The arbitrator shall be entitled to require from any of the parties to make such further documentation available as he may require. The parties shall provide such requested documentation within 3 (three) days from such written request of the arbitrator.

6. LIASON WITH ESKOM

The arbitrator shall be entitled to liaise with ESKOM's duly authorised representatives, and to request any documentation with regard to this project from ESKOM, who is hereby authorised by both parties to make such documentation available.

7. INSPECTION AND MEASUREMENT

The arbitrator shall commence with the inspection and measurement of the work done on site on or about 27 October 2003. Each party shall provide their reasonable cooperation with the aim of completing the process as speedily as possible, and shall appoint representatives to attend the physical inspection and measurement.

. . . .

10. FULL AGREEMENT

This agreement constitutes the full and complete agreement reached between the parties and no variation, amendment, alteration, addition or omission shall be valid and binding on the parties unless reduced to writing and signed by all the parties or their duly authorised representatives."

[8] The arbitrator published his award on 23 August 2004. In terms thereof Mphaphuli was liable to Bopanang in the sum of R339 998, 82, with interest thereon as from 6 October 2002.

High Court proceedings

[9] On receipt of the award Mphaphuli's then attorney addressed a letter to the arbitrator stating that certain aspects of the award would require clarification and proposing a round table discussion thereanent. The response of the arbitrator was that the arbitration agreement did not provide for such a process. On 16 September 2004 Mphaphuli's attorney advised Bopanang's attorney that instructions had been received to take the matter on review to the High Court. Attempts by Mphaphuli to secure Bopanang's agreement for the remittal of the matter to the arbitrator were unsuccessful.

[10] When no application for review was forthcoming, Bopanang, on 18 October 2004, applied to the High Court in terms of section 31(1) of the Arbitration Act 42 of 1965[3] (Arbitration Act) for the award to be made an order of court and for judgment in its favour in the sum of R339 998, 83, plus interest.

[11] The application was opposed by Mphaphuli, which filed its answering affidavit on 13 December 2004. At the same time it launched a separate application in terms of section 32(2) of the Arbitration Act,[4] seeking relief in the form of an order—

[3] Sections 31(1) and (3) provide as follows:

> "(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
>
> . . . .
>
> (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[4] Section 32(2) provides as follows:

> "The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct."

(i) reviewing and setting aside the award; and

(ii) remitting the matter to the arbitrator for a review of the award having regard to the issues raised in the founding affidavit.

Both the arbitrator and Bopanang were cited as respondents in this application.

[12] On 7 March 2005 the arbitrator lodged his reasons and what purported to be the record in the arbitration proceedings with the Registrar, in accordance with High Court Rule 53(1)(b).[5] The document filed with the Registrar reads as follows:

> "FIRST RESPONDENT'S REASONS IN TERMS OF RULE 53(1)(b).
>
> TAKE NOTICE that First Respondent hereby furnishes his reasons, as set out in the following documents:
>
> 1. First Respondent's decision dated 23 August 2004, annexed to Applicant's Founding Affidavit as Annexure 'L4';
>
> 2. Letter by First Respondent to Niland and Pretorius Inc. dated 18 October 2004, annexed to Applicant's Founding Affidavit as Annexure 'L8'; and
>
> 3. Preliminary site measurements dated 23 August 2004 attached hereto as Annexure 'NA1'.
>
> TAKE NOTICE further that First Respondent does not wish to supplement such reasons at this time."

[13] Mphaphuli's Pretoria attorney sought instructions from its Polokwane attorney regarding the site measurements included in the record and the possible

[5] The Rule required the arbitrator to lodge the record, together with such reasons as he may wish to furnish, with the Registrar within 15 days after receipt of the notice of motion, and to notify the applicant that he had done so.

supplementation or amendment of the founding affidavit and amendment of the notice of motion. The response was that the measurements were referred to Mphaphuli but that the latter did not consider that they took the matter any further; accordingly, the matter should be enrolled as soon as possible. The Pretoria attorney thereupon advised Bopanang's attorney that Mphaphuli did not wish to amend, add to or vary the terms of its notice of motion in terms of Rule 53(4),[6] and the filing of the opposing affidavits was called for. This was done by both the arbitrator and Bopanang on 18 May 2005.

[14] On 5 August 2005 Mphaphuli, having engaged new attorneys, filed an amended notice of motion supported by an affidavit styled a supplementary founding affidavit. The substantive relief sought was—

(i) an order reviewing and setting aside the award;

(ii) a declarator that Bopanang was indebted to Mphaphuli in certain stated sums, together with an order that the award be substituted with an order that Bopanang pay the said sums; and

(iii) as an alternative to (ii), an order remitting the matter to the arbitrator to review his award having regard to the issues raised in the original founding affidavit and the supplementary founding affidavit.

[6] The Rule provides as follows:

> "The applicant may within 10 days after the Registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit."

[15] There was also a prayer for condonation of the late bringing of the initial application and for the late filing of the amended notice of motion and the supplementary founding affidavit.[7]

[16] Both the arbitrator and Bopanang filed further answering affidavits in response to the supplementary founding affidavit of Mphaphuli. The latter in turn filed affidavits in reply thereto. It also filed affidavits in reply to the first answering affidavits of the arbitrator and Bopanang (filed in response to the original founding affidavit of Mphaphuli). Mphaphuli's reply to the further answering affidavit of the arbitrator elicited a rejoinder affidavit from the latter.

[17] On 18 January 2006 Mphaphuli filed a further amended notice of motion in which the third (alternative) prayer, referred to in paragraph 14 above, was substituted with a prayer for an order referring the dispute between the parties for trial, alternatively, for the hearing of oral evidence. A further prayer was added, for an order that the six week period stipulated in section 32(2)[8] be extended to provide for the admission of Mphaphuli's original founding affidavit, as supplemented by its supplementary founding affidavit.

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[7] As recorded in n 4 above, an application in terms of section 32(2) for the remittal of a matter to the arbitrator is required to be brought within six weeks of the publication of the award. Similarly, section 33(2) provides that an application for the setting aside of an award on any of the grounds set out in section 33(1) must be brought within six weeks of the publication of the award. (The full text of section 33(1) is reproduced in n 14 below.)

Section 38 of the Arbitration Act provides as follows:

> "The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not."

[8] Above n 4.

[18] The two applications were heard together by the High Court. In the result, the Court granted Bopanang the relief it sought and dismissed Mphaphuli's application on the merits. In the course of its judgment the High Court recorded its dismissal of Mphaphuli's applications for condonation on the grounds both of an absence of a proper explanation for the delay and, more particularly, of a lack of merit in the cause of action invoked by Mphaphuli. (It may be noted that, as the High Court itself commented, the refusal of condonation had the result that there was in fact no application by Mphaphuli before it. The correct order would have been that the application be struck from the roll, not its dismissal. Be that as it may.)

The Supreme Court of Appeal proceedings

[19] The Supreme Court of Appeal upheld the High Court's decision not to grant condonation to Mphaphuli. While commenting that that should have been the end of the matter, the Court went on to give consideration to aspects relating to the merits. On that score, too, it found against Mphaphuli. It accordingly dismissed the appeal against the High Court judgment.

Condonation in this Court

[20] Mphaphuli's application for leave to appeal was filed one day late (although it was served timeously on the respondents). The reason for the late filing was unexpected pressing business exigencies on the last day for filing, resulting in the unavailability of the deponent to the affidavit in support of the application until late during that day. A proper case for condonation has been made out.

[21] The arbitrator and Bopanang also seek condonation for the late filing of their answering affidavits. In each case this was occasioned in the main by the intervention of the annual holiday season and the consequent unavailability of counsel. The grant of condonation is not opposed by Mphaphuli. A proper case for condonation has been made out.

The application for leave to appeal

[22] This Court only has jurisdiction to hear a matter if it is a constitutional matter or if it raises an issue connected with a decision on a constitutional matter.[9] That, however, is not decisive.[10] In addition, it must be shown that it is in the interests of justice that the application be granted.[11] Whether it is in the interests of justice for leave to appeal to be granted is based on a careful weighing up of all relevant factors, including the interests of the public and the prospects of success.[12]

Constitutional matter

[9] Section 167(3)(b) of the Constitution. See *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 11.

[10] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 15; *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29; *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25.

[11] See in this regard *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC) at para 24; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[12] See the cases cited above in n 9.

[23] On behalf of Mphaphuli it was argued that, having regard to the judgments of both the High Court and the Supreme Court of Appeal, the application for leave to appeal raises a series of constitutional issues regarding the relationship between arbitrations, the courts and the Constitution. In particular, it was contended that three main issues arise:

(a) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

(b) By concluding an arbitration agreement, can parties be taken to have waived fundamental aspects of their right to a fair hearing in terms of section 34 of the Constitution,[13] and if so, under what circumstances?

(c) What is the correct approach to the grounds of review set out in section 33(1) of the Arbitration Act,[14] when that section is properly interpreted in the light of the right to a fair hearing contained in section 34 of the Constitution?

It was stressed that the three aspects bear on Mphaphuli's right to a fair and impartial hearing in terms of the Arbitration Act read with section 34 of the Constitution.

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[13] Section 34 reads as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[14] Section 33(1) provides as follows:

> "Where—
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[24] Other than providing that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution,[15] the Constitution itself does not define what a constitutional matter is. The decision whether a constitutional matter is at issue or whether an issue is connected with a decision on a constitutional matter reposes in this Court.[16]

[25] In my view a number of constitutional matters are at issue. First, the case involves the interpretation of section 34 of the Constitution and its application to arbitrations held in terms of the Arbitration Act. Allied thereto is the question of the correct approach to the grounds of review set out in section 33(1) of the Arbitration Act properly interpreted in the light of the right to a fair and impartial hearing guaranteed in section 34 of the Constitution. Relevant to these questions is an application of the provisions of section 39(2) of the Constitution.[17] Second, the question arises whether, and to what extent, the parties, by entering into an arbitration agreement, are to be taken to have waived the constitutional right (entrenched in the Bill of Rights) to a fair and impartial hearing. Third, the role of the courts in confirming or setting aside arbitration awards involves the administration of justice, and that too is a constitutional issue. As was said in the early case of *Burns & Co v Burne*[18] (where an arbitrator's award was sought to be assailed on grounds similar to those invoked by Mphaphuli in the present matter): ". . . the matter is not one affecting

[15] Section 167(7) of the Constitution.

[16] Section 167(3)(c) of the Constitution.

[17] The provisions of section 39(2) are quoted in full in n 31 below.

[18] 1922 NPD 461 at 462.

only the parties to this particular dispute, but it concerns the administration of justice generally."

[26] That the administration of justice is concerned is borne out by the following considerations:

(a) Arbitration awards made orders of court may be enforced in the same manner as any judgment or order to the same effect, including execution by state mechanisms.

(b) Arbitrators have no powers to enforce their awards and the effectiveness of the private process therefore rests on the binding, even coercive, powers the state entrusts to its courts.

(c) State execution of court orders, an integral part of the resolution of disputes between parties, and which is antithetical to self-help, is an important facet of the rule of law,[19] a core constitutional precept.

[27] Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.[20]

[19] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at paras 39-43.

[20] South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001* at para 2.16; Redfern and Hunter *Law and Practice of International Commercial Arbitration* 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 *Arbitration* 3 at 4-5; *London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd* [1958] 1 WLR 271 at 278.

[28] In *Telcordia Technologies Inc v Telkom SA Ltd*[21] the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts. The decision of the Supreme Court of Appeal in the present matter was informed by this principle.[22] Resolving, for the purposes of the present case, the tension between this principle and the duty of the courts to ensure, before ordering that an arbitration award be enforced by the state, that the award was obtained in a manner that was procedurally fair, as required by section 34 of the Constitution,[23] is the key constitutional issue that arises in this case.

[29] Two further issues require mention. First, the question whether the arbitrator acted as an arbitrator or a valuer, is an issue connected with the constitutional matters referred to above. Second, to the extent that the refusal by the High Court and the Supreme Court of Appeal to grant Mphaphuli condonation is to be ascribed to a failure properly to consider constitutional imperatives, a constitutional issue is involved. At the very least, the question is an issue connected with the constitutional matters referred to above.

Interests of justice

[21] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.

[22] Above n 1 at para 14.

[23] Above n 13. The question of the applicability of section 34 to the present matter is considered below [69]-[78].

[30] The matter is of obvious importance to the parties. However, it has implications that go substantially beyond the narrow interests of the parties. As already recorded, the matter also concerns the administration of justice generally; and it does so in an area that is extremely important in the commercial world: recourse to arbitration proceedings to resolve disputes is extensive and is increasing. Moreover, important constitutional issues arise, including the extent to which an agreement such as that with which this matter is concerned can be read as amounting to a waiver of a constitutional right (the right to a fair and impartial hearing) in respect of which this Court has the benefit of the recent judgment of the Supreme Court of Appeal in *Telcordia*[24] together with the judgment of the same court in the present matter. It may be noted that while Mphaphuli did not in explicit language advert to a constitutional issue in the High Court or the Supreme Court of Appeal, the aspects invoked by it, by their nature, raised the constitutional issues referred to.[25]

[31] As will appear below, Mphaphuli has reasonable prospects of success in the appeal.

[32] I conclude accordingly that it is in the interests of justice to grant leave to appeal.

Condonation in the High Court

[24] Above n 21.

[25] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27 which dealt pertinently with the provisions of the Promotion of Administrative Justice Act 3 of 2000.

[33] The judgment of the High Court recorded that three applications by Mphaphuli for condonation required to be considered:

(a) condonation of the late filing of Mphaphuli's replies to the answering affidavits of the arbitrator and Bopanang filed in response to Mphaphuli's initial founding affidavit;

(b) condonation of the late filing of Mphaphuli's supplementary founding affidavit;

(c) condonation of the late filing of the initial founding affidavit in view of the provisions of the Arbitration Act.

[34] As already recorded, condonation was refused on the grounds both of an absence of a proper explanation for the late filing and of the lack of merits in Mphaphuli's case. The former inquiry also embraced a consideration of the nature of the contents of the documents in question. At this stage only the first inquiry will be addressed. The merits will be considered separately at a later stage. However, it may be recorded that, as will appear below, the merits of Mphaphuli's case also favoured the grant of condonation.

[35] It is necessary briefly to list what complaints were raised in the two founding affidavits. Reference will, however, only be made to aspects that are relevant for purposes of this judgment.

[36] In the initial affidavit, Mphaphuli alleged that the arbitrator had awarded Bopanang amounts for work not done by it, nor even claimed by it, and amounts in excess of those claimed by it, and had not made allowance for remedial work done by AA Electrical.

[37] In the supplementary affidavit, Mphaphuli alleged that the arbitrator failed to perform his mandate in a number of respects, that he committed manifest material errors, that he failed to afford Mphaphuli a fair hearing, and that he was biased or at least that his conduct gave rise to a reasonable perception of bias. On this score Mphaphuli, in the first place, in substance repeated the allegations referred to in the preceding paragraph, giving details in amplification thereof, including the alleged non-adherence by the arbitrator to the pleadings and the terms of the agreement between the parties, and the award by him of interest on the total amount of the capital sum awarded as from 6 October 2002 while, at best, only the sum of approximately R140 000,00 was owing on that date. In addition, Mphaphuli invoked the fact that, as the record of the arbitration proceedings revealed, the arbitrator had held three "secret" meetings with the representatives of Bopanang without the knowledge and attendance of Mphaphuli as well as the fact, also revealed by the record, that correspondence having a material bearing on the dispute between the parties (to which Mphaphuli had not been made privy, and in which certain allegedly false and misleading information had been imparted by Bopanang) had passed between the arbitrator and Bopanang. In the result, the arbitrator had also misconducted himself or

committed gross irregularities in the conduct of the arbitration and/or had exceeded his powers.

[38] Apart from the contents of the various affidavits filed by Mphaphuli, a further aspect dealt with in the judgment of the High Court was the fact that after the arbitrator had notified the parties that the record had been lodged with the Registrar, Mphaphuli's then attorney advised Bopanang's attorney that Mphaphuli did not intend to amend its notice of motion. The Court noted that there was no indication that either Mphaphuli or its attorney had demanded sight of the record. The Court further commented that Mphaphuli was in any event in possession of all the documents contained in the record. The Court then recorded its finding that Mphaphuli had through its attorney taken a considered and informed decision not to amend its notice of motion.

[39] This approach cannot be endorsed. First, the record filed by the arbitrator with the Registrar was wholly deficient, and what was filed was not of any assistance to Mphaphuli in respect of the supplementation of its initial founding affidavit. Second, the comment that Mphaphuli was in any event in possession of all the documents contained in the record (or which should have been contained in the record) constituted a misdirection on the part of the Court: specifically, Mphaphuli was not in possession of the documents which revealed the material additional aspects adverted to in paragraph 37 above. Third, Mphaphuli recorded that it had not been consulted by the attorney in respect of the question of amending its notice of motion, and the

attorney in question confirmed that he had had no mandate on that score and that he had acted in ignorance. It is not necessary to consider the question whether Mphaphuli was bound by the actions of its attorney. The communication by the attorney to his counterpart did not constitute a waiver of the right to amend the notice of motion and to supplement the grounds relied upon for the relief sought in the sense that the issue could not thereafter be revisited (nor did the High Court suggest otherwise).

[40] For purposes of the present judgment it is necessary only to consider the applications for condonation of the late filing of the initial founding affidavit and of the supplementary founding affidavit.

[41] In its papers Mphaphuli set out comprehensive explanations of the delays in question. Save in one respect, to be referred to below, the High Court judgment did not advert to these explanations. Instead, the High Court focused its attention on the substantive contents of the affidavits and its interpretation thereof (an aspect to which I revert later). The basis of the finding that there was no proper explanation for the delays does not appear from the judgment.

[42] In sum, the explanation tendered by Mphaphuli for the late filing of the supplementary affidavit was as follows:

(a) On 8 June 2005 an employee of Mphaphuli's current attorneys attended at the office of the Registrar. On inspection of the court file it was discovered that it

only contained the pleadings in the matter, but no record. Enquiries of members of the Registrar's staff elicited the answer that despite a search for the record, it could not be located.

(b) Mphaphuli's attorneys then contacted the arbitrator's attorneys in order to procure a copy of the record. Agreement between the attorneys was reached that upon receipt of such copy from the arbitrator, the Registrar would be deemed to have made the record available to Mphaphuli for the purpose of Rule 53(3).[26] The record was collected and received by Mphaphuli on 18 July 2005. (The supplementary affidavit was filed on 5 August 2005, some four days beyond the 10 day period prescribed in Rule 53(4). It should be noted further that it was this record that revealed the additional aspects of the meetings and correspondence referred to in paragraph 37 above.)

(c) The arbitration record was voluminous, extending to more than 400 pages. Supplementation of Mphaphuli's papers required close scrutiny of the record and a comparison thereof with other relevant documentation. The process was extremely time consuming and it was not feasible for it to be completed within 10 days.

(d) No prejudice to the other parties resulted from the late filing.

(e) Mphaphuli would, however, be unjustly prejudiced if denied the opportunity of amplifying its case on the basis of the contents of the record.

[26] Rule 53(3) provides inter alia that the Registrar shall make available to the applicant the record despatched to him upon such terms as the Registrar thinks appropriate to ensure its safety.

[43] The only comments in the High Court judgment bearing on this explanation are that there was no indication that Mphaphuli or its attorney had demanded sight of the record filed with the Registrar, that Mphaphuli through its attorney took a considered decision not to amend its notice of motion or to supplement its founding affidavit and that it was only when a new set of attorneys appeared on the scene that Mphaphuli relied on the "so-called unavailability of the record to now amend its papers and to practically bring a new case before court."

[44] The comments are unpersuasive. On the other hand the explanation furnished by Mphaphuli adequately explains the delay in question.

[45] The High Court held that with the supplementary founding affidavit Mphaphuli was in fact bringing a completely new application on completely different grounds from those relied on in the initial founding affidavit. That is, of course, so (subject thereto that allegations made earlier, and amplified in the later affidavit, were incorporated in support of the new application). But what the High Court appears to have overlooked is that *the new case was dictated by what the record of the arbitration proceedings revealed*. I deal further with this aspect when considering the judgment of the Supreme Court of Appeal. Suffice it to say at this stage that in the circumstances the raising of the new case was justified, and it constituted no reason to refuse condonation. In adopting a contrary view the High Court erred. In doing so it failed, as will be shown below, to consider the true nature of the case presented by Mphaphuli: In short, it viewed Mphaphuli's case as an attempt in effect to appeal

against the award of the arbitrator in that it also engaged aspects that otherwise had a bearing on the merits of the award and it failed to recognise that what Mphaphuli invoked was the fundamental right to a fair hearing, although it did recognise that alleged bias on the part of the arbitrator was relied upon. (The manner in which the High Court dealt with the last aspect is referred to below.)[27]

[46] The High Court further commented that Mphaphuli's two affidavits in reply to the answering affidavits of the arbitrator and Bopanang in response to the supplementary founding affidavit, again sought to make out a new case and further and more detailed grounds of review were put forward. In this regard, however, the High Court substantially misread the affidavits and misdirected itself. In the main the affidavits, first, answered the allegations by the arbitrator and Bopanang and, second, restated and amplified allegations it had already made, without raising new matter. In limited respects new matter was raised, but this was of a relatively minor nature.

[47] In sum, the explanation tendered by Mphaphuli for the late filing of the initial founding affidavit was as follows:

(a) The affidavit was filed approximately 14 weeks after publication of the award, and was accordingly some eight weeks out of time.

(b) The dispute arose in January 2003 and was referred to arbitration during October 2003. The arbitration award was published in August 2004. In this

[27] Below at [138]-[142].

context, so it was contended, the further delay of some two months in bringing the review application was not an unduly long period.

(c) The fundamental basis of the review application was the schedule prepared by Mphaphuli and annexed to the founding affidavit marked "L7". The preparation of the schedule entailed an enormous amount of work, requiring inter alia a comparison of Bopanang's invoices and supporting documentation containing the quantities of the supply and installation of material claimed by it, with the quantities awarded by the arbitrator. The exigencies of Mphaphuli's normal business activities also hampered the preparation of the schedule, which required to be completed to enable Mphaphuli's attorneys to proceed with the review application.

(d) The attorneys made bona fide attempts to resolve the matter and thus obviate the necessity of bringing the review application. Communications were addressed to the arbitrator and Bopanang on 13 and 14 October 2004 in which Mphaphuli's objections to the award were made known. Mphaphuli could not, however, secure agreement that the reference be remitted to the arbitrator in terms of section 32(1) of the Arbitration Act.[28]

(e) Mphaphuli conducts business in Polokwane, a considerable distance from Pretoria, and difficulties in communication with its attorneys contributed to the time taken to prepare and finalise the papers.

(f) No prejudice suffered by Bopanang weighed against the grant of condonation.

[28] Section 32(1) makes provision for the parties to remit by written agreement any matter which was referred to arbitration, to the arbitrator for reconsideration.

(It may be repeated that the review application included a prayer for the remittal of the matter to the arbitrator, relief for which section 32(2) of the Arbitration Act makes provision.)[29]

[48] As already recorded, the High Court did not advert to the above explanation. In my judgement, an adequate explanation for the delay in question was furnished. In so finding I have not lost sight of the fact that, already in its own application and in its response to Mphaphuli's initial founding affidavit, Bopanang raised the issue of an absence of an application for an extension of time, and that same was only sought when the supplementary affidavit was filed.

[49] In *Giddey NO v JC Barnard and Partners*[30] this Court had occasion to deal with the question of the exercise of a discretion by the High Court in terms of the provisions of Rule 47(3), which empowers a court to require a litigant to furnish security for the costs of its opponent in the litigation in question. It was noted, inter alia, that for courts to function fairly, they must have rules that regulate their proceedings; these rules often require parties to take certain steps on pain of being prevented from proceeding with a claim or a defence; to that extent they constitute a limitation of the right to access to court; in the absence of a constitutional challenge to a particular rule having that effect a litigant's only complaint can be that the Rule was not properly applied by the court; very often the interpretation and application of the Rule will require a consideration of the provisions of the Constitution, as section 39(2)

[29] Above n 4.

[30] [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC).

of the Constitution instructs;[31] a court that fails adequately to consider the relevant constitutional provisions will not have properly applied the rules at all.[32]

[50] Where the exercise of a discretion in the application of a rule contemplates that the court may choose from a range of options, it is a discretion in the strict sense.[33] The ordinary approach on appeal to the exercise of such a discretion is that the appellate court will not consider whether the decision reached by the court of first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.[34]

[51] The issue of condonation in the present case required the exercise of a discretion in the strict sense. In the light of what has been set out earlier (and leaving aside considerations relating to the merits) the refusal of the High Court to grant the condonation sought was vitiated by misdirection, did not constitute a judicial exercise of discretion and resulted in an impermissible and unconstitutional denial of Mphaphuli's right of access to court. The refusal accordingly falls to be reversed.

Condonation in the Supreme Court of Appeal

[52] The Supreme Court of Appeal stated as follows:

[31] Section 39(2) of the Constitution provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[32] Above n 30 at para 16.

[33] Id at paras 19-23.

[34] Id.

> "The grounds for any review, as well as the facts and circumstances upon which a litigant wishes to rely, have to be set out in its founding affidavit amplified insofar as may be necessary by a supplementary affidavit after the receipt of the record from the presiding officer, obviously based on the new information that has since become available.[35] The original founding affidavit filed by Lufuno comprised ten pages excluding annexures. Lufuno abused its right to amplify in this case by filing a supplementary affidavit of 80 pages in which it raised all manner of new allegations.
>
> The only new information that emerged from the record of the arbitration proceedings filed by Andrews in terms of rule 53(1)(b) was what Lufuno described as evidence of three 'secret meetings' between Andrews and Bopanang's representative. That new information could hardly justify the lengthy supplementary affidavit that had been filed, ostensibly in terms of rule 53(4). Leaving aside for the moment the secret meetings to which I will return, Lufuno sought in effect to make out a completely new case in its supplementary affidavit. That plainly was not authorised by rule 53 or by any other principle of our law. In those circumstances, it seems to me, the court below can hardly be faulted for having exercised its judicial discretion against Lufuno under s 38 of the Act. It has not been suggested that the discretion was exercised capriciously or upon a wrong principle or upon any other ground justifying interference by a court of appeal. That, one would have thought, would have been the end of the matter".[36] (Footnotes amended.)

[53] In a number of respects these comments cannot be endorsed. The first and fundamental aspect is that there can, in my view, be no objection in principle to a new case being made out in terms of Rule 53(4) *where the record in question provides justification therefor*.[37]

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[35] Reference was made to *Telcordia* above n 21.

[36] *Lufuno Mphaphuli* above n 1 at paras 15-6.

[37] Cf *Pieters v Administrateur, Suidwes-Afrika en 'n Ander* 1972 (2) SA 220 (SWA); *Muller and Another v The Master and Others* 1991 (2) SA 217 (N) at 220D-E. See also *Telcordia* above n 21 at para 32, which reads as follows:

> "The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a

[54] Second, neither the use of the word "abused" nor the comment "all manner of new allegations" was justified. Prolix in certain respects the affidavit may have been, but that is another matter, and an analysis of the affidavit (which, incidentally, also embraced the grounds for the applications for condonation) does not reveal that any material allegation therein was not germane to the case being put forward. As stated above, Mphaphuli was entitled to raise the allegations in terms of Rule 53(4), and it was also entitled to incorporate and amplify previously registered complaints, insofar as they were relevant, in support of the new case made out in the supplementary affidavit.

[55] Third, evidence of the three meetings was not the only new information disclosed by the record. In addition, evidence of correspondence between the arbitrator and Bopanang, to which Mphaphuli was not made privy, was also revealed. The Supreme Court of Appeal made no reference thereto. (Nor for that matter did the High Court.)

[56] The Supreme Court of Appeal approached the question of condonation on a restricted basis: in essence what it held (wrongly) to be an impermissible attempt by Mphaphuli to make out a new case in its supplementary affidavit. No consideration was given to the explanation of Mphaphuli for the delay, nor to constitutional imperatives.

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supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available." (Footnote omitted.)

[57] In my view, therefore, while the Supreme Court of Appeal did go on to consider aspects relating to Mphaphuli's complaints on the merits of its case (an aspect to which I revert later), its endorsement of the High Court's refusal of condonation cannot be supported.

Certain aspects arising out of the judgments of the High Court and the Supreme Court of Appeal

[58] It is unnecessary to consider in any detail the comments of the High Court concerning Mphaphuli's not having been entitled in effect to appeal against the arbitrator's award, which comments were valid (and in fact the High Court recorded that Mphaphuli abandoned any relief which would have fallen under the rubric of an appeal). That is not the case that Mphaphuli asks this Court to consider.

[59] Two observations require to be made, however, concerning the High Court's apparent interpretation of the arbitrator's mandate. First, as will be shown later, it was not simply, as the High Court judgment suggests, a matter of inspection and re-measurement. Second, the statement by the Court, said to be based on what the arbitrator had alleged, that after the re-measurement the parties reached agreement as to the work actually done by Bopanang, must be viewed against a reading of the arbitrator's affidavits in their entirety. While there are statements in his affidavits to the effect that the re-measurement would be conclusive as the parties had reached agreement on the work done by Bopanang and that was the work measured, he in fact

elsewhere made it clear that after the re-measurement (on which he said there was agreement) he was still required to embark on a determination of what part of the work re-measured had actually been done by Bopanang (on which there was not agreement). An earlier comment by the arbitrator had recorded that on the correspondence a "huge factual dispute" had arisen as to what remedial work had been done by AA Electrical and what work had actually been done by Bopanang, and it was imperative that he resolve that dispute as well.

[60] Similarly, certain comments by the Supreme Court of Appeal concerning the nature of Mphaphuli's case appear to have been misplaced. Paragraph 14 of the judgment reads, in part, as follows:

> "The legal principles applicable to an enquiry of this kind were recently set out by Harms JA on behalf of this court.[38] Applying those principles to the facts of this case, which I have set out in some detail in this judgment, illustrates, to my mind, that Lufuno fundamentally misconceived the nature of its relief. Moreover, Lufuno's founding papers assumed, erroneously so – as was subsequently conceded by it – that the private arbitration process was an administrative one, which had to be lawful, reasonable and procedurally fair.[39] That fundamental misapprehension permeated its founding application, which as I shall presently show, it subsequently sought in its supplementary papers, to remedy. The parties clearly intended Andrews to have exclusive authority to decide whatever questions were submitted to him and that each was precluded by virtue of the provisions of clause 2 of the arbitration agreement from appealing against his decision. The parties had accordingly waived the right to have the merits of their dispute re-litigated or reconsidered."[40] (Footnotes added.)

[38] Reference was made to *Telcordia* above n 21.

[39] Reference was made to *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) Pty Ltd* [2002] ZASCA 14; 2002 (4) SA 661 (SCA) at para 25.

[40] The reference was to *Telcordia* above n 21 at para 50.

[61] The first observation to be made is that, on the basis set out in paragraphs 15 and 16 of the judgment,[41] the Supreme Court of Appeal held that Mphaphuli's "attempt" to remedy what was referred to as its "fundamental misapprehension" was unsuccessful in that the "attempt" sought, impermissibly, to make out a new case in its later papers. I have already shown[42] that that approach was fundamentally flawed. The second observation is that the case that Mphaphuli seeks this Court to consider does not entail a re-litigation or reconsideration of the merits of the dispute.

[62] Mphaphuli's submission is in essence that it did not receive a fair hearing from the arbitrator and that at least a reasonable perception of bias on the part of the arbitrator arose. The submission is not only founded on the three meetings referred to earlier, the only aspect adverted to by both the High Court and the Supreme Court of Appeal; it is also based on the correspondence between the arbitrator and Bopanang to which Mphaphuli was not made privy, as well as on aspects of the award made in favour of Bopanang by the arbitrator.

[63] Despite the conclusion reached by the Supreme Court of Appeal on the issue of condonation it went on to consider certain issues relating to the merits.

[64] The Court held[43] that Mphaphuli could only challenge the award by invoking the statutory provisions contained in section 33(1) of the Arbitration Act,[44] "as any

[41] The paragraphs are quoted in [52] above.

[42] See [53]-[57] above.

[43] Above n 1 at para 14.

further ground of review, either at common law or otherwise, had by necessary implication been waived by it." In this regard it followed the approach in *Telcordia*.[45]

[65] In *Telcordia* the Supreme Court of Appeal held inter alia that—

(a) private arbitrations would, as a starting point, fall within the ambit of section 34 of the Constitution;[46]

(b) the rights contained in the section "may be waived unless the waiver is contrary to some other constitutional principle or otherwise contra bonos mores;"[47]

(c) by agreeing to arbitration, parties waive their rights *pro tanto*; they usually waive the right to a public hearing;[48]

(d) by agreeing to arbitration the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else;[49] and

(e) by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in section 33(1) of the Act, and, by necessary implication, they waive the right to rely on any further ground of review, "common law" or otherwise.[50]

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[44] The provisions of section 33(1) are set out in full in n 14 above.

[45] Above n 21 at paras 50-1.

[46] Id at para 47. The provisions of section 34 are set out in n 13 above.

[47] Above n 21 at para 48.

[48] Id.

[49] Id at para 50.

[50] Id at para 51.

[66] After an earlier comment that Mphaphuli, relying primarily on the "secret meetings", alleged that the arbitrator exhibited conscious bias in favour of Bopanang,[51] the judgment of the Supreme Court of Appeal proceeded as follows:

> "Were an arbitrator to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity, which may without more warrant the award being set aside.[52] But, against the backdrop of the arbitration agreement and the context of the arbitrator's mandate, those meetings were quite innocuous and had no effect whatsoever on Andrews. To describe them as 'secret meetings', as Lufuno does, is to give them a sinister connotation that is wholly unwarranted. The purpose of those meetings was simply to verify certain figures and to clarify the use of certain items. That fell within the parameters of Andrews' mandate. That being so, even if he had been wrong those would have been errors of the kind committed within the scope of his mandate.[53]
>
> Proof that Andrews misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for the setting aside of the award. An error of fact or law, or both, even a gross error, would not per se

[51] *Lufuno Mphaphuli* above n 1 at para 16.

[52] Reference was made to *S v Roberts* 1999 (4) SA 915 (SCA) at para 23, which reads, in part, as follows:

> "That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258B-C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence. Had such a discussion occurred before conviction in this matter there can be no question but that the conviction would have been fatally irregular: *S v Seedat* 1971 (1) SA 789 (N) at 792F."

[53] Reference was made to *Telcordia* above n 21 at para 86 which reads as follows:

> "Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd." (Footnote omitted.)

justify the setting aside of the award.[54] It followed that Lufuno had to go further than that. For, as Smalberger ADP put it:

> 'A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct . . . which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as "wrongful and improper conduct" . . . "dishonesty" and "*mala fides* or partiality" . . . and "moral turpitude".'[55]

Lufuno asserted bias. It was for it to establish a reasonable apprehension of bias.[56] The threshold for a finding of real or perceived bias is high.[57] The bias complained of was, according to Lufuno, grounded in the relationship between Andrews and Bopanang. Why Andrews would have shown an inclination to favour the one party to the dispute does not emerge on the papers. The three 'secret meetings', as I have just illustrated, were not only innocuous but also occurred within the scope of Andrews' mandate. The proceedings, on any yardstick, were thus not infected by them. No other overt act is relied upon in support of the proposition that the proceedings were contaminated and that the award is therefore susceptible to attack. Simply put, there are no reasonable grounds to think that Andrews might have been biased. It must follow that the award, on this score, is immune from interference."[58] (Footnotes amended.)

[67] I revert later to consider the validity of certain comments in these paragraphs.

[68] One of counsel's main attacks on the approach of the Supreme Court of Appeal related to the fundamental question whether parties, by referring their dispute to

[54] Reference was made to *Total Support* above n 39 at para 35.

[55] The quotation is from *Total Support* above n 39 at para 21.

[56] Reference was made to *S v Basson* [2004] ZACC 13; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 30.

[57] Reference was made to *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 15.

[58] Above n 1 at paras 18-20.

arbitration, waive their rights to invoke any grounds of review beyond those provided for in section 33(1) of the Arbitration Act. More specifically, the question is whether the parties agree that the fairness of the hearing will be determined solely by the provisions of the Act and are precluded from invoking the provisions of section 34 of the Constitution, which enshrines the right to a fair and impartial hearing.

[69] A preliminary question is whether section 34 of the Constitution applies to private arbitrations. In *Total Support*[59] the Supreme Court of Appeal commented that while at first blush it may seem that the fairness requirements of section 34 do apply to consensual or private arbitrations, closer analysis may lead to a different conclusion. The Court further noted that—

> "[i]t is a moot point whether the words 'another independent and impartial tribunal or forum' in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions."[60]

The context referred to was the fact, as it was stated to be, that the word "fair" in the section qualifies "public hearing", and it was noted that parties to a private arbitration may by agreement exclude any form of public hearing. However, the further comment was that the ambit and application of the section had not been fully argued and its proper interpretation had therefore to be left open.

[59] Above n 39 at paras 27-8.

[60] Id at para 27.

[70] However, in my view, the word "fair" qualifies any "hearing" and not only a "public hearing", and the circumstance that the parties may waive the right to a public hearing (a proposition that was not disputed by counsel for Mphaphuli and in *Telcordia* it was stated that that was the usual position)[61] does not appear to be a reason why it should be questioned whether private arbitrations are subject to the provisions of the section, specifically the fairness requirements set out therein.

[71] As already recorded,[62] in *Telcordia* the Supreme Court of Appeal took the view that section 34 was applicable to arbitrations, which, it noted, was in accordance with the approach in the European Court of Human Rights, as per the decision in *Suovaniemi v Finland*.[63] The conclusion in *Telcordia* commends itself for acceptance. As counsel for Mphaphuli argued, the right provided for in section 34 is plainly capable of application in the private sphere, and it would be extraordinary if in deciding whether or not to make an arbitration award an order of court a judicial officer could turn a blind eye to a lack of fairness on the basis that section 34 was not of application.

[72] It is not clear why in *Telcordia* the Supreme Court of Appeal held that by agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else, or that they limit interference by the courts to the grounds of procedural irregularities

[61] *Telcordia* above n 21 at para 48.

[62] Above at [65(a)].

[63] ECHR Case No. 31737/96 (23 February 1999), cited in *Telcordia* above n 21 at para 47.

set out in section 33(1) of the Act and by necessary implication waive the right to rely on any further ground of review. It is so, as was commented in *Total Support*,[64] that even if the fairness requirement of section 34 of the Constitution applies to private arbitrations there is nothing which precludes the parties themselves from defining what is fair. I have difficulty, however, with the comment following thereon, that the fairness requirement is satisfied where parties who resort to arbitration agree to forego a right of appeal and accept that the well-known and well-established principles governing arbitration will apply and that therefore viewing the Arbitration Act through the prism of the Bill of Rights does not justify any departure from those principles (if the comment is to be interpreted as offering support for the approach adopted in *Telcordia*).

[73] The principle of party autonomy, stressed in *Telcordia*, which requires a high degree of deference to arbitral decisions, and which implicitly informed the approach of the Supreme Court of Appeal in the present matter, is not a weighty consideration against a conclusion that the fairness requirement of section 34 is of application to arbitrations. *Telcordia* itself, and the authorities it referred to in emphasising the principle,[65] were matters which concerned errors of fact or law to which the well-known and well-established principles governing arbitrations do apply. Procedural irregularities giving rise to unfairness are, however, a horse of a different colour.

[64] Above n 39 at para 28.

[65] Above n 21 at para 4.

[74] In my view, there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act. On the contrary, there is every reason why co-existence should be accepted: the fairness requirement in section 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.

[75] This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights,[66] including the right to a fair and impartial hearing guaranteed by section 34.[67]

[76] Reference may also be had to the South African Law Reform Commission Report on Domestic Arbitration,[68] in which recommendations were made concerning the contents of a proposed new Arbitration Act.

(a) In paragraphs 1.03 – 05 the Report records the following:

(i) the objective of a domestic arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense;

[66] Section 39(2) of the Constitution, quoted above at n 31.

[67] See, for example, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-6.

[68] South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001*.

(ii) the second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties);

(iii) the third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process.

(b) In the summary of the Commission's recommendations it is stated:

> "True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner."

[77] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[69] a case dealing with statutory arbitrations under the Labour Relations Act[70] (the LRA), Ngcobo J made comments to the following effect. In order to give effect to the intention that, as far as possible, arbitration awards would be final and only interfered with in very limited circumstances, the drafters of the LRA, in section 145(2)(a) thereof, chose to provide for narrow grounds of review similar to those provided for in section 33(1) of the Arbitration Act, and did so aware of the jurisprudence under the latter Act.[71] But they were equally aware that in construing the provisions of section

[69] [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

[70] 66 of 1995.

[71] *Sidumo* above n 69 at para 245.

145(2)(a), in particular the ambit of the grounds of review in the section, the Labour Courts would have regard inter alia to the right to fair labour practices guaranteed to everyone in terms of section 23 of the Constitution and the interpretative injunction contained in section 39(2) of the Constitution.[72] The crucial inquiry (in assessing irregularities) is whether the conduct of the decision-maker complained of prevented a fair trial of issues.[73] The requirements of fairness in the conduct of arbitration proceedings are consistent with the LRA and the Constitution: section 138(1) of the LRA enjoins the commissioner to determine the dispute fairly; section 34 of the Constitution enshrines the right of everyone to, inter alia, a fair hearing. The right to a fair hearing before a tribunal lies at the heart of the rule of law, and a fair hearing before a tribunal is a pre-requisite for an order against an individual, and this is fundamental to a just and credible legal order.[74]

[78] Similarly, O'Regan J stated that it was beyond doubt that the functions performed by a commissioner in an arbitration under the LRA clearly fall within the terms of section 34 of the Constitution.[75] In my judgement, private arbitrations are, as a starting point, not to be subjected to a lower standard of procedural fairness – once an arbitration award is made an order of court the legal effect thereof is identical to that of an arbitration award under the LRA.

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[72] Id at para 246.

[73] Id at para 265.

[74] *Suovaniemi* above n 63. See too the similar comments in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11, and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* [1998] ZACC 21; 1999 (4) SA 147 (CC); 1999 (2) BCLR 175 (CC) at para 35.

[75] *Sidumo* above n 69 at para 124.

[79] I conclude therefore that the mere fact of a submission to arbitration does not import a waiver of the fairness requirement. This conclusion finds support in *Suovaniemi*.[76]

[80] In the above discussion I have assumed that the constitutional right to a fair hearing may validly be waived.[77]

[81] The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person.[78] Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights.[79] Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier

[76] Above n 63. This case concerned an arbitration and the applicability of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal".

At page 5 of the decision the following statement appears:

> "There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 . . . Even so such a waiver should not necessarily be considered to be a waiver of all rights under Article 6."

In the result, it was held, on the facts, that there had been an enforceable waiver of the right to challenge the award on the basis of the alleged lack of impartiality of one of the arbitrators.

[77] See the discussion on the permissibility of the waiver of certain constitutional rights in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras 61-8.

[78] *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at paras 15-7.

[79] *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* [1993] ZASCA 3; 1993 (2) SA 451 (A) at 469.

be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive.[80] The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.[81]

[82] What should be emphasised is that, as will appear from the authorities referred to below, the fairness rights invoked by Mphaphuli lie at the core of a legitimate arbitration and it would require extremely strong evidence for a conclusion to be sustained that Mphaphuli waived such rights. Yet, neither the arbitrator nor Bopanang alleged, let alone proved, that there had been a waiver of rights sufficient to allow the arbitrator to engage with Bopanang in the absence of Mphaphuli.

Arbitrator or valuer

[83] It was argued on behalf of Bopanang in the Supreme Court of Appeal (and in this Court too, albeit without vigour), that in this matter an arbitration *stricto sensu* was not intended, that in fact the arbitrator acted as a valuer and not as an arbitrator whose position was governed by the provisions of the Arbitration Act. Accordingly, the arbitrator had not been required to act in a quasi-judicial capacity in the discharge

[80] *Pretorius v Greyling* 1947 (1) SA 171 (W) at 177; *Mothupi* above n 78 at para 19.

[81] *Laws v Rutherford* 1924 AD 261 at 263. See too *Mahomed* above n 77 at paras 62 and 64; *Mothupi* above n 78 at para 19.

of his duties, but had merely to exercise an honest judgement.[82] While commenting that it seemed that the parties intended the Arbitration Act to apply to their dispute, the Supreme Court of Appeal found it unnecessary to decide the issue whether the arbitrator had in fact been a valuer, on the basis that this would not have affected its decision on the merits.[83] Suffice it to say that, while elements of the functions of a valuer might have been embraced in the arbitrator's mandate (and while it is understandable that the parties preferred to appoint someone who had expertise in the field covering their dispute), it is clear on a conspectus of all the circumstances that the arbitrator was required to act and in fact acted as an arbitrator (hence, Bopanang's application in terms of section 31 of the Arbitration Act for the award to be made an order of court). He was accordingly obliged to act in a quasi-judicial capacity.[84]

The arbitrator's duty to act in a quasi-judicial capacity

[84] A review of cases dealing with arbitrations reveals that the courts have emphasised the requirement of procedural fairness in the conduct of arbitral proceedings, where an arbitrator acts in a quasi-judicial capacity. It will be sufficient to consider some of these cases to illustrate the point. Needless to say of course that what they say must be understood in the context in which the issue arose.

[82] See *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359 (A) at 373H-374C; and *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another* 1994 (1) SA 837 (C) at 843E.

[83] Above n 1 at para 22.

[84] See the comprehensive discussion of the different approaches required of arbitrators and valuers in *Chelsea West*, above n 82. I revert later to consider specific aspects arising out of the approach required of an arbitrator.

[85] In *Lazarus v Goldberg and Another*[85] the following passage appears:

> "According to the practice of the Roman-Dutch law, a submission to arbitration (Verblyf) was always subject to the *conditio tacita* that the arbitrator should proceed according to law and justice. Although our modern practice has somewhat departed from that of the Roman-Dutch law, in regard to the procedure for setting aside an award, the above principle, which has been well expressed by Cloete J, still exists at the present day. In *Croll qq. Kerr v. Brehm (2 Searle* at p. 229), that learned Judge says:
>
> > 'Nothing is more clearly laid down in the textbooks than that arbitrators are judges in deciding the matters submitted to them, and that they ought to follow those broad rules laid down for judicial investigation; and no rule is more clear than that they should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done *inaudita altera parte* – so as to give the opposite party the opportunity of answering or rebutting such evidence.'
>
> A similar view was taken by Bell and Watermeyer JJ, in the same case, which is one quite in point in the present instance, and must be considered as a leading authority on the subject. This principle has always been strictly observed by the Court, even although, as put by Watermeyer J in *Croll's* case, 'substantial justice has been done between the parties', as appears from *MacDonald & Co v Gordon & Co* (1 R 251) and subsequent cases, as well as from the passage from Russell on Arbitration (7th ed. p. 191), cited at the Bar."[86]

[86] Citing a series of earlier cases, South African and English, the decisions in *Shippel v Morkel and Another*[87] and *Chelsea West*[88] followed suit. In the former case Van Winsen J is reported as follows:

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[85] 1920 CPD 154.

[86] Id at 157.

[87] 1977 (1) SA 429 (C).

"*Voet*, 4.8.1., states that 'there is a great correspondence between arbitrations and judicial proceedings' and that 'there is the same sequence of proceeding and proof' as in judicial proceedings (*Gane's* trans., vol. 1, p. 737); *Van Leeuwen*, bk. 5. ch. 94 (*Kotzé* trans.), says that arbitrators are required to 'pronounce an award according to the requirements of law and custom'. Our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings . . . . This would also appear to be the position in England . . . .

The similarity between proceedings in Court and before an arbitrator are also apparent from the terms of the Arbitration Act, 42 of 1965.

It can thus be said with confidence that it is well established by the cases in our Courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties. This appears from numerous cases in the South African Courts . . . .

Save in certain types of arbitration, the same principle has been applied by the English Courts . . . .

As Mr. Marais for second respondent rightly points out this rule can be modified were the parties to agree that the arbitrator be permitted to hear evidence in the absence of one of the parties. He submits that by clause 4 of the submission to arbitration the arbitrator may proceed ex parte 'in the event of either party failing after reasonable notice to . . . attend the hearing'.

If it could have been said that evidence has been received before the arbitrator in the absence of one party under the circumstances contemplated by clause 4 then that would have afforded protection to such proceedings."[89]

[87] In the latter case Seligson AJ expressed himself as follows:

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[88] Above n 82.

[89] Above n 87 at 434A-G.

"The position of an arbitrator in the true sense is very different [from that of a valuer]. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner '. . . as to ensure a fair administration of justice between the parties' . . . . This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in the absence of one or either of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases . . .

> 'Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate a departure from the rule which recognises this right in very special circumstances.'"[90]

[88] In *Burns & Co*[91] the following passage appears:

"Amongst the rules governing the administration of justice there is the elementary one which is stated in "Russell on Awards", 8th Ed. 134, in the following language:

> 'Except in the few cases where it is unavoidable, as where the arbitrator is justified in proceeding ex parte, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. If he err in this respect he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award.'

Nor does it matter whether the arbitrator was influenced by it. Lord ELDON, L.C. in *Walker v. Forbisher*, 6 Ves., 70, in setting aside an award, on the ground that evidence had been improperly admitted, although the arbitrator swore that the evidence had no effect on his award, said that no Court should permit an arbitrator to decide so delicate a matter as to whether a witness examined in the absence of one of

[90] Above n 82 at 845F-G.

[91] Above n 18.

> the parties had an influence on him or not; and in *Drew v. Drew*, 2 Macq, 1 Lord CRANWORTH said that the principles of universal justice required that the person who is to be prejudiced by the evidence ought to be present to hear it taken; and that an arbitrator entirely misconceived his duty who took upon himself to hear evidence behind the back of the party interested in controverting it.
>
> It has been decided by a long string of cases that infringement of that rule by an arbitrator is misconduct within the meaning of section 18 of our Arbitration Act, 24 of 1898. That being the principle of law which we are bound to apply".[92]

[89] In the result the arbitrator's award was declared abortive on the grounds that the arbitrator took evidence in the absence of one of the parties and that he had received a communication from one of the parties bearing on the merits of the matter. On the latter score the judgment included the following comment:

> "That may or may not have influenced the arbitrator in changing the view which he had expressed in the afternoon that an allowance should be made for this particular work. He says that it did not. But, as was said by Lord ELDON it is not permissible to say whether it did or not. That letter never came to the knowledge of the respondent until the award was made."[93]

[90] A similar approach was adopted in *Sapiero and Another v Lipschitz and Others*,[94] as appears from the following passage:

> "It is also a question whether the whole award is not bad on the ground of irregularity. Although it is true that an arbitration is usually regarded as a somewhat informal procedure still there are certain legal principles which govern that procedure. One of these principles is that no evidence must be given or produced

[92] Id at 462-3.

[93] Id at 464.

[94] 1920 CPD 483.

> before the arbitrator or the umpire in the absence of any one of the parties. It is common cause in this case that a certain letter was placed before Mr. Potgieter [the arbitrator] and that he read it. That letter was undoubtedly placed before Mr. Potgieter by Mr. Hotz with the object of influencing him. Mr. Potgieter very properly returned the letter to Mr. Hotz and said that he would take no notice of it but would decide the matter independently of the letter. The Court cannot now, however, go into the question as to whether Mr. Potgieter was influenced by the letter or not. I hold that the mere production and reading of that letter in the absence of the respondents constitute good ground for them to object to the award being made a rule of court."[95]

[91] In *Naidoo v Estate Mahomed and Others*[96] it was said, with reference to *Burns & Co*, that where an arbitrator hears evidence from one party in the absence of the opponent such action—

> "offends against the fundamental principles of justice, and although he may not appreciate in himself that he was doing an injustice, he in fact commits an injustice towards the other party to the submission, and his action would . . . be improper although not necessarily dishonest."[97]

[92] Even an agreement in the reference to arbitration that the arbitrator may take evidence without both parties being present does not dispense with the duty to observe the prescripts of natural justice. The headnote in *Landmark Construction (Pvt) Ltd v Tselentis*[98] reads as follows:

> "The parties had agreed to submit a dispute arising from a building contract to an arbitrator and it was agreed that further evidence would be taken without the presence

[95] Id at 486.

[96] 1951 (1) SA 915 (N).

[97] Id at 920.

[98] 1972 (1) SA 435 (R).

> of both parties at its taking. It appeared that the arbitrator had taken such evidence but had not apprised the respondent of the fact nor the contents of such evidence. In an application to have the award made an order of Court and a counter-application to have it set aside,
>
> *Held,* that, in deciding to receive further evidence, the arbitrator had to observe the requirements of natural justice, i.e. the need to apprise the parties of the content of the evidence so as to afford them a suitable opportunity for rebutting it or otherwise dealing with it, remained undisturbed.
>
> *Held*, accordingly, that the application should be dismissed and the counter-application should be granted."

[93] The principle that nothing must be done in the absence of any of the parties to the arbitration is nicely encapsulated in the following passage by McKenzie:[99]

> "The rule that nothing must be done *inaudita altera parte* has been strictly applied. Courts have refused to uphold awards in the following circumstances: where a party was given no opportunity of presenting his case, or was absent during the hearing, or during the giving of certain evidence; where a party was absent from a meeting with the arbitrators at which no new matter was introduced; and where one party was absent when another put a letter before the arbitrator who read it and handed it back with the remark that he would take no notice of it in reaching his decision. In one case where the parties had agreed that evidence could be taken without both parties being present, an award was nevertheless set aside on the grounds that where such evidence was taken the other party should have been apprised of the fact and given an opportunity to rebut such evidence. Where, however, a party was absent at a meeting of arbitrators at which the latter were not exercising any discretion or any judicial functions, but were merely calculating certain figures upon an agreed basis, it was held that there was no irregularity in the proceedings."[100]

[99] *The Law of Building and Engineering Contracts and Arbitration* 5ed (Juta: Cape Town, 1994).

[100] Id at 188-9.

[94] The same approach, in a criminal context, was taken by the Supreme Court of Appeal in *Roberts*,[101] and in this Court in *S v Jaipal*[102] where the following comment was made:

> "As stated above, contact between judicial officers and one party to the trial in the absence of the other does not accord with the ideals and imperatives of independent courts that function impartially and free from interference."[103]

[95] The common law principles applicable to arbitrations set out above are, in my judgement, not at odds with the Constitution; rather, the converse. It is to be emphasised that notwithstanding the parallels drawn between arbitrations and court proceedings in the authorities referred to, it is not suggested, nor does this judgment in any way do so, that the same level of procedural fairness required in court proceedings is to be required in arbitration proceedings. It is accepted that the concept of fairness in arbitrations is context-related.

[96] The arbitration agreement[104] in the present matter provided for the arbitrator to receive such documentation as either party wished to place before him, by a date preceding the commencement of the arbitration hearing, to require the parties to make

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[101] Above n 52.

[102] [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC).

[103] Id at para 46. See too *SARFU* above n 77 at para 35 which reads as follows:

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."

[104] Quoted above at [7], clauses 4, 5 and 6.

available such further documentation as he stipulated and to liaise with Eskom's representatives and request Eskom to furnish him with such documentation as he required. Those provisions did not, however, entitle him to disregard the *audi alteram partem* rule.

Facts relating to the meetings and correspondence

[97] Two preliminary observations may be made. First, in their written submissions counsel for Mphaphuli echoed its stance in describing the meetings and correspondence in question as "secret". (During argument counsel preferred the less emotive and neutral epithet of "ex parte" when referring to the meetings and the correspondence.) This approach flowed from the fact that Mphaphuli only became aware of the meetings and the correspondence after receipt of the arbitration record. Had the review proceedings not been instituted, Mphaphuli would not have come to know thereof. Second, it is unnecessary in this judgment to give consideration to the first of the three meetings in question: counsel did not press reliance thereon during argument.

The two meetings

[98] It is common cause that the arbitrator held two further ex parte meetings with Bopanang, in the absence of Mphaphuli, at which matters relating to the arbitration were discussed, namely on 2 June 2004 and on 29 July 2004 (the latter meeting being shortly before the arbitrator published his award on 23 August 2004).

[99] The deponent to Mphaphuli's supplementary founding affidavit in the High Court states, inter alia, as follows: Mphaphuli has no idea what was discussed by the arbitrator and Bopanang at the meetings, other than what was stated by the arbitrator in his chronology. No notes of the contents of the meetings or the nature of the discussions were ever furnished to it. It presumed, however, that Bopanang furnished the arbitrator with comments.

[100] In its supplementary answering affidavit in the High Court, Bopanang stated, in respect of the meeting of 2 June 2004, inter alia, as follows: On 29 April 2004 the arbitrator sent a query to both parties indicating that it was not clear to him where particular items were to be installed as it was unclear from the drawings as to their intended usage. (It may be interposed here that in response to the query Mphaphuli, on 26 May 2004, furnished the arbitrator with a list of estimates of items which had been installed, but not measured; the list was copied by the arbitrator to Bopanang.) The arbitrator had clearly become confused when he could not find the relevant items specified in the schedule of quantities with reference to the drawings. Bopanang pointed out "the aforegoing" to the arbitrator during a telephonic conversation, but he found it difficult to follow the explanation. Bopanang then volunteered to visit the arbitrator at his office as it would be easier to furnish an explanation *inter praesentes*. That visit took place and the explanation was given. For that purpose Bopanang furnished the arbitrator with an explanatory sketch. The arbitrator recorded the explanation. Quantities were not addressed at the meeting as the items had already been measured. All that Bopanang did was to explain the "practical realities" – why

the particular items were there although same could not be related to the drawings. The technical aspects addressed were only for a better understanding by the arbitrator of the matters in question and in no way affected the quantities. As the items had already been measured the discussion did not concern the merits of the award, but only served to enlighten the arbitrator to a better understanding of the measurements already done and agreed to between the parties. The discussion, which was not of long duration, did not at all affect the ultimate award. Mphaphuli, knowing full well that the relevant items had already been measured, only had itself to blame if it elected not to point out to the arbitrator what the position was and to respond on the aspects of the technical issues in question.

[101] In respect of the meeting of 29 July 2004 Bopanang stated inter alia as follows: On 23 July 2004 Bopanang's attorney addressed a letter to the arbitrator inquiring about the progress in the matter. The arbitrator's written response, dated 26 July 2004, recorded that he had arranged a meeting with "Gerhard" (Bopanang's representative) on 29 July 2004 "*to resolve the final outstanding issues*" (my emphasis), and that the adjudication would follow shortly thereafter. These developments were to be seen against the background of the arbitrator's earlier request, on 9 July 2004, to both parties "to confirm certain outstanding queries". Bopanang responded by way of certain handwritten notes on the documentation received from the arbitrator. The arbitrator experienced difficulty in securing a response from Mphaphuli and therefore had "difficulties pertaining to the technical aspects". The quantities were already established by way of re-measurement and

deductions therefrom and agreed to by the parties. A telephonic conversation between Bopanang and the arbitrator brought the latter's apparent confusion to the fore. It was apparent that the arbitrator did not understand the structures and the materials used, as measured. Again, it proved difficult to furnish an explanation over the telephone and Bopanang then tendered its "technical explanation" to the arbitrator at his offices on 29 July 2004. The meeting lasted a maximum of thirty minutes and did not canvas the quantities already measured and agreed to on site, but only *why* the particular items had to be installed. The discussion had nothing to do with the merits or the ambit of the arbitrator's mandate, but only served "to enlighten him to a better understanding of *the issues involved*" (my emphasis). The ultimate award was not affected, the measurements having already been done.

[102] In his supplementary answering affidavit in the High Court the arbitrator confirmed the statements of Bopanang and intimated that he did not wish to comment further on Mphaphuli's averments, save that he added that the purpose of the meetings was "simply to calculate certain figures, and to clarify the use of certain items by the parties". He averred further that at no stage during the meetings was he expected to "exercise a judicial function or discretion".

[103] The arbitrator acknowledged, however, that when he arranged the meeting of 29 July 2004 with Bopanang:

> "I was during that period busy consolidating and finalising the results of our inspection and measurements with the aim of making the award. In this process, I picked up further crucial queries relating to the fundamental method of determining

> the total length of the cables . . . which I immediately forwarded to the parties under cover of a letter dated 27 July 2004."

He further stated:

> "After receipt of the above information [i.e. the responses from the parties to his queries, including what was conveyed to him orally by Bopanang], I was in a position to determine what work had been done by the Second Respondent and what amount (if any) Applicant owed it. I accordingly sat down and, after due consideration of all the facts placed before me, I firstly consolidated the results of our inspections and measurements on a single spreadsheet. Thereafter and on the basis of the figures contained therein, I completed the award."

[104] In response to the supplementary answering affidavits the deponent to Mphaphuli's replying affidavits pointed out, inter alia, that there were contradictions in the explanations proffered by Bopanang and the arbitrator and he registered a non-acceptance of the explanations. More importantly, the deponent placed on record that "the clarification of the use of certain items" related to allegations of fact which were still in dispute between the parties and were material to the dispute between them. A further averment was that the second meeting had resulted in the arbitrator rejecting certain of Mphaphuli's submissions in respect of Bopanang's claims and that "misconceptions" revealed in the arbitrator's findings could have been avoided had he liaised with Eskom. Bopanang's reply thereto was that Mphaphuli was impermissibly seeking to have his opinions preferred to those of the arbitrator. The response missed the point, that procedural unfairness was the subject of the complaint. In this regard it bears repetition that in its supplementary founding affidavit Mphaphuli averred, and it

was not denied, that Bopanang's comments to the arbitrator were at no stage communicated to it, Mphaphuli.

[105] It is apposite to add further that, by contrast, all discussions which the arbitrator had with Mphaphuli were held in the presence of Bopanang. This was pertinently alleged by Mphaphuli in its supplementary founding affidavit, and was not placed in dispute by either the arbitrator or Bopanang.

The correspondence

[106] The first aspect requiring mention is that in its first answering affidavit Bopanang pertinently alleged that the arbitrator had "requested further information and/or documentation from both parties *always* with copies thereof and replies sent to the other party." (My emphasis.)

[107] In its supplementary founding affidavit Mphaphuli confirmed that the record disclosed that all of its written comments in response to the arbitrator's various queries were copied to Bopanang or its attorneys. Initially, all correspondence from Bopanang to the arbitrator was similarly copied to Mphaphuli. (In my judgement, this procedure speaks volumes of the intention of the parties when concluding the arbitration agreement.) However, the arbitrator subsequently failed to adhere to the policy of copying communications received from Bopanang to Mphaphuli. Specifically, reference was made to three letters. Included was a letter dated 12 December 2003, addressed by Bopanang to the arbitrator in response to a request for

submissions on various aspects. Therein Bopanang criticised the contents of a fault report by Eskom dated 13 March 2003 and claims for remedial work made by AA Electrical. Counsel offered no submissions in respect of this letter, however, and focused on the two letters referred to below.

[108] The first was a letter dated 24 February 2004, addressed by Bopanang's attorneys to the arbitrator in which comments were furnished on, inter alia, certain claims registered by AA Electrical and certain transformer areas. It was correctly contended that these issues were closely connected to the arbitrator's assessment of amounts due. The arbitrator stated that the failure to favour Mphaphuli with a copy of the letter was the result of a bona fide oversight on his part.

[109] The second was a letter dated 19 July 2004, addressed by Bopanang to the arbitrator. It had been preceded by a letter dated 9 July 2004, addressed by the arbitrator to both parties in which a detailed list of queries was set out. Bopanang's letter of 9 July 2004 to the arbitrator furnished detailed answers to and comments on the arbitrator's queries.

[110] The queries raised by the arbitrator were substantive and technical in nature. They related, inter alia, to the following aspects:

(a) the occurrence of strain assemblies;

(b) whether a terminal assembly would occur at each pole, other than where it would be an intermediate assembly;

(c) whether Bopanang supplied Delta structures for the remaining transformers supplied by other entities.

[111] It was Mphaphuli's averment that Bopanang's comments to the arbitrator contained numerous material misrepresentations and allegations some of which were false or misleading, and all of which significantly influenced the arbitrator's award. Had Bopanang's comments been made available to it, Mphaphuli would have been able to point out to the arbitrator where the comments were false and/or misleading.

[112] By contrast, so Mphaphuli further averred, its comments on the query letter of the arbitrator, which were furnished on 16 August 2004, were copied to Bopanang's attorneys. This averment was not placed in dispute.

[113] In its supplementary answering affidavit Bopanang registered the complaint that it was not afforded the opportunity of responding to Mphaphuli's comments in that, in forwarding same to Bopanang, the arbitrator stated that no further submissions would be allowed unless specifically requested. It is clear, however, that no such request was made. If it had been, it would have had to be granted. Bopanang tendered no further response to the allegations of Mphaphuli set out above. In particular, it did not deny that its letter contained numerous material representations, or that some of them were false or misleading, or that they all significantly influenced the arbitrator's award.

[114] As with the first letter, the arbitrator ascribed his omission to forward a copy of Bopanang's response to his list of queries to Mphaphuli to a bona fide oversight on his part.

[115] The further response of the arbitrator to Mphaphuli's allegations proceeded as follows. He was not aware of any false and/or misleading allegations in Bopanang's comments, and in the absence of specific allegations on that score, he was unable to comment on the materiality or otherwise of his omission to copy Bopanang's comments to Mphaphuli. The arbitrator did not deny that the letter contained representations that were material to his award.

[116] In its replying affidavit Mphaphuli indicated various allegedly incorrect statements in Bopanang's reply to the arbitrator's queries. Counsel highlighted three aspects. I briefly note each in turn, together with the arbitrator's response thereto (contained in the rejoinder affidavit filed by the arbitrator in the High Court). The reason I do so will appear later.

[117] The first related to terminal assemblies and Mphaphuli indicated that on this score Bopanang's comments were incorrect in certain respects. The arbitrator's response was, however, that his award was in fact in accordance with Mphaphuli's objections.

[118] Mphaphuli's second objection was that Bopanang did not, as claimed, supply any Delta structures for transformers supplied by other contractors (as had in fact earlier been conveyed by Mphaphuli to the arbitrator on 26 May 2004). It was pointed out that Delta structures are installed only where a particular type of transformer is involved, and there were only three such transformers in the whole project. It was further stated that in terms of the arbitrator's award there were no transformers installed in eight of the 19 transformer zones, yet the arbitrator awarded 19 Delta structures with transformers despite the fact that Bopanang only claimed 14.

[119] The arbitrator responded as follows: In his letter of 9 July 2004 he had specifically asked whether Bopanang had supplied the Delta structures for the main transformers supplied by other contractors. The response of Bopanang was unequivocal and affirmative. Mphaphuli did not answer the question, and from its silence the arbitrator inferred that the contractor had indeed supplied these Delta structures. He found it difficult to understand how Mphaphuli could say that Bopanang had supplied no Delta structures: the price list initially contained a quantity of 19, which implied one Delta structure per transformer zone; the transformers were physically measured on site and the number (of Delta structures) included in the award was therefore correct.

[120] It may be noted *en passant* that this response of the arbitrator, contained in his rejoinder affidavit, was not in accordance with his response in his initial answering affidavit. Although this latter response referred also to the letter of 9 July 2004, it

appears that the arbitrator's comments therein related to the replies he received to an earlier letter of 29 April 2004. The comments read as follows:

> "I specifically requested the parties in my letters dated 29 April 2004 and 9 July 2004 to inform me what the estimated quantities thereof were and also to indicate who installed the Delta structures for the remaining transformers. In its reply, [the reference is to the letter of 26 May 2004 referred to in paragraph 118 above], Applicant [Mphaphuli] indicated that none of these items were used. I did not receive a specific response from Second Respondent [Bopanang]. However, I rejected Applicant's response for the simple reason that the pricing list makes it clear that all transformers had to be installed on Delta structures. Second respondent installed 19 transformers and for that reason I allowed for a corresponding number of Delta structures." (Footnotes omitted.)

[121] The third objection related to the quantity of strain assemblies. The complaint was that the arbitrator should have ascertained the correct state of affairs from Eskom's specifications and drawings.

[122] The arbitrator's response was that the Eskom drawings did not form part of the record as same had never been placed before him. He emphasised that what was on site was physically measured and his award was based on those results.

The arbitrator's mandate in respect of amounts to be awarded to Bopanang

[123] It will be remembered that when the parties reached agreement that their dispute be referred to arbitration they further agreed to exchange pleadings. Pursuant thereto Bopanang submitted its statement of claim in which it claimed payment of the sum of R656 934,44 (together with interest on the component amounts thereof from

various dates), made up as reflected in the invoices annexed to the statement of claim. Incorporated in the statement of claim were the papers filed by Bopanang in the High Court in its application for an interdict against Eskom, which included an affidavit by Bopanang's representative verifying that the invoices constituted an accurate record of the work it had done. Further pleadings were filed by both parties. At the meeting with the arbitrator on 7 October 2003 he was furnished with copies of all the pleadings that had been filed.[105]

[124] It is a fair inference that the above history was the genesis of the contents of the preamble to the arbitration agreement,[106] which recorded the details of Bopanang's claim as set out in its statement of claim.

[125] It is common cause that the arbitrator, in making his award, failed to adhere to the pleadings and that, in the first place, he in fact awarded Bopanang a series of amounts in excess of what it had claimed. Involved were some nine items in respect of which, in each case, the arbitrator's award substantially exceeded the amounts claimed by Bopanang. In the result, the award embraced a total of R352 007,50 in respect of the nine items as against a total of R91 100,00 claimed by Bopanang.

[126] In the second place the arbitrator ruled that the total amount of R339 998,83 awarded was "subject to interest at 0.5% per week from 6 October 2002, when the payment was originally due". This was not in accordance with the relief sought in

[105] Above [5]-[7]

[106] Quoted above at [7].

Bopanang's statement of claim, referred to in the preamble to the arbitration agreement, which sought interest on the amount of R143 395,53 from 6 October 2002 and interest on the balance of its claim only from 21 April 2003.

[127] From the outset of the review proceedings Mphaphuli adopted the stance that in terms of the arbitrator's mandate any amounts to be awarded to Bopanang would be limited to those claimed by it. In its initial founding affidavit it stated that the arbitrator was expected to verify the work allegedly done by Bopanang, as well as the costs invoiced therefor; he was not expected to award any costs for work not carried out or at prices higher than those provided for in the price list or for work never claimed by Bopanang.

[128] In its supplementary founding affidavit in the High Court, Mphaphuli persisted with the stance that the arbitrator was obliged to have regard to the pleadings of the parties and the supporting documents attached thereto, which had been furnished to him. It stressed that Bopanang had at no stage sought to amend its pleadings to increase the amount claimed. Yet, so it was contended, the arbitrator failed to have regard to the pleadings, which were not even mentioned in his award. Accordingly, he had failed to perform his mandate and had exceeded his powers. It was further stressed that the fact that the arbitrator could not award Bopanang higher quantities than those claimed by it was so obvious that neither party thought it necessary to remind the arbitrator thereof.

[129] It is also important to note that from the outset and on the basis of Mphaphuli's founding papers, both Bopanang and the arbitrator, as appears from their answering affidavits, understood that one of Mphaphuli's grounds of review was that the arbitrator exceeded his powers by failing to have regard to the pleadings and invoices.

[130] Bopanang's response to Mphaphuli's averments was in essence that Mphaphuli had misconstrued the arbitration agreement and submitted that in terms of clause 1 thereof[107] the arbitrator had to determine the value of the work done as determined by inspection and measurement by him as provided for in clause 7, with the co-operation of the parties; in other words that the arbitrator was not bound by the claim and invoices submitted by Bopanang.

[131] In answer to Mphaphuli's allegations in its initial affidavit set out above, the arbitrator initially stated that, having studied the documentation handed to him (which at that stage essentially comprised only the pleadings of both parties), he realised that he would not be in a position to determine if any payment was in fact due in terms of the contract unless the quantities were re-measured on site. The parties therefore agreed, at his instance, that his mandate be extended to include the physical measurement of the work done on site. This was formalised in the arbitration agreement concluded by the parties.[108] It was therefore envisaged that his adjudication should be based on a re-measurement of the work executed, to be done in co-operation with the parties.

[107] Above at [7].

[108] Above at [7], clause 7.

[132] I have already in another context recorded that the arbitrator made it clear that after the re-measurement (on which he said there was agreement) he was still required to embark on a determination of what part of the work re-measured had actually been done by Bopanang (on which there was not agreement).[109]

[133] His further response to Mphaphuli's allegations set out above was in consonance with this stance. He agreed that he had been obliged to verify the work done by Bopanang. However, so he said, it was at all times understood that Bopanang was to be compensated for work it had actually done, irrespective of what was reflected in its invoices, i.e. it was never the understanding that it would be bound by the invoices and would therefore not be able to claim for work it had done but had failed to invoice or had incorrectly invoiced. The invoices had had no other function than to serve as a basis for interim payments claimed by Bopanang during the currency of the agreement. That the parties had not understood his mandate to be restricted as contended for by Mphaphuli was borne out by the fact that neither party ever submitted that Bopanang would not be entitled to compensation for work actually done, but not included in an existing invoice.

[134] He further sought to emphasise that it would not have made any sense to limit Bopanang's claim, irrespective of the amount of work done, to only that amount which it had in fact claimed. Otherwise the re-measurement exercise would have been

[109] Above at [59].

a waste of time and resources if the sole purpose was only to "reduce" Bopanang's claim. It was inconceivable that Bopanang would have agreed to the arbitration under such conditions as it would have had nothing further to gain.

[135] In his answer to Mphaphuli's supplementary founding affidavit, however, the arbitrator stated as follows:

> "I respectfully agree that on a strict reading of the arbitration agreement, I was obliged to take into account the pleadings exchanged by the parties, and all supporting documents attached thereto.
>
> However, as I have repeatedly indicated above, the parties (as they were entitled to do) restricted my mandate during the arbitration process to the physical re-measurement of the work that had been done, and a determination of what was reasonably due by any of the parties to the other on the basis of such re-measurement."

To that he later added the following:

> "I categorically deny that it was at any stage contemplated that I could not award higher quantities than those claimed by [Bopanang] in its invoices and other documentation. The intention was, at all relevant times, that the result of the physical re-measurement would be conclusive."

[136] In his rejoinder affidavit the arbitrator made it clear that it was his contention that during the arbitration process the parties reached agreement that the result of the physical re-measurement would be conclusive. He then for the first time added that the agreement was also that the quantities and figures stated in the invoices submitted by Bopanang had to be ignored.

[137] As regards the award in respect of interest the arbitrator explained that he had to "make an equitable decision as far as interest was concerned", that it was "not possible to determine on what date [Bopanang] became entitled to payment in respect of any particular work it had done" and that "in view of this practical difficulty" he simply decided to take the date 6 October 2002 (which was in fact the earliest date possible) as the starting point for the running of interest on *all* the amounts.

The findings of the High Court and the Supreme Court of Appeal

[138] I have already noted[110] that for all practical purposes the High Court failed to consider whether the award was made following on unfair procedural irregularities. It did not consider or even mention the constitutional right to a fair hearing. Instead, it insisted on viewing the review application before it as an impermissible attempt in effect to appeal against the arbitration award because it also engaged on aspects which otherwise had a bearing on the merits of the award.

[139] After noting that the allegation of bias was founded on the meetings referred to earlier, the High Court briefly analysed what it considered were the relevant facts relating to the meetings and on the basis of that analysis it concluded that there was no merit in the submission that the arbitrator was biased in favour of Bopanang.

[110] Above at [38]-[48].

[140] In respect of the second meeting the High Court contented itself with the following observations. The arbitrator requested the parties on 29 April 2004 to supply him with certain information. Bopanang made oral submissions. Mphaphuli replied in writing. Both parties were therefore afforded the opportunity to be heard. They, however, chose to supply the arbitrator with the required information in their own way. In respect of the third meeting, the comments of the High Court were restricted to the following. This meeting too was the result of the parties responding to a query raised by the arbitrator. Again, Bopanang replied in writing and made oral submissions, and Mphaphuli only furnished a written reply. It was significant, however, that the arbitrator decided the question raised in the third meeting in favour of Mphaphuli.

[141] It would seem that it was the High Court's view that the circumstance that both parties were given an opportunity of being heard was all that was required of the arbitrator, and sufficient to dispose of the issue of bias (the only issue that the Court was considering at that stage).

[142] What the High Court overlooked, however, was that whatever Mphaphuli had communicated to the arbitrator was copied to Bopanang, but on the other hand Mphaphuli was not made privy to the "oral submissions" made by Bopanang to the arbitrator on either of the occasions in question. The High Court failed, and in so doing misdirected itself, to consider the fact that the two ex parte meetings constituted a material infraction of the arbitrator's quasi-judicial duties (which in respect of the

last meeting, was not undone by the decision reached by the arbitrator) laid down in the authorities referred to earlier[111] and the impact it had on the fairness of the arbitration proceedings. The remarks made below concerning the comments of the Supreme Court of Appeal on the third meeting are also relevant here.[112]

[143] The Supreme Court of Appeal's approach to the meetings is set out in paragraphs 18 and 19 of its judgment.[113] I deal below with certain factual issues arising out of the comments made in these paragraphs. At this stage attention will be given to certain legal aspects. I have already found that section 34 of the Constitution finds application in arbitration proceedings and that Mphaphuli did not waive its right to a fair hearing to which it was entitled in terms of the section. The approach of the Supreme Court of Appeal, as reflected in the stated paragraphs, does not take account of that right (and it may be pointed out in this regard that the inference referred to in the quotation from *Total Support* in paragraph 19 of the judgment of the Supreme Court of Appeal, relating to an arbitrator's state of mind, is not a requisite for a court to hold that the precepts relating to procedural fairness were not adhered to). This approach was due to its finding that Mphaphuli was restricted to invoking the grounds of review set out in section 33(1) of the Arbitration Act.

[111] Above at [84]-[94].

[112] Below at [145]-[146].

[113] Above n 1. See also above at [66].

[144] The Supreme Court of Appeal categorised the meetings as "innocuous".[114] The categorisation is flawed, for reasons of fact and law.

[145] The Supreme Court of Appeal's comment that "[t]he purpose of those meetings was simply to verify certain figures and to clarify the use of certain items" was based on one of the arbitrator's averments, recorded in paragraph 102 above. However, also recorded is the arbitrator's confirmation of the statements made by Bopanang. The latter's explanations[115] demonstrate that the meetings did not have the restricted purpose found by the Court, but were about substantive issues that were related to the issues to be determined by the arbitrator – notwithstanding Bopanang's claim that the discussions did not concern the merits of the award or affect the ultimate award. This is made the clearer by the arbitrator's own further comments[116] and Mphaphuli's response thereto.[117] The arbitrator held repeated telephone discussions and meetings with one party on relevant issues. His final meeting with the party was arranged in formal fashion, on three days' notice, but without notice to the other side. It took place at a time where, on his own version, he was finalising his results and had found it necessary to raise further "crucial queries". The purpose of the 29 July 2004 meeting was to "resolve the final outstanding issues" ahead of his decision which was to follow shortly thereafter. "Innocuous" was in the circumstances a wholly inappropriate epithet.

[114] Above n 1 at para 18.

[115] Above [100]-[101].

[116] Above [103].

[117] Above [104].

[146] The Supreme Court of Appeal opined that the meetings were innocuous "against the backdrop of the arbitration agreement and the context of the arbitrator's mandate" and that the purpose of the meeting, as found by it, "fell within the parameters of [the arbitrator's] mandate."[118] (Seemingly, it is implied that all rights in terms of section 34 of the Constitution were waived by Mphaphuli.)

[147] This approach cannot be supported. As counsel for Mphaphuli argued, there is no factual basis for the conclusion that the arbitration agreement or the arbitrator's mandate permitted him to hold meetings with Bopanang in the absence of Mphaphuli. No explicit or implicit provision to that effect is contained in the arbitration agreement and, indeed, as shown below, neither the arbitrator nor Bopanang contended otherwise. On the contrary, clause 7 of the agreement provided expressly that "[e]ach party . . . shall appoint representatives to attend the physical inspection and measurement [by the arbitrator]." As counsel further pointed out, as a matter of fact, both parties took their right (and obligation) to be present at the inspection and measurement seriously. Bopanang recorded that both parties were represented at each site inspection and measurement held in terms of the arbitration agreement. In substance, the arbitrator confirmed this statement. In these circumstances counsel validly argued that once it is clear that the parties had a right and duty to be present at a physical inspection and measurement, it is inconceivable that it was their intention that following on the conclusion of the inspection and measurement, the arbitrator

[118] Above n 1 at para 18.

would be allowed to have discussions thereanent and about the arbitration with one party without the other being present.

[148] In fact, in its supplementary founding affidavit in the High Court, Mphaphuli states, directly contrary to the finding of the Supreme Court of Appeal, as follows:

> "The arbitration agreement did not mandate the Arbitrator to conduct meetings with the parties for the purposes of gathering evidence and in particular did not mandate the Arbitrator to convene such meetings with only one of the parties. Had [Mphaphuli's] attorneys not obtained the arbitration record, [it] would never have known that these meetings took place.
>
> Such meetings were not authorised by the arbitration agreement."

(Mphaphuli added that the meetings also "go to bias", an aspect to which I revert later.)

[149] Neither Bopanang nor the arbitrator takes issue with the above averments of Mphaphuli. Instead, in substance they seek to suggest only that the meetings did not affect the ultimate outcome of the arbitration (a stance, as will be shown below, which is impermissible in law).

[150] The finding is inescapable that what occurred amounted to a material procedural irregularity, resulting in unfairness sufficient, in terms of the authorities referred to earlier, to vitiate the arbitrator's award and warrant its setting aside by this

Court. [119] In reaching a contrary decision, the High Court and the Supreme Court of Appeal failed to interpret the Arbitration Act in accordance with the Constitution.

[151] For the sake of completeness, it may be added that the considerations discussed above at the same time vitiated the arbitrator's award on the basis that the arbitrator misconducted himself in relation to his duties as arbitrator and/or that he committed a gross irregularity in the conduct of the arbitration proceedings and/or that the award was improperly obtained, as envisaged in section 33(1) of the Arbitration Act.[120]

[152] However, even were the epithet "innocuous" to be apt, that would, as a matter of law, not avail against Mphaphuli's claim. Counsel for Mphaphuli accepted that in the case of some irregularities resulting in unfairness it may be permissible and necessary to look at the nature of the prejudice flowing therefrom. That issue, they argued, did not arise *in casu* where the nature of the infraction resulted in a failure of justice per se. I agree. Again, the authorities referred to earlier[121] (and those referred to below) have made clear that where a party is wrongly denied a hearing, where an ex parte meeting is held by the arbitrator with one of the parties and aspects bearing on or relating to the merits of the dispute between the parties are the subject of discussion, the result is a fundamental infraction of the requirements of fairness. It matters not, and the court does not enquire into, what the party denied its lawful opportunity would have said or whether, on the face of it, justice was done between the parties, or

[119] Above at [84]-[94]. See further the comments in [153] *et seq* below.

[120] Above n 14.

[121] Above [84]-[94].

whether or not the arbitrator was influenced by what was said at the meeting. Neither the arbitrator nor the other party is entitled to proffer such latter propositions. The Supreme Court of Appeal accordingly misdirected itself in making the comment, and relying thereon, that the meetings "had no effect whatsoever on [the arbitrator]".

[153] Courts should not lightly assume that the right to be heard has no application. As Goldstone J put it in *Traube and Others v Administrator, Transvaal, and Others*[122] (a matter involving an administrative decision):

> "As I understand the law, if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity. In *General Medical Council v Spackman* 1943 AC 627 at 664-5 Lord Wright said:
>
> > 'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.'"[123]

[154] In *Administrator, Transvaal, and Others v Zenzile and Others*[124] a similar approach was adopted:

> "It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6 ed puts the matter thus at 533-4:

[122] 1989 (1) SA 397 (W).

[123] Id at 403D-E.

[124] 1991 (1) SA 21 (A).

> 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'

The learned author goes on to cite the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402:

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"[125]

[155] The comments in paragraphs 150 and 151 above are of application.

[156] As noted before,[126] neither the High Court nor the Supreme Court of Appeal canvassed the ex parte correspondence. This omission is inexplicable.

[157] The authorities referred to earlier[127] reflect that the same principles applicable to ex parte meetings between an arbitrator and one of the parties apply *mutatis mutandis* to ex parte correspondence between an arbitrator and one of the parties. Counsel for Mphaphuli accepted, correctly, that under appropriate circumstances the

[125] Id at 37C-F. See too the quotation from *Roberts*, above n 52; *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 204; and *Zondi v MEC for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 112.

[126] Above at [55] and [62].

[127] Above at [84]-[94].

question of materiality may have to be considered in relation to ex parte correspondence, depending on the nature thereof.

[158] It is not in dispute that the letter of 19 July 2004 canvassed aspects that were material to the issues between the parties.

[159] The resolution of the factual disputes between Mphaphuli and the arbitrator adverted to in paragraphs 116 to 122 above is not, and cannot be, the subject of this judgment. They do, however, underscore the materiality of the contents of the letter.

[160] The important aspect is that on a material issue the arbitrator, on his own showing, received (and acted on) representations made to him by Bopanang, without Mphaphuli being afforded an opportunity of responding thereto.

[161] It should be stated that the provisions of clause 5 of the arbitration agreement[128] are of no assistance to the arbitrator or Bopanang. The fact that the arbitrator was entitled to require any of the parties to make such documentation available as he may have required, did not entitle him to disregard the prescripts of natural justice. In terms of the authorities cited earlier,[129] he nevertheless incurred the obligation to refer Bopanang's ex parte correspondence to Mphaphuli.

[128] Quoted above at [7].

[129] Above [84]-[94], specifically, *Landmark Construction*, above n 97.

[162] The fact that the two letters in question were not sent by the arbitrator to Mphaphuli because of a "bona fide oversight" is not a relevant consideration. As was explained in *Rose v Johannesburg Local Road Transportation Board*:[130]

> "The fact that they or any of them [the members of the board] acted from excellent motives and feelings will not avail them if they have acted contrary to a well-settled principle of law in circumstances which may seem to affect the justice of their decision."[131]

[163] Again, the comments in paragraphs 150 and 151 above are of application.

[164] Neither the High Court nor the Supreme Court of Appeal adverted pertinently to the issue whether the arbitrator, in making any award in favour of Bopanang, was bound by Bopanang's pleadings, which detailed its claim as substantiated by the invoices incorporated in its statement of claim, or to the matter of amounts awarded which were in excess of those claimed. The High Court's relevant comments were that Mphaphuli's papers reflected an impermissible attempt in effect to appeal against the award of the arbitrator. The Supreme Court of Appeal commented that by submitting their dispute to arbitration the parties had waived their right to have the merits of their dispute re-litigated or reconsidered, and that an error of fact or law, even a gross error, would not per se justify the setting aside of the award – it would at best be evidence of misconduct.

[130] 1947 (4) SA 272 (W).

[131] Id at 289.

[165] In the remarks that follow I do not lose sight of the circumstance that it is often the case that arbitration is resorted to in order, inter alia, to avoid the niceties of pleading. However, I conclude that in fact the arbitrator was bound by the pleadings. The reasons for this conclusion follow.

[166] It should immediately be emphasised, first, that the preamble to the arbitration agreement[132] states in terms what claim Bopanang was pursuing, as instituted by it. Second, as clause 4 of the arbitration agreement recorded, the arbitrator was placed in possession of Bopanang's pleadings, which incorporated the invoices. Third, clause 10 of the arbitration agreement precluded any variation thereof unless same was reduced to writing and signed by, or on behalf of, the parties.

[167] Further, I do not lose sight of the fact that clause 1 of the agreement records that the purpose of the arbitration was to determine whether payment was due in terms of the contract between the parties, and if so, the extent thereof, and that a final assessment of moneys reasonably due by either party to the other was required to be made by the arbitrator. The fact remains that the claim of Bopanang was placed on record and, as would be the position in ordinary civil litigation, that was the claim which Mphaphuli came to the arbitration to meet.

[168] As was stated in *Interbulk Ltd v Aidan Shipping Co Ltd, The "Vimiera"*:[133]

[132] Above at [7].

[133] [1984] 2 Lloyd's Rep 66.

> "The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive issues. If an arbitrator believes that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of material justice to put the point to them so that they have an opportunity of dealing with it."[134]

[169] The arbitrator's initial response to Mphaphuli's averments[135] does not support his stance that he considered that he was entitled to ignore the pleadings or the invoices. Rather, on his own version, the agreement he refers to was simply that his mandate "was extended" to include the physical measurement, not that this would be the full extent of his mandate. However, he did later allege[136] that the common understanding was that Bopanang was to be compensated for work actually done by it, irrespective of what was reflected in its invoices. The comment may be made, however, that the basis on which the arbitrator sought to found this common understanding, namely that neither party ever suggested otherwise, is unpersuasive. An absence of contrary comment by either party would carry more weight in respect of a stance that Bopanang was bound by its pleadings. Moreover, as pointed out below, the arbitrator later changed tack, no longer relying on an understanding, but in fact alleging an actual agreement.

[134] Id at 76.

[135] See above at [131].

[136] See above at [133].

[170] Two further averments in the arbitrator's initial response do not bear scrutiny. First, the contention (not raised by Bopanang) that the invoices, previously sent by Bopanang to Mphaphuli, had solely served as a basis for interim payments during the currency of the agreement, may be based on the arbitrator's interpretation of the contract between the parties. Nevertheless, it bears emphasis that the selfsame invoices were incorporated in Bopanang's statement of claim.

[171] Second, the arbitrator's comment that it would be a waste of time if the sole purpose of the re-measurement would be to reduce Bopanang's claim and that Bopanang would have had nothing to gain from the arbitration,[137] need only to be stated to be rejected. The very dispute between the parties was whether Bopanang had done the work it claimed for. Re-measurement would have contributed to the resolution of that issue, *but it could only have done so on the basis of the existing pleadings and invoices*. The gain that would have accrued to Bopanang was obvious: to the extent that the re-measurement, and the arbitrator's determination of what portion of the work re-measured was done by Bopanang, established Bopanang's existing claims, it would have been successful.

[172] The arbitrator's stance in his further answering affidavit and his rejoinder affidavit[138] was somewhat different to his initial response. He acknowledged that on a strict reading of the arbitration agreement he *was obliged to take into account the pleadings exchanged by the parties and all supporting documents attached thereto* (to

[137] Above at [134].

[138] Above at [135] and [136].

which the preamble to the arbitration agreement and clause 4 thereof made reference). But he contended that during the arbitration process the parties reached a further agreement and restricted his mandate to the physical re-measurement, the results of which would be conclusive, and that the invoices had to be ignored.

[173] However, in the first place, this contention, which in itself embraced contradictions and inconsistencies, did not square with his other averment that after the re-measurement he was still required to embark on a determination of what portion of the work re-measured had been done by Bopanang. This point was emphasised by Mphaphuli, which stated that the purpose of the inspections and measurements was to establish empirically what work had been done on site whereafter it had to be determined, in the light of the contract between the parties, which entity did what work and what compensation was due to Bopanang. Second, the arbitrator did not see fit to explain how or when it was that the further agreement was reached. Third, any such further agreement would have been invalid in the light of the non-variation provision in clause 10 of the arbitration agreement. Fourth, even if there had been such a further agreement (to the effect that the result of the physical measurement would be conclusive and eclipse the invoices), it would not have applied to at least some of the nine items referred to in paragraph 125 above, in that these items were not *measured* by the arbitrator, but the quantities thereof were the result of inferences based on assumptions by the arbitrator that the items would have been associated with other items that he did measure.

[174] The arbitrator's explanation[139] for the award of interest made by him does not constitute justification for his failure to adhere to the pleadings.

[175] The circumstance that the arbitrator regarded himself as unconstrained by the pleadings and the invoices, notwithstanding that they gave rise to the dispute, not only had the result that he exceeded his powers in terms of section 33(1)(b) of the Arbitration Act,[140] but also constituted a gross irregularity in the conduct of the proceedings in terms of the same section. It consequently adversely affected Mphaphuli's right to a fair hearing in terms of section 34 of the Constitution.

[176] This is made clear by the decision in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another*.[141] The case concerned a review of the decision of a valuation court, but the principles adverted to apply equally to arbitrations. Schreiner J commented as follows.[142] For cognisance to be taken of irregularities there is no need that there be intentional arbitrariness of conduct or any conscious denial of justice. It is not only high-handed or arbitrary conduct which is described as a gross irregularity – behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues – if it did, it will amount to a gross irregularity. A mere mistake of law relating to the merits will not constitute a gross

[139] Above at [137].

[140] Above n 14. See *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) at paras 28-30.

[141] 1938 TPD 551. The decision was endorsed by the Supreme Court of Appeal in *Telcordia*, above n 21, in the context of the Arbitration Act.

[142] *Goldfields Investment* above n 141 at 560-1.

irregularity, but if the mistake leads to the tribunal's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duty in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.

[177] These remarks find operation in the present case and the arbitrator, owing to his erroneous view of, and misconstruing, his functions in respect of the application of the pleadings and invoices to the matters that he had to decide, failed to deal with them in the manner contemplated by the arbitration agreement.[143] The resultant gross irregularity constituted sufficient unfairness to vitiate his award.

[178] Again, the comments in paragraphs 150 and 151 are of application.

Bias

[179] Counsel correctly did not persist in a contention of actual bias on the part of the arbitrator and confined their argument to the contention that there was a reasonable apprehension of bias on the arbitrator's part. Counsel further accepted that Mphaphuli bore the onus of establishing the existence of such apprehension and that the test is an objective one. In *Van Rooyen*,[144] this Court stated the following:

> "That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted.

[143] *Hos+Med* above n 140.

[144] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

> The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen*
>
> . . . .
>
> The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts. When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality:
>
> > 'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal . . . that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'."[145] (Footnote omitted.)

In *Jaipal*, the Court cited this dictum with approval in the context of criminal proceedings.[146]

[180] The threshold for a finding of perceived bias is high. In *South African Commercial Catering*[147] this Court discussed the apparent double requirement of reasonableness posed in *SARFU*,[148] that is a reasonable person and a reasonable apprehension, and stated:

> "[T]he two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

[145] Id at paras 32-3.

[146] Above n 102 at para 15.

[147] Above n 57.

[148] Above n 74 at para 45. See too *Roberts* above n 52 at para 32.

> 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'"[149] (Footnote omitted.)

The comments are of equal application where a quasi-judicial capacity is involved.

[181] It matters not, however (as I accept was the position *in casu*), that the arbitrator's intentions were good or that he bona fide thought that he was acting within the terms of his mandate or was unconscious of any apprehension of bias that might arise from his conduct.[150]

[182] For their contention of a reasonable apprehension of bias, counsel placed reliance on the meetings, the correspondence and the award of amounts in excess of those claimed by Bopanang and reflected in its pleadings and invoices.

[183] As already recorded,[151] both the High Court and the Supreme Court of Appeal addressed the issue of bias only with reference to the ex parte meetings, and the latter Court commented that no other overt act was invoked to found the contention of a reasonable apprehension of bias. That restricted approach was incorrect and misdirected. Further, the comment by the Supreme Court of Appeal that no reason

[149] Above n 57 at para 15.

[150] *Naidoo* above n 96 and *Goldfields Investment* above n 141. Cf *Sidumo* above n 69 at para 264 where Ngcobo J commented that for a gross irregularity to be found it is not necessary to find "intentional arbitrariness of conduct or any conscious denial of justice."

[151] Above at [66], [139] and [156].

emerges from the papers as to why the arbitrator would have shown an inclination to favour one party, was misplaced. A desire to favour one party does not require to be proved.

[184] In my judgement, the factors invoked by Mphaphuli, viewed objectively, both separately but more particularly cumulatively, must result in a finding that a reasonable apprehension of bias has been demonstrated: a reasonable person in Mphaphuli's position would reasonably apprehend that he/she had been the victim of bias, albeit unintentional, and that he/she had not received a fair hearing.

[185] Where a reasonable apprehension of bias is demonstrated, the court does not enter the debate whether there was actual influence and it is at pains not to measure the degree of the bias apprehended. In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*[152] (a case involving what was considered to be a quasi-judicial tribunal, the Industrial Court) the following passage appears:

> "Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."[153]

[186] Again, the comments in paragraphs 150 and 151 above are of application.

[152] [1992] ZASCA 85; 1992 (3) SA 673 (A). Cf *James v Magistrate, Wynberg and Others* 1995 (1) SA 1 (C).

[153] Id at 694J-695A.

Conclusion

[187] In the light of the findings set out in this judgment, it is my view that Mphaphuli is entitled to the relief it seeks from this Court, and I would have granted Mphaphuli that relief with appropriate ancillary orders. However, this is a minority judgment and accordingly no order is made.

Jafta AJ and Nkabinde J concur in the judgment of Kroon AJ.

O'REGAN ADCJ:

[188] I have had the opportunity of reading the judgment prepared in this matter by my colleague, Kroon AJ. Unfortunately I cannot concur in it. In my view, although leave to appeal should be granted, the appeal should be dismissed. As will appear from the reasons that follow, there are two differences between my approach and that of Kroon AJ. First, in my view, section 34 of the Constitution does not apply to private arbitration although I do hold that it is an implied term of every arbitration agreement that it be procedurally fair. Secondly, it is my view that the arbitration agreement at issue in this case, properly construed, required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one.

[189] As Kroon AJ explains in his judgment, the applicant, Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli) is an electrical infrastructure contractor who was awarded a contract by Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo Province. In May 2002, Mphaphuli entered into a subcontract with the second respondent, Bopanang Construction CC (Bopanang). In January 2003, Bopanang vacated the site early without completing its work on the ground that Mphaphuli had failed to pay moneys owing to it. Another contractor, AA Electrical, was then employed by Mphaphuli to complete the work and to undertake remedial work on the work performed by Bopanang.

[190] In April 2003, Bopanang issued summons in the High Court in Pretoria against Mphaphuli seeking payment of R656 934,44 from Mphaphuli for work it had done but for which it had not been paid. Bopanang also sought to interdict the client, Eskom, from paying Mphaphuli further. Bopanang and Mphaphuli then agreed that such an interim interdict should issue and that the dispute concerning the amount claimed by Bopanang should be referred to arbitration.

[191] Pursuant to this agreement, Bopanang prepared a statement of claim and Mphaphuli a statement of defence, as well as a counterclaim. Mr Nigel Andrews, the first respondent, was appointed as arbitrator on 21 July 2003, which appointment was confirmed when the arbitration agreement was signed on 16 October 2003. Mr Andrews was furnished with copies of all the pleadings.

[192] The arbitration process then followed. It is described in some detail later in this judgment. On 23 August 2004, Mr Andrews published his award in terms of which he found Mphaphuli to be liable to Bopanang in an amount of R339 998,83 and he ordered that interest be paid on that amount from 6 October 2002. Mphaphuli did not make payment in terms of the award, and, on 18 October 2004, Bopanang approached the High Court for the award to be made an order of court. Mphaphuli opposed this application and launched a separate application to set aside the arbitration award and to have the matter remitted to the arbitrator.[1] Mphaphuli was unsuccessful in both the High Court and subsequently the Supreme Court of Appeal.[2] It now seeks leave to appeal to this Court.

[193] There are several issues that arise. A preliminary issue is that Mphaphuli's application for condonation for the late filing of its founding affidavit and its supplementary founding affidavit was refused by the High Court, and this decision was upheld by the Supreme Court of Appeal. Kroon AJ concludes that both the High Court and the Supreme Court of Appeal misdirected themselves in this regard. Given the conclusion I reach on the merits, it is not necessary for me to traverse this issue at all and I refrain from doing so.

[1] Bopanang's application was launched in the High Court in Pretoria under case number 27225/04. Mphaphuli's separate application was launched in the same court under case number 33188/2004. The applications were consolidated and decided together – *Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*, Case Nos. 27225/04 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.

[2] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA).

[194] Turning then to the issues in the case before us. Mphaphuli identifies the following three constitutional issues: to what extent are courts entitled to exercise supervision over arbitral proceedings; whether parties waive their constitutional rights in terms of section 34 of the Constitution when they agree to refer a dispute to private arbitration; and what the correct approach is to the grounds of review set out in section 33 of the Arbitration Act 42 of 1965 (the Arbitration Act). I think it may be more logical and helpful to pose the constitutional questions in the following manner: (a) does section 34 of the Constitution apply to private arbitrations? (b) what, if any, is the relevance of the Constitution to the terms of private arbitration agreements? and (c) what, if any, is the relevance of the Constitution to the judicial scrutiny of arbitration awards?

Private Arbitration

[195] In approaching these questions, it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another*[3] as follows:

> "The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement."[4]

[3] [2002] ZASCA 14; 2002 (4) SA 661 (SCA).

[4] Id at para 25.

[196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. This growth has been fostered, in part, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[5] which provides for the enforcement of arbitration awards in contracting states and which has had a profound effect on arbitration law in many jurisdictions.[6] It has also been served by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL Model Law) by the United Nations Commission on International Trade Law in 1985, which was amended in 2006 and which has been adopted in many jurisdictions.[7]

[197] Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-

[5] The New York Convention was entered into in June 1958 in New York. It now has 144 signatories see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on 16 March 2009). South Africa has ratified the Convention and brought it into force by enacting the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (although the Act has been criticised by the South African Law Reform Commission – see South African Law Reform Commission Project 94 "Arbitration: An International Arbitration Act for South Africa" *Report: July 1998* at paras 3.13-3.15). The Convention has been described as the "most effective instance of international legislation in the entire history of commercial law" (Mustill "Arbitration: History and Background" (1989) 6(2) *Journal of International Arbitration* 43 at 49 quoted in the South African Law Reform Commission *Report: July 1998*, op cit, at para 3.3).

[6] See Sutton, Gill and Gearing *Russell on Arbitration* 23ed (Sweet & Maxwell, London 2007) at 21.

[7] For a discussion in the South African context see Christie "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations" (1994) 111 *South African Law Journal* 360; and Turley "The proposed rationalisation of South African arbitration law" (1999) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 235.

effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body).[8] In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.

[198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.[9]

Does section 34 apply to private arbitration?

[199] The first question that arises then is whether section 34 of the Constitution applies to private arbitration. Section 34 provides that:

[8] For a fuller discussion, see Redfern and Hunter *Law and Practice of International Commercial Arbitration* 4ed (Sweet & Maxwell, London 2004) at 22-35.

[9] See *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at paras 258-60. See also *Total Support Management* above n 3 at para 26, and see further discussion below at [211]-[218].

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

In *Chief Lesapo v North West Agricultural Bank and Another*,[10] Mokgoro J on behalf of a unanimous Court reflected on section 34 as follows:

> "An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law."[11]

[200] This comment makes clear that the primary purpose of section 34 is to ensure that the state provides courts or, where appropriate, other tribunals, to determine disputes that arise between citizens. A similar understanding of the section was expressed by Langa CJ in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*[12] where he reasoned:

> "The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums *provided by the State* for the settlement of such disputes. Thus section 34 of the Constitution provides as follows . . . ."[13] (My emphasis.)

[201] On a straightforward reading, the section provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public

[10] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[11] Id at para 13.

[12] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

[13] Id at para 39. See also the remarks of Ngcobo J in *Zondi v MEC for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 60-3.

hearing by a court or by another independent or impartial tribunal. Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice. The question that then arises is whether an arbitrator is "another independent and impartial tribunal or forum" as contemplated in the section. It seems to be beyond doubt that these words apply to other tribunals established by law such as the CCMA.[14] Such tribunals must also conduct "fair, public hearings" as provided for in section 34. The more difficult question, however, is whether these words apply to private dispute mechanisms established by parties by consent.

[202] In *Total Support Management*,[15] the Court grappled with the question as follows:

> "It is a moot point whether the words 'another independent and impartial tribunal or forum' in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions. The word 'fair' qualifies 'public hearing' and the phrase 'fair, public hearing' relates not only to proceedings before a court but also before 'another independent and impartial tribunal or forum'. In a private arbitration the parties may by agreement exclude any form of public hearing – the need for anonymity or secrecy may well underlie the decision to resort to arbitration. The proper interpretation of s 34 may also involve the vexed question whether there may be a waiver of a constitutional right."[16]

[14] Established in terms of section 112 of the Labour Relations Act 66 of 1995. See *Sidumo* above n 9 at paras 123-4 and 207-9 and see the further discussion below at [233]-[235].

[15] Above n 3.

[16] At para 27.

[203] In *Telcordia Technologies Inc v Telkom SA Ltd*,[17] Harms JA concluded that "[o]n balance" the provisions of section 34 would apply to private arbitration. Kroon AJ in his judgment in this matter finds that this conclusion "commends itself for acceptance" and his judgment proceeds on the basis that section 34, and particularly the requirement of "fairness" within it, applies to private arbitration.[18]

[204] In reaching his conclusion, Harms JA relied on the jurisprudence of the European Court of Human Rights which has held that Article 6 of the European Convention on Human Rights is applicable to private arbitration.[19] The text of Article 6(1) is, of course, somewhat different to the text of section 34. Article 6(1) provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[205] In *Suovaniemi and Others v Finland*,[20] the applicants to the European Court of Human Rights complained that their right to a fair hearing in terms of Article 6(1) had been violated since the Finnish courts had upheld an arbitral award which the

[17] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 47.

[18] Above at [71] and [73]-[74].

[19] *Telcordia* above n 17 at paras 47-8.

[20] ECHR Case No 31737/96 (23 February 1999).

applicants alleged had been made by an arbitrator lacking impartiality. One of the arbitrators who had made the award had previously acted as counsel to one of the parties. They also objected to the manner in which the second of the three arbitrators had conducted the proceedings. The Court held that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable.[21] However, the Court continued:

> "Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is 'permissible'. Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings (see, Eur.Court H.R., Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171, pp. 20-21, §§ 66-67). The same applies, *a fortiori*, to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all was left open in the Pfeifer and Plankl v. Austria case, as in any case in the circumstances of that case there was no unequivocal waiver."

[206] The European Court then went on to consider whether the fact that the parties had known before proceeding to arbitration that one of the arbitrators had previously acted as legal counsel to one of the parties constituted an impermissible waiver. The Court reasoned as follows:

> "In the present case and insofar as concerns arbitrator M., the Court considers that the waiver made during the arbitration proceedings was unequivocal . . . .

[21] Id at 5 and relying on *Bramelid and Malmstrőm v Sweden* ECHR Case Nos. 8588/79 and 8589/79 (12 December 1982).

> The Court considers that the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings . . . . In view of this the finding of the Finnish court based on Finnish law that by approving M. as an arbitrator despite the doubt, of which the applicants were aware, about his objective impartiality within the meaning of the relevant Finnish legislation does not appear arbitrary or unreasonable. . . . The Court furthermore notes that in the proceedings before the national courts the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings. Without having to decide whether a similar wavier would be valid in the context of purely judicial proceedings the Court comes to the conclusion that in the circumstances of the present case concerning arbitral proceedings the applicants' waiver of their right to an impartial judge should be regarded as effective for Convention purposes."[22]

[207] The conclusion of the European Court was thus that, given that the applicants had known that one of the arbitrators had acted as legal counsel for one of the other parties prior to the arbitration, and given that Finnish law provided that such knowledge gave rise to a valid waiver, the applicants had effectively waived their right to impartiality in the arbitration proceedings in terms of the Convention, and concomitantly their right to object on that ground. The precise relationship between private arbitration and Article 6 remains difficult and is an issue increasingly drawing the attention of commentators.[23]

[22] Id at 5-6.

[23] See, for example, the full discussion of the relationship between Article 6 and arbitration in Liebscher *The Healthy Award – Challenge in International Commercial Arbitration* (Kluwer Law International, The Hague 2003) at 61-80 and the authorities cited therein.

[208] Harms JA relied on *Suovaniemi* in *Telcordia.* Having found that section 34 did apply to private arbitration, like the judges in *Suovaniemi,* he then employed the concept of waiver. He reasoned as follows:

> "The rights contained in s 34 (as the ECHR accepted) may be waived unless the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores.* Parties to a private dispute may, for instance, compromise their dispute and thereby forego all their rights under section 34. By agreeing to arbitration, parties waive their rights *pro tanto.* They usually waive the right to a public hearing. They may even waive their right to an independent tribunal. Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute."[24] (Footnotes omitted.)

[209] The Court then held that parties who agree to refer a dispute to arbitration "necessarily agree that the fairness of the hearing will be determined" by the provisions of the Arbitration Act only, that they waive the right to an appeal (unless they agree to an arbitral appeal panel), and that they limit the interference by courts to the procedural irregularities set out in section 33(1) of the Arbitration Act.[25]

[210] I find it difficult to reconcile the latter portion of the reasoning with the former portion. It seems to me that if one accepts that parties to an arbitration have waived their rights under section 34 in such a manner that the fairness of the hearing will be determined only by reference to the Arbitration Act, and that interference by courts with arbitration shall be limited to the irregularities spelt out in section 33(1) of the Arbitration Act, it cannot be said that section 34 has any direct application to private

[24] *Telcordia* above n 17 at para 48.

[25] Id at paras 50-1.

arbitration at all. The thrust of the reasoning seems to me to be that when parties enter a private arbitration agreement, as long as that agreement is not contra bonos mores, they waive the rights that they would otherwise enjoy under section 34. However, we still need to consider whether section 34 does indeed apply directly to private arbitration.

[211] As it is clear that a private arbitrator is not a court, the question posed by Smalberger ADP in *Total Support Management* remains. When section 34 refers to another independent and impartial tribunal, does it include private arbitration? If it does not, then section 34 can have no application to private arbitration. In answering this question, one needs to read section 34 closely to see if its structure and purpose extend to private arbitration. It is clear that the section provides a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial tribunal. Properly read, an independent and impartial tribunal (if appropriate) must hold fair, public hearings when it resolves disputes by the application of law. It is not possible textually to detach the requirement of fairness from the requirement of being in public: both requirements apply to proceedings before courts and independent and impartial tribunals.

[212] Underlying this right, as this Court has held, is the rule of law and the positive obligation upon the state to provide courts and, where appropriate, other fora for the

resolution of disputes.[26] Private arbitrators are, of course, not provided by the state but are private agents employed by parties for the resolution of disputes.

[213] In considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the *Suovaniemi* case suggests, parties can knowingly consent to an arbitrator who may not be entirely independent.[27] Accordingly, it is not clear that arbitrators can accurately be described as "independent . . . tribunals". As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be "independent", then the language of section 34 does not seem to fit our conception of private arbitration.

[214] The only strong reason to read private arbitration to fall within the meaning of section 34 is the requirement imposed by that section that the hearing be "fair" and, indeed, it seems to be on that basis that Kroon AJ concludes that section 34 does apply to private arbitration. However, I am not persuaded that it is appropriate to understand the section to relate to private arbitration, which otherwise does not fit the language of the section, simply because it might be seen to be desirable to require arbitration

[26] See *Chief Lesapo* above n 10 at paras 13 and 22; *Modderklip* above n 12 at para 39; and *Zondi* above n 13 at paras 60-3.

[27] See also the remarks by Harms JA in *Telcordia* above n 17 quoted above at [209].

proceedings to be fair. The section must be interpreted on its own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration.[28]

[215] In concluding that section 34 does not have direct application to private arbitration, I do not finally consider what indirect application it may have, if any. Indirect application of rights in the Bill of Rights operates generally through section 39(2) of the Constitution which requires courts when interpreting statutes or developing the common law or customary law to promote the "spirit, purport and objects" of the Constitution. No argument was addressed to us on this issue but, mindful of the role courts have in giving effect to arbitration agreements, it seems to me that section 34 may have some relevance to the interpretation of legislation or the development of the common law.

[216] If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34.[29] I do not think, therefore, that the language of

[28] No argument was addressed to us on the question of whether an arbitrator appointed by the parties would himself or herself directly bear obligations under section 34 of the Constitution within the contemplation of section 8(2) of the Constitution. It seems to me that for the reasons given in this judgment, the answer to that question is probably "no". However, I refrain from firmly deciding the matter given that no argument was addressed to this Court in this regard.

[29] For a discussion of the difference between waiver and a choice not to exercise a constitutional right, see *Mohamed and Another v President of the RSA and Another (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 61, n 55. Some constitutional rights inhere in the individual and do not fall to be exercised and may,

waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all,[30] but that is a topic for another day.

[217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual – no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.

[218] In the light of the foregoing, on a proper construction of section 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

The relevance of the Constitution to the terms of arbitration agreements

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arguably, therefore never be waived (see the authorities in *Mohamed*, op cit). The question is a difficult one and need not be further elaborated here.

[30] See the interesting discussion by Woolman "Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*" (2008) 125 *South African Law Journal* 10.

[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.

[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution,[31] the arbitration agreement will be null and void to that extent[32] (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.[33] As stated above, it is not necessary to determine what role section 34 might play in this analysis.

[221] At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly[34] or, as it

[31] See the reasoning of Cameron JA in *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 91, cited with approval in *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) at para 18; and also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 59 (per Ngcobo J).

[32] See the similar but not identical reasoning in *Telcordia* above n 17 at para 48.

[33] See section 39(2) of the Constitution and the authorities cited above at n 31.

[34] Voet *Commentary on the Pandects* 4.8.26: "since every approval of an award still to be made by an arbitrator rests on this implied condition that the arbitrator shall have given a fair decision". See Gane (tr) *The Selective Voet, Being the Commentary on the Pandects* Vol 1 (Butterworth and Co (Africa) Ltd, Durban 1955) 760. Although the Latin word used in Voet is "tacita", I think this is, in modern usage, best translated as "implied" rather than "tacit". The distinction in our modern law was nicely explained by Corbett AJA in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532G-H as follows:

> "The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have

is sometimes described, according to law and justice.[35] The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair.[36] Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution. The arbitration agreement should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores.

[222] The contractual obligation of fairness accords with the approach of recent legislation regulating arbitration in other jurisdictions. Most notably, perhaps, it accords with section 33 of the United Kingdom Arbitration Act, 1996 which provides that arbitrators have a general duty to act "fairly and impartially . . . giving each party

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> contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term."

[35] See *Lazarus v Goldberg and Another* 1920 CPD 154 at 157.

[36] See in this regard section 1 of the United Kingdom Arbitration Act, 1996 which provides as follows:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

a reasonable opportunity of putting his case and dealing with that of his opponent".[37] This is a general duty that may not be varied by agreement between the parties. In a similar vein, Article 18 of the UNCITRAL Model Law provides –

> "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

[223] Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context.[38] Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative,[39] and may dispense with pleadings, with oral evidence, and even oral argument.

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[37] In this regard see also the Report of the South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001* which, in its draft Bill, proposes a similar provision to the provision in the United Kingdom Arbitration Act. They propose a general principles clause in section 2 of the Bill which would provide that "the object of arbitration is to obtain the fair resolution of disputes". See also the proposed section 28(1) which establishes a general duty of fairness similar to that contained in section 33 of the United Kingdom Arbitration Act.

[38] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39.

[39] So, for example, section 34(1) of the United Kingdom Arbitration Act, 1996, provides that the tribunal may decide all procedural and evidential matters, subject to the agreement between the parties. Procedural and evidential matters are defined in section 34(2)(g) to include "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law." I have opted to use the term "investigative" to describe a manner of proceeding in which the arbitrator, rather than the parties, takes the initiative in ascertaining the relevant facts and law. I could perhaps have used the term "inquisitorial", but have avoided it, preferring "investigative" which suggests immediately that what the arbitrator must do is investigate, in contrast to adversarial proceedings in which the contending parties lead evidence and proffer argument before the arbitrator.

The relevance of the Constitution to the judicial scrutiny of arbitration awards

[224] The final question that arises for consideration before turning to the facts of this case is the extent to which the judiciary may scrutinise arbitration awards. This is a matter which is regulated by section 33(1) of the Arbitration Act. This section provides relatively narrow grounds for setting aside an arbitration award as follows:

> "Where—
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[225] The basis upon which a court may set aside an arbitration award is a difficult issue which has been the subject of much debate.[40] It should be noted that one of the important questions of modern arbitration law around the world is the extent to which courts may supervise arbitration awards. Both the New York Convention and the UNCITRAL Model Law limit the scope for intervention to a narrow range of complaints.

[226] In approaching this question, it should be borne in mind that arbitration awards are given effect by the ordinary courts. So if a party refuses to obey an award, the law provides for the enforcement of the award by the ordinary courts. Indeed, this is the

[40] See Christie "Arbitration: Party Autonomy or Curial Intervention III: Domestic Arbitrations" (1994) 111 *South African Law Journal* 552.

very purpose of the New York Convention which provides for the recognition and enforcement of arbitration awards in member jurisdictions even where the arbitration has taken place in another jurisdiction. The New York Convention provides only narrow grounds for a court to refuse to give effect to an award. Article V of the Convention provides as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid . . . ; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority . . . .
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[227] Article 34(2) of the UNCITRAL Model Law provides the grounds for setting aside an arbitral award by a court. Its terms are modelled on the provisions of Article

V of the New York Convention, so that the international regulation of arbitration sets the same standards for refusing to make an award an order of court as it does for setting aside the award. This has been described as "a pleasing symmetry".[41]

[228] A somewhat different approach to the courts' powers of intervention is provided in the United Kingdom Arbitration Act, 1996. Section 68 provides that a court may set aside an arbitration award on the grounds of serious irregularity if the court considers the irregularity "has caused or will cause substantial injustice to the applicant". The grounds of serious irregularity listed include a failure to comply with the section 33 duty to act fairly; failure to conduct the proceedings in accordance with the procedure agreed by the parties; and failure by the tribunal to deal with all the issues that were put to it. This approach thus requires both a serious procedural irregularity and a showing of substantive injustice. The explanation given for this section by the Departmental Advisory Committee on Arbitration Law in their *Report on the Arbitration Bill and Supplementary Report on the Arbitration Act 1996* included the following comments:

> "[Serious] irregularities stand on a different footing [from complaints concerning lack of jurisdiction]. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. . . . The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could

[41] Redfern and Hunter above n 8 at 412.

> reasonably be expected of the arbitral process that we would expect the court to take action."[42]

[229] In considering the question of the powers of the courts to set aside arbitration awards, the South African Law Reform Commission, in its report on "Domestic Arbitration", noted the following:

> "One of the most controversial issues of arbitration law reform concerns the powers of the court in relation to arbitration. It is accepted that court support for the arbitral process, particularly as regards the enforcement of arbitration agreements and arbitral awards, is essential. It is also accepted that courts are entitled to certain supervisory powers as the price for their powers of assistance. A court cannot be expected to enforce an arbitral award which has been obtained as a result of an arbitral procedure which was fundamentally unfair and which has substantially prejudiced the losing party."[43] (Footnotes omitted.)

The report then notes that a difficult balance needs to be achieved between affording the courts appropriate powers to scrutinise arbitration awards and not empowering unscrupulous parties to use the courts to undermine the purpose of arbitration: the speedy resolution of disputes.[44]

[230] The authors of the report continue:

> "The drafters of the Model Law were well aware of this problem and gave careful attention to it. It is generally accepted that they achieved the right balance regarding the extent of the courts' powers and the time in the arbitration proceedings when they may be exercised. Even in England, which has traditionally been regarded as a

[42] See Sutton, Gill and Gearing above n 6 Appendix 2 at 693.

[43] South African Law Reform Commission *Report: May 2001* above n 37 at para 2.16.

[44] Id at para 2.20.

> jurisdiction where the courts have enjoyed excessive powers in the context of arbitration, there has been a clear and continuing trend since 1979 to curtail the powers of the courts."[45]

For these reasons, the Commission concludes by recommending that the powers conferred upon the courts to set aside an arbitration award should be modelled on the powers contained in the Model Law, in preference to the provisions of section 33(1) of the Arbitration Act.[46] In addition, it also proposes, in section 52(5) of its draft Bill, that an award in conflict with public policy (one of the Model Law grounds for setting aside an arbitration award) includes—

> "(a) an award made in breach of the tribunal's duty under section 28 such as to cause substantial injustice to the applicant; or
>
> (b) an award induced or affected by fraud or corruption."[47] (Footnote omitted.)

[231] This approach is in effect a hybrid between the Model Law and the United Kingdom Arbitration Act, 1996. The section 28 duty mentioned in section 52(5)(a) is the general duty of the arbitrator to act fairly (the equivalent of section 33 of the United Kingdom Arbitration Act),[48] so the effect of section 52(5)(a) is that an award can be set aside when a failure to act fairly causes substantial injustice.

[232] I set out the approach of the Model Law, as well as the United Kingdom approach and the debate in the South African Law Reform Commission, as I consider

[45] Id at para 2.21.

[46] Id at para 2.22.

[47] Id at 157.

[48] See [41] above.

it to be important background in considering how one should properly and constitutionally interpret section 33(1) of the Arbitration Act insofar as private arbitration is concerned. Kroon AJ in his judgment concerning the proper approach to the interpretation of section 33(1) of the Arbitration Act relies on the minority judgment of Ngcobo J in this Court in *Sidumo v Rustenburg Platinum Mines Ltd*.[49]

[233] In that case, the Court was concerned with a statutory arbitration before the CCMA in terms of the Labour Relations Act 66 of 1995. Section 145(2) of the Labour Relations Act sets out the grounds upon which an award made by the CCMA can be set aside by a court in terms nearly identical to those contained in section 33(1) of the Arbitration Act. In his reasoning, stating that the jurisprudence on section 33(1) provided a useful starting point for an analysis of section 145(2), Ngcobo J nevertheless emphasised the need not to overlook the differences in context between the two statutes. In this regard, he emphasised the importance of the fact that a CCMA commissioner "performs a public function and exercises public power".[50]

[234] The difference identified by Ngcobo J is indeed important, for it seems to me that the considerations set out in the preceding paragraphs which urge a court to be slow to set aside private arbitration awards are not directly applicable to the award of a statutory tribunal performing an important public power and protecting a constitutional right (the right to fair labour practices).[51] To that extent, therefore, I do

[49] Above n 9.

[50] Id at para 260.

[51] Section 23(1) of the Constitution.

not think that the reasoning in *Sidumo* can, without more, be of great assistance in determining the proper constitutional approach to the interpretation of section 33 of the Arbitration Act in the context of private arbitration.

[235] To return then to the question of the proper interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of section 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.

[236] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings

should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly.[52] The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.

Should the court grant the application for leave to appeal?

[237] After this somewhat lengthy introduction on the law and private arbitration, I turn now to consider whether this case raises a constitutional issue within the jurisdiction of the Court and one which it is in the interests of justice to hear. At the outset I should say that ordinarily the question whether a particular arbitration award should be set aside, turning as it must on the precise terms of the arbitration agreement

[52] In this regard, see section 34(2)(g) of the United Kingdom Arbitration Act, 1996, and Article 19(2) of the UNCITRAL Model Law which provides that in the absence of agreement between the parties, "the arbitral tribunal may . . . conduct the arbitration in such manner as it considers appropriate." This right is subject, of course, to the parties being treated equally in terms of Article 18 of the UNCITRAL Model Law.

which regulated it, will not raise a constitutional issue of sufficient substance to warrant being entertained by this Court.

[238] This case, however, being the first such challenge to be considered by this Court, is different. The Court has had to consider the relationship between private arbitration and the Constitution, the proper scope of section 34 of the Constitution and the approach to the interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this Court and which, given the need to provide guidance in this regard, it is in the interests of justice for this Court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide. In so doing, we will avoid the piecemeal determination of the case and provide an application of the principles set out above which will hopefully elucidate those principles in a helpful manner. I would therefore grant the application for leave to appeal.

Should the arbitration award be set aside?

[239] Mphaphuli argues that the arbitration award be set aside because, first, the arbitrator held what it terms three "secret" meetings with Bopanang during the course of the arbitration. Secondly, Mphaphuli points to the fact that not all correspondence between Bopanang and the arbitrator was furnished to Mphaphuli; and thirdly, Mphaphuli submits that the arbitrator committed a gross irregularity by "effectively

ignoring the pleadings filed before him" and awarding amounts in excess of what had been claimed and invoiced. Before turning to consider these complaints in detail, it will be helpful to give some further background to the arbitration.

The arbitration process

[240] As set out in the introductory paragraphs of this judgment, the arbitration agreement was entered into between the parties once litigation had been initiated by Bopanang to recover moneys it alleged Mphaphuli owed it in terms of a contract in which Bopanang had been appointed as a sub-contractor by Mphaphuli to electrify certain rural villages in Limpopo Province. In July 2003, Mphaphuli and Bopanang held a pre-arbitration meeting at which they agreed that Mr Andrews, a quantity surveyor, would be appointed as arbitrator. The note of this agreement reflected that Mr Andrews was appointed in the light of his qualifications and experience. The parties further agreed that Mr Andrews would be furnished with Bopanang's particulars of claim, together with a list of documents upon which it relied. Further, Mphaphuli was to lodge its plea and counterclaim (if any) and its list of documents by a certain date, which would then be followed by Bopanang's reply and plea to the counterclaim (if any).

[241] According to the arbitrator, once he had received this documentation he realised that he could not determine what, if anything, was due by Mphaphuli to Bopanang from the invoices alone and he concluded that he needed to re-measure the quantities on site. When the arbitration commenced on 6 October 2003, he informed the parties

of this and the parties agreed that the matter would have to be postponed, and the mandate of the arbitrator extended to include physical re-measurement on site. Thereafter, a further arbitration agreement reflecting this agreement was signed on 16 October 2003.

[242] Clause 1 of this agreement was titled "Purpose of Arbitration". It provided as follows:

> "The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the Defendant or ESKOM; the value of the work that has been done by the Plaintiff; the effect of any defects, if any, and the rectification thereof; any and all payments made to the Plaintiff. Therefore a final assessment of the moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator."

The clear purpose of the arbitration was therefore to determine what, if anything, was owed by Mphaphuli to Bopanang.

[243] In relation to the procedure to be followed, the agreement provided in clause 4 that—

> "The parties record that the arbitrator has already been provided with a bundle of documentation forming part of the Plaintiff's Particulars of Claim. In addition hereto, each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 [sic]."

[244] Clause 5 provided that the arbitrator "shall be entitled to require from any of the parties to make such further documentation available as he may require". It further stated that the parties would furnish the documentation to the arbitrator within three days of his request. Clause 6 provided that the arbitrator could liaise with representatives of Eskom and request Eskom to furnish any relevant documentation. Neither clause 5 nor 6 expressly stated that the documentation received by the arbitrator would be furnished to the parties. Clause 10 of the agreement stipulated that the terms of the agreement were the full agreement between the parties and were not to be varied save in writing.

[245] Clause 7 of the agreement provides that the arbitrator would commence the "inspection and measurement of the work" on site on 27 October 2003. It specifically added that each party should appoint representatives to attend the inspection and measurement.

[246] I should pause here to note that the agreement makes no express provision for formal adversarial adjudicative proceedings at all in which evidence would be led or legal argument submitted. Both Mphaphuli and Bopanang accept this. The agreement provided only for the furnishing of documents to the arbitrator by the parties and Eskom (with a power for the arbitrator to request further documents should he consider it necessary) and for a re-measurement process to take place on site. It was only in relation to the re-measurement process that the agreement stipulated that

parties would appoint representatives. It is again worth noting that the representatives appointed were not lawyers.

[247] The date for the inspection was delayed till 12 and 13 November 2003. In his affidavit, the arbitrator describes, in a largely undisputed version, what happened on those days as follows:

> "Tatjane is a rural area situated in a remote and mountainous part of Limpopo province. It is a large area (totalling approximately 20-30 km^2) and for most of it, inaccessible to vehicles. Since it became clear to all of us that the inspection and measurements would have had to be done on foot, it was decided after consultation with the parties, that we split into two teams. Each team would comprise of representatives of both parties and would be tasked physically to re-measure all work done by Second Respondent. In the evening, we would then get together and combine the results of both teams. The first team comprised of myself, Mr Lufuno Mphaphuli . . . and Mr Shawem Kigole who represented the Second Respondent. The second team comprised of Mr Gerhard Esterhuizen (who represented the Second Respondent) and one Moses (who represented the Applicant)."

[248] Rain washed out most of the efforts at measurement on 12 November 2003 and the teams agreed to meet again on 1 December 2003. In the meanwhile, the arbitrator consolidated the results of the inspection and forwarded them to the parties. The arbitrator notes that the equipment installed by Bopanang was physically counted and measured. He emphasises that work installed by other contractors was not measured. The arbitrator further states that on 1 and 2 December 2003, the remainder of the area was inspected and re-measured. He notes that it became clear during the inspection process that Bopanang had to supply electricity to considerably more informal dwellings than had originally been estimated by Mphaphuli and that many of the

dwellings in the area were new. It was also accepted, says the arbitrator, that Bopanang was entitled to be compensated for these additional installations. He also noted that the mountainous nature of the area had resulted in the need to re-route some of the electricity cables. By 18 December 2003, the arbitrator had completed a schedule reflecting the results of the inspection and re-measurement process which he sent to the parties for their comment.

[249] A flurry of correspondence occurred in the early months of 2004 when the parties wrote to the arbitrator setting out various concerns. From this correspondence and from his work on the measurements, the arbitrator recounts that it became clear that some measurements had been omitted and also that there was a significant factual dispute between the parties as to the remedial work that had been undertaken by AA Electrical. He accordingly suggested a further meeting on site with representatives of AA Electrical to resolve this dispute and to complete the omitted measurements. The meeting took place on 24 March 2004. The arbitrator once again consolidated the results of the re-measurement and inspection of 24 March and forwarded it to the parties.

[250] At this stage, I should note that Mphaphuli now objects to the procedure followed by the arbitrator on the basis that once the arbitrator had done the measurements, he should again have referred to the invoices and claims of the second respondent to limit the amount due to the amount claimed by Bopanang. The arbitrator rebuts this argument on the basis that he had advised the parties that a

determination on the invoices would be impossible and that inspection and re-measurement were required. He states that once the parties had agreed on re-measurement, it would have made no sense to seek to do that in the light of the invoices. I shall return to this issue in a moment.

[251] On 29 April 2004, the arbitrator wrote to the parties identifying certain outstanding issues upon which he needed guidance. Mphaphuli responded to this request in writing, but Bopanang felt that it could not explain its responses in writing. Accordingly, a meeting was held between the arbitrator and a representative of Bopanang on 2 June 2004 where Bopanang's clarification was provided to the arbitrator. This was the second of the so-called secret meetings. According to the arbitrator, the result of this meeting was that the arbitrator wrote to the parties on 9 July 2004 in which he asked both parties to comment on the tentative conclusions he had drawn in the light of the meeting of 2 June 2004.

[252] Bopanang responded to this letter with a series of cryptic yes-or-no answers pencilled onto the faxed copy of the original letter. A copy of this response was not sent to Mphaphuli. However, the same questions had been put to Mphaphuli who did not respond immediately. Finally, after being reminded to do so by the arbitrator in writing on 6 August 2004, Mphaphuli, on 16 August 2004, furnished its responses to the queries of 9 July. It did not respond to all the queries raised by the arbitrator but where it did not respond, the arbitrator accepted that Mphaphuli did not disagree with his (the arbitrator's) tentative proposed conclusion.

[253] One final issue needs to be described here. When the arbitrator received Bopanang's cryptic responses to his letter of 9 July 2004, the answer in relation to one issue was unclear to the arbitrator. That issue related to a proposed revision of prices. The arbitrator held a further meeting with Bopanang, in the absence of Mphaphuli, on 29 July 2004 to discuss this issue. This was the third so-called secret meeting and is discussed in greater detail below. After that meeting, the arbitrator rejected Bopanang's proposal that revised prices should be awarded, and held in favour of Mphaphuli that Bopanang was not entitled to the revised prices as they had never been agreed in writing – the original contract required amendments to be in writing.

The proper interpretation of the arbitration agreement

[254] Construed in its context, it seems to me that this arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of proceeding. The factors are the following. First, the arbitrator is a quantity surveyor, expressly stated to have been appointed because of his expertise and experience. This fact suggests that the parties understood the process to be primarily a quantitative exercise which would require the accurate measurement of work done by Bopanang to determine the indebtedness of Mphaphuli.

[255] Secondly, the terms of the arbitration agreement itself contemplate that the purpose of the arbitration was to determine—

> "whether payment is due in terms of the contract concluded between the parties, and if it is . . . due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the Defendant or ESKOM; the value of the work that has been done".

It concluded by stating that "a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator". Again, this emphasises that the function of the arbitrator was primarily quantitative.

[256] Thirdly, the agreement contemplates that "each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator". There is no express provision for the exchange of documentation between the parties. Similarly, the arbitrator is entitled to request documentation from the parties without an express provision for an exchange of the documentation. Fourthly, the arbitrator was authorised to liaise with Eskom directly which was in turn authorised to furnish the arbitrator with any documentation he required. Again, the agreement does not stipulate that such documentation would be furnished to the parties. Fifthly, there is only one express provision that requires the presence of the parties and that is at the re-measurement process itself. Sixthly, the agreement makes no provision at all for the leading of oral evidence or the submission of oral argument.

[257] I am strengthened in my conclusion that an informal, investigative process was envisioned by the process that was in fact adopted as I have described it above. That process was one where the arbitrator received evidence, prepared a schedule of quantities based on the evidence he received, gave both parties a copy of the schedule

or a letter setting out his concerns and gave each an opportunity to comment. A revised schedule containing the re-measured quantities was circulated to the parties at least three times during the arbitration: on 17 November 2003, 18 December 2003 and at the end of March 2004 (after the meeting with AA Electrical). In addition, the arbitrator wrote to the parties at least three times asking for their comments on preliminary conclusions he had reached: on 18 December 2003, 25 February 2004 and on 9 July 2004. Neither of the parties complained about the procedure followed to the arbitrator during the proceedings, and one can only assume that this was the process the parties had contemplated.

[258] I conclude therefore that on a proper interpretation of this arbitration agreement, the parties intended the arbitrator to follow an informal, investigative process and one in which no oral evidence would be led. The procedure was by and large aimed at the determination of facts and in particular the amount owed by Mphaphuli to Bopanang, if anything. No provision was accordingly made for legal argument. The question that now arises is whether the conduct complained of by Mphaphuli constitutes a gross irregularity within the meaning of section 33(1) of the Arbitration Act in the light of this understanding of the arbitration agreement. I shall deal with each of the three complaints separately. Before doing so, I wish to deal briefly with the cases cited by Kroon AJ concerning the need for both parties to be present at all stages during arbitration proceedings.

[259] Kroon AJ relies on *Lazarus v Goldberg and Another*[53] which cites Cloete J in *Croll qq. Kerr v Brehm* to state that "no rule is more clear than that they [arbitrators] should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done *inaudita altera parte*". This rule is clearly correct in the context of an adversarial process. It is not clear to me, however, that it is applicable to investigative proceedings of the sort under examination here. Can it be said that it is unfair to one party for an arbitrator to obtain information, to form a preliminary view on the basis of that information and then to give both sides an opportunity to rebut that preliminary view? I do not think so.

[260] Another case relied upon by Kroon AJ is *Shippel v Morkel and Another*[54] in which Van Winsen J relied on a passage from Voet and concluded that

> "our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings."[55]

In my view, this conclusion is incorrect. There is nothing in the Arbitration Act which excludes investigative proceedings, as I have reasoned above, and judges should be cautious not to interpret section 33(1) of the Act so as to require arbitrators to proceed as if they were courts of law. Such an interpretation would undermine the purposes of arbitration which are to provide flexible and affordable alternatives to judicial dispute resolution. Van Winsen J's conclusion that "it is well established . . . that the

[53] 1920 CPD 154, cited above at [86] of Kroon AJ's judgment.

[54] 1977 (1) SA 429 (C).

[55] Id at 34.

procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties" seems to me (particularly given the previous dictum) to assume that the proceedings must be adversarial. That is an assumption that should not be made.

[261] It is not necessary to deal with each and every one of the authorities cited by Kroon AJ. Suffice it to say that, in the light of modern arbitration practice and procedure, courts should be careful not to require arbitrators to proceed in an adversarial fashion. To the extent that these authorities stipulate requirements of fairness relevant to adversarial proceedings, they cannot be faulted. To the extent, however, that they suggest that investigative procedures may not be followed by arbitrators, they cannot be accepted. This does not mean that anything goes in an investigative process. The requirement of fairness obtains there, as it does in adversarial proceedings. Its content is simply different. In each case, the question will be whether the procedure followed afforded both parties a fair opportunity to present their case.

The "secret" meetings

[262] The three "secret" meetings Mphaphuli refers to were held on 17 March 2004, 2 June 2004 and 29 July 2004. According to Bopanang, all that happened at the first meeting was that the arbitrator and a representative of Bopanang agreed to a date for a site meeting to discuss the extent of the remedial work conducted by AA Electrical. The meeting took place following a letter by Bopanang to the arbitrator enquiring

about progress. Following the meeting of 17 March, the arbitrator immediately wrote to Mphaphuli to advise it of the date set for the site meeting, being 24 March.

[263] In assessing whether this meeting constituted a gross irregularity, it should be added that it is clear from the record that there were a number of occasions on which the arbitrator contacted one or other party to arrange a meeting or some similar administrative arrangement.[56] It is clear from the record that the process was an informal one and that neither party objected to this during the arbitration. It is also clear that nothing that happened on 17 March 2004 prevented Mphaphuli from presenting its case to the arbitrator within the framework of the arbitration procedure adopted. Given that the proceedings followed were informal and investigative and based on a methodology whereby the arbitrator repeatedly placed his preliminary views before the parties and gave them an opportunity to respond, the meeting of 17 March 2004 does not constitute a gross irregularity, if it constitutes an irregularity at all.

[264] The second meeting took place on 2 June 2004.[57] That meeting was held because Bopanang found it hard to respond in writing to the queries sent by the arbitrator to both parties on 29 April 2004. In the meeting, Bopanang's representative explained to the arbitrator the way in which certain equipment had been installed. On the arbitrator's version, the result of this meeting was that the arbitrator wrote a letter

[56] So, for example, on 16 October 2003, Mphaphuli's representative contacted the arbitrator to inform him that the revised arbitration agreement had been signed and to suggest a site meeting with representatives on 27 October 2003. Again at the site meeting of 24 March 2004, Mr Mphaphuli declined to accompany the arbitrator on a site inspection saying he had to attend another meeting.

[57] It is discussed above at [251].

on 9 July 2004 to both parties setting out his initial and tentative conclusions on some of the equipment issues and asked both parties to respond. Both parties did eventually respond.

[265] It may have been unwise for the arbitrator to meet alone with a representative of Bopanang. The question that arises in this instance is whether it was unfair in the sense that it denied Mphaphuli an opportunity fairly to state its case. Mphaphuli was given an opportunity to respond to the explanations given by Bopanang to the arbitrator, in that the arbitrator formulated the issues and sent them to both parties requesting confirmation. This followed the process that had been adopted throughout the arbitration. The arbitrator reached preliminary conclusions and then gave the parties an opportunity to comment thereon. At times, by consent, those conclusions were reached in the absence of one or other of the parties. As noted above, for example, the site inspection on 24 March 2004 had gone ahead in the absence of Mr Mphaphuli as he chose to attend another meeting. It is to be assumed that he was willing to do this because he understood that the arbitrator would give him an opportunity to comment on the results of the inspection. This the arbitrator did in due course.

[266] Given the nature of the proceedings agreed upon, and particularly the fact (consistent with the conduct of the arbitration throughout) that the arbitrator set out the preliminary conclusions he had reached arising from this meeting and gave both parties an opportunity to comment thereon, it cannot be said that the meeting

prevented Mphaphuli from presenting its case fairly to the arbitrator. It was indeed given an opportunity to do so. I cannot conclude therefore that the second meeting constituted a gross irregularity.

[267] The third meeting took place on 29 July 2004. In this meeting, the representative of Bopanang sought to persuade the arbitrator to award certain revised prices. According to the arbitrator, he decided after consideration that these revised prices were not payable by Mphaphuli and ruled in its favour in this regard. I should add here (though it is not an issue upon which Mphaphuli relies) that Bopanang's version of this meeting is less crisp. It is clear from its version too that it related to the arbitrator's desire to get clarity in relation to the cryptic responses Bopanang had given to his queries of 9 July 2004, but it suggests that the discussion may have ranged more broadly than the question of revised prices.

[268] Again this meeting should not have been held alone with the representative of Bopanang. Yet, at the time, the arbitrator was having difficulty contacting Mphaphuli at all which had still not responded to the letter of 9 July. When it did finally respond to the letter of 9 July, it appears to have agreed with many of the preliminary conclusions reached by the arbitrator in that it did not dispute them and instead mainly raised issues relating to quantities in the re-measurement schedule. Finally, on the arbitrator's version, the result of the meeting favoured Mphaphuli. In all these circumstances, it does not seem to me that this meeting should be found to constitute a

gross irregularity in the context of this arbitration sufficient to warrant the award being set aside.

Failure to disclose all correspondence

[269] The second irregularity to which Mphaphuli points is the failure by the arbitrator to ensure that all correspondence received from Bopanang was forwarded to Mphaphuli. The arbitrator states that, to the extent that this happened, it was an oversight in his office, and that the vast majority of the correspondence received was circulated to both parties.

[270] Mphaphuli points to three letters in this regard (though in written and oral argument only the second and third letters were raised). The first letter was a letter sent by Bopanang to the arbitrator on 12 December 2003 raising a report by Eskom and the remedial works done by AA Electrical. Whatever impact this letter may have had, if any, on the arbitrator's conclusions, Mphaphuli would have had an opportunity to respond given that the arbitrator furnished it with his tentative conclusions in a schedule of measurements at least twice after the letter was received. Although it may well have been a regrettable oversight not to have forwarded the letter to Mphaphuli, it cannot be said that the failure to do so constituted an irregularity so material as to require this Court to set aside the arbitration award.

[271] The second letter was a letter of 24 February 2004 in which Bopanang wrote to the arbitrator furnishing comments on the claims of AA Electrical. This letter was one

of a flurry of letters between the parties and the arbitrator at that time. The arbitrator generally forwarded letters of one party to the other, but in this case he admits the letter was not forwarded due to an oversight. However, it is also clear that this flurry of letters made plain to the arbitrator that there was a serious dispute of fact between the parties concerning the work done by AA Electrical. As a result, the arbitrator called a further site meeting to be attended by both parties and AA Electrical to resolve this factual dispute.[58] After that meeting the arbitrator reworked his measurements and sent them to the parties again at the end of March.

[272] Accordingly, although it may have been unfortunate that the arbitrator failed to provide Mphaphuli with a copy of Bopanang's letter of 24 February 2004, it cannot be said that this undermined Mphaphuli's ability fairly to make its case. It was given a full opportunity on 24 March 2004 to assist in the determination of the dispute concerning what work had been done by AA Electrical, and again once the revised measurements were sent to it at the end of March. The failure to provide Mphaphuli with a copy of the letter of 24 February, therefore, cannot be said to have amounted to a serious irregularity which would warrant setting aside the arbitration.

[273] The third letter to which Mphaphuli points in this regard is a letter from Bopanang to the arbitrator dated 19 July 2004. This letter is the cryptic response to the arbitrator's letter of 9 July 2004 described above at paragraph 64. It will be recalled that the arbitrator had given the parties a list of preliminary conclusions upon

[58] See [249] above.

which he wanted their comment before finalising his award. It is clear that both parties were given an opportunity to respond to this preliminary set of conclusions. Although there is no doubt that it would have been desirable as a matter of practice for the arbitrator to have furnished a copy of Bopanang's letter of 19 July to the applicant, I am not persuaded that anything turns on this at all. The process adopted is quite clear. The arbitrator made preliminary findings and asked each party for comment. This is a classic investigative process. Mphaphuli was given a fair opportunity to make out its own case. There is no suggestion that the arbitrator contemplated an adversarial exchange between the parties on his preliminary conclusions. He simply asked each party whether the approach he adopted was correct or not.

[274] Each party then had an opportunity to persuade the arbitrator that his preliminary conclusions were wrong. In respect of several of the preliminary conclusions he had suggested in his letter of 9 July 2004, the arbitrator ruled in favour of Mphaphuli. Moreover, Bopanang's responses were cryptic as has been described. By and large, they were yes-or-no answers. In my view, there is not much that Mphaphuli could have said to rebut these simple yes's or no's beyond what it said in its own response to the very same queries. I conclude on this point too that Mphaphuli has not established a gross irregularity in this regard.

Ignoring the pleadings/arbitral mandate

[275] The final argument made by Mphaphuli is that the arbitrator, in pursuing a full re-measurement of the work undertaken by Bopanang, ignored the pleadings and thus

misconstrued his mandate. This complaint goes to the question of the proper construction of the arbitration agreement. In this regard, I disagree with my colleague Kroon AJ. In my view, it is clear from the record that it was the arbitrator's view that it was impossible to determine on the basis of the invoices alone what money if any was owing to Bopanang. The arbitrator told the parties this and suggested that a fair process would be to conduct a re-measurement on site to identify what work Bopanang had in fact undertaken.

[276] It was further his view that once that re-measurement had been undertaken he would deduct from the re-measurement the amount Mphaphuli had paid Bopanang. The arbitrator states that it was not the intention of the parties that the amounts owing would be limited to the amounts originally claimed by Bopanang or as stipulated in the contract. In asserting this, the arbitrator points to the fact that it became apparent during the site inspection that far more dwellings needed to be electrified than had originally been provided for in the contract, and that the parties agreed that Bopanang was entitled to remuneration for work actually done. This Mphaphuli now disputes.

[277] During the arbitration, it must have been clear to Mphaphuli from the measurements repeatedly sent to it by the arbitrator that this is how the arbitrator construed his task. The arbitration agreement properly construed did not require both the re-measurement and determination of what was due on the basis of the re-measurement, and also the determination of what was due on the invoices and, in the light of the invoiced amounts, somehow curtailing the amount found to be due on the

re-measurement. Such an approach was inconsistent with the agreement that a re-measurement was necessary, and that it would form the basis of a new schedule setting out the amounts Bopanang was entitled to in terms of the price schedule in the contract. Mphaphuli participated fully in this process. What is more, it was afforded at least three opportunities during the proceedings to dispute the re-measured quantities when the arbitrator furnished his preliminary re-measurements. One can only conclude that Mphaphuli did not dispute this manner of proceeding because its understanding of the arbitration agreement was precisely the understanding proffered by the arbitrator – the arbitration was to be based on the re-measured quantities and not on the invoiced amounts.

[278] I conclude in this regard that the arbitrator correctly understood his mandate and that Mphaphuli's complaint in this respect must fail. Counsel for the applicant did not press the argument relating to bias on the part of the arbitrator in either written or oral argument. Given the conclusion I have reached, there is no basis for concluding that the manner in which the arbitrator conducted himself gave rise to a reasonable perception of bias. No more need be said on this score.

Costs

[279] Mphaphuli has raised a constitutional issue in this Court. The respondents were brought to this Court to answer that argument. They did not rely on any constitutional right of their own but disputed the constitutional argument made by the applicant. Properly construed, therefore, this is private litigation relating to a commercial matter

and the applicant has lost. In my view, it should pay the costs, including those consequent upon the employment of two counsel.

Order

[280] For the reasons set out above, I make the following order:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

(c) The applicant is ordered to pay the costs of both respondents in this Court, such costs to include the costs of two counsel.

Langa CJ, Mokgoro J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan ADCJ.[*]

NGCOBO J:

[281] I have read the judgments prepared by my colleagues O'Regan ADCJ and Kroon AJ. They both agree that the application for leave to appeal raises a constitutional matter and that it is in the interests of justice to grant leave to appeal. However, they reach different outcomes. I accept that the contentions advanced by

[*] Although Madala J sat in the case, ill health prevented him from participating in the judgment.

Mphaphuli raise a constitutional matter. However, I am unable to agree with my colleagues that it is in the interests of justice to grant leave to appeal. In my view, the application falls to be dismissed with costs. And for reasons set out in this judgment, I do not therefore express any view on the constitutional matter that Mphaphuli raises in this Court.

[282] The facts are set out in the judgments of my colleagues. I do not propose to repeat them in this judgment except to the extent necessary for this judgment.

[283] Suffice it to say that this litigation that has its genesis in a subcontract entered into between Mphaphuli and Bopanang on 16 May 2002. A dispute that ensued between Mphaphuli and Bopanang over payment and execution of the agreement led to Bopanang vacating the subcontracted site during January 2003. High Court litigation ensued. This culminated in an arbitration agreement signed by the parties on 16 October 2003. The arbitrator published his award on 23 August 2004. He found Mphaphuli liable to Bopanang in an amount of R339 998.83 together with interest on that amount calculated from 6 October 2002. The attempt by Mphaphuli to have the award reviewed and set aside failed in the High Court in Pretoria. An appeal to the Supreme Court of Appeal suffered the same fate. Hence this application for leave to appeal.

[284] In its application for leave to appeal to this Court, Mphaphuli alleged that the crisp question on which it seeks the ruling of this Court is whether or not, in behaving

irregularly, the arbitrator compromised one of its constitutional rights. The constitutional right implicated was said to be the right of access to court, which is enshrined in section 34 of the Constitution. In its written argument, it contended that the issue which lies at the heart of its application for leave to appeal is the relationship between arbitrations, the courts and the Constitution.

[285] It submitted that the application raises in particular:

i) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

ii) Does the mere conclusion of an arbitration agreement mean that the parties had undertaken to waive fundamental aspects of their right to a fair hearing in terms of section 34 of the Constitution, and, if so, under what circumstances?

iii) What is the correct approach to the grounds of review set out in section 33 of the Arbitration Act 42 of 1965 when that section is properly interpreted in the light of the right to a fair hearing contained in section 34 of the Constitution?

[286] These contentions by Mphaphuli no doubt raise a constitutional matter. But these issues are being raised for the first time in this Court. They were neither raised in the High Court nor in the Supreme Court of Appeal. And these are the kind of issues that, on Mphaphuli's version, arise from the manner in which the arbitrator

conducted himself. They are, therefore, issues which were always there and did not arise subsequent to the decisions of the High Court or of the Supreme Court of Appeal. The question is whether it is in the interests of justice to grant leave to appeal in these circumstances. It is instructive to trace Mphaphuli's cause of action as it developed in a series of affidavits filed by it in the High Court.

[287] The cause of action relied upon by Mphaphuli in its founding affidavit of 10 December 2004 was based on administrative action. It alleged that the arbitration process constitutes administrative action and should therefore be lawful, reasonable and procedurally fair as required by section 33(1) of the Constitution. In support of this cause of action, Mphaphuli alleged that the arbitrator had awarded Bopanang costs for work that was neither performed nor claimed for by Bopanang. In its opposing affidavit, dated 12 May 2005, Bopanang raised among others, two points. The first was that the arbitration process does not constitute administrative action, and that the provisions of section 33(1) of the Constitution do not apply. The other point was that none of the grounds of review set out in the founding affidavit amounts to those envisaged in section 33(1)(a)-(c) of the Arbitration Act.[1]

[1] Section 33(1) of the Arbitration Act provides:

> "Where—
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[288] In a supplementary founding affidavit, dated 3 August 2005, filed ostensibly to deal with matters raised in the record filed by the arbitrator, Mphaphuli conceded that the private arbitration process does not constitute administrative action. It now alleged that the process should be more accurately described "as a judicial or quasi-judicial process." In amplification of this, Mphaphuli alleged that the arbitrator failed to perform his mandate, he was biased in favour of Bopanang and there were manifest errors in the award. In response, Bopanang alleged that the arbitrator followed a transparent process which was fair to both parties and that he had applied his mind consistently with his mandate.

[289] In its four further replying affidavits filed between 3 October and 22 December 2005, Mphaphuli stood by its allegations that the arbitrator failed to perform his mandate and that there were manifest errors in the award. In particular, in its replying affidavit, dated 22 December 2005, to Bopanang's first answering affidavit, Mphaphuli stated that it had been advised that in the initial application for review, it had erroneously invoked section 33 of the Constitution. Mphaphuli claimed that this was due to its ignorance of the law and the fact that it relied upon its legal representatives.

[290] Now I have referred to these affidavits filed on behalf of Mphaphuli in order to show that despite modifying its cause of action as the litigation progressed, Mphaphuli did not raise any of the constitutional issues that it now seeks to raise. Nor did it raise these issues in its 15-page application for leave to appeal to the Supreme Court of

Appeal. These issues were not raised in the Supreme Court of Appeal either. Any doubt on this score is immediately removed by an affidavit filed by Mphaphuli's attorney in this Court in support of the application for condonation.

[291] In that affidavit, the attorney tells us that:

> "At the outset I must confess that although I have been a practising attorney specialising in litigation for nearly 13 years, I have not ever dealt with a constitutional matter before this one. In addition, senior and junior counsel who appeared on behalf of the Applicant before the Supreme Court of Appeal are also highly experienced in litigation, but have not previously appeared before the Constitutional Court. Accordingly I deemed it necessary and received an instruction from the Applicant, to brief a new counsel with specialist experience in constitutional matters. Initially the brief to new counsel was to consider whether there were reasonable prospects of success with an appeal to the Constitutional Court. In other words, was there a constitutional issue which was implicated in the matter?"

[292] Mphaphuli itself confirms that the constitutional issues are being raised for the first time in this Court. In dealing with the interests of justice, it acknowledges the reluctance of this Court "to hear matters concerning constitutional issues that have not first been ventilated in other courts." It goes on to say, however, that "[w]hilst it is true that the constitutional issue was not couched as crisply as it has been in these papers, the same or similar issues were nevertheless raised (albeit more obliquely) in the Supreme Court of Appeal." But Mphaphuli goes on to admit that "the point remains that the constitutional argument was never articulated the way it has been done here and was therefore not adequately ventilated in the judgment of the . . . Supreme Court of Appeal."

[293] It is patently clear from these statements that the constitutional issue was raised as an after thought in order to get the ear of this Court.

[294] The Supreme Court of Appeal and the High Courts have jurisdiction to hear constitutional matters. The Constitution contemplates that this Court will ordinarily sit as a final court of appeal on constitutional matters except in those instances where it has original jurisdiction or where direct access to it is appropriate in the interests of justice. A litigant who intends to raise a constitutional issue must, therefore, do so in the court of first instance. Parties should not, in an attempt to appeal further from the Supreme Court of Appeal, raise, for the first time in this Court, a constitutional issue. This practice deprives both the High Court and the Supreme Court of Appeal the opportunity to consider constitutional matters. But more importantly, it deprives this Court of the views of both the High Court and the Supreme Court of Appeal on the issue. In *Carmichele*,[2] we held that:

> "There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this Court has not had the benefit of any assistance from either court on either stage of the inquiry referred to above."[3]

[2] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[3] Id at para 41.

[295] This Court has, on many occasions, indicated that it is undesirable to determine constitutional questions as the court of first and last instance.[4] This is even more so in a matter such as this which concerns the interpretation and the application of a private arbitration agreement. In *S v Bierman*,[5] we said the following concerning the failure to raise a constitutional issue in the lower courts:

> "The applicant's failure to raise the constitutional issues concerning the admissibility of the Rev Bothma's evidence in her application to the Supreme Court of Appeal inhibits her ability to raise them now in this Court. As a result of that failure, this Court has not had the benefit of that Court's consideration of these issues which relate directly to established principles of the common law and to the application of such principles. The applicant's failure to raise the constitutional issues upon which her application to this Court is based in the Supreme Court of Appeal may well have been sufficient of itself to mean that her application to this Court should have been refused".[6]

[296] It is no answer for Mphaphuli to suggest that this Court has the benefit of the judgment of the Supreme Court of Appeal in *Telcordia*[7] on the constitutional issues raised together with the judgment of the Supreme Court of Appeal in the present matter. In the present matter, the Supreme Court of Appeal did not consider the role of section 34 in private arbitrations nor did it consider any of the questions now raised by Mphaphuli in its application for leave to appeal. That judgment is therefore of no benefit to this Court on the issues that Mphaphuli seeks to raise.

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[4] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 26 and the cases cited therein.

[5] [2002] ZACC 7; 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC).

[6] Id at para 8.

[7] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA).

[297] In *Telcordia*, the Supreme Court of Appeal did not consider any of the questions that Mphaphuli is inviting us to consider in its intended appeal. What the Supreme Court of Appeal considered in that case is whether section 34 was applicable to private arbitration and held that it was.[8] It is true, the court held, that "there is nothing to prevent parties from defining . . . what is fair for the purposes of their dispute."[9] It also held, relying on the approach of the European Court of Human Rights, that the rights contained in section 34 may be waived unless the waiver is contrary to some other constitutional principle or is otherwise contra bonos mores.[10] But it also held that by agreeing to arbitration, the parties "necessarily agree that the fairness of the hearing will be determined by the provisions of the [Arbitration] Act".[11] This case therefore does not help us to resolve the issues that Mphaphuli seeks to raise in its intended appeal.

[298] What must be stressed here is the role of this Court and that of the Supreme Court of Appeal. This Court is not just another court to which an appeal from the Supreme Court of Appeal lies. This Court has a special role to play in the context of our judicial system. It is the highest court, not in all matters, but in constitutional matters only. It follows from this that its appellate jurisdiction is limited to appeals against decisions on constitutional matters. This means that the appellate jurisdiction of this Court may be invoked only in respect of a constitutional matter that has been

[8] Id at para 47.

[9] Id.

[10] Id at para 48.

[11] Id at para 50.

raised and considered by the lower courts. As we have recently held, albeit in a different context, "the jurisprudence of this Court is greatly enriched by being able to draw on considered opinion of other courts."[12]

[299] Apart from this, the Constitution carves out our jurisdiction from that of the Supreme Court of Appeal. The Supreme Court of Appeal is "the highest court of appeal except in constitutional matters".[13] By constituting the Supreme Court of Appeal as the final court of appeal in "non-constitutional" matters, the Constitution seeks to achieve finality in litigation. If parties were to be allowed to raise a constitutional matter for the first time in this Court, this would not only undermine the role of the Supreme Court of Appeal, but it would also undermine the principle of finality in litigation.

[300] For these reasons, this Court should be very reluctant to entertain a constitutional matter that could have been, but was not, raised in the High Court or the Supreme Court of Appeal. This does not mean that this Court would never entertain a constitutional issue that is raised for the first time in the appeal before it. There may be circumstances where the interests of justice may well require this Court to entertain a constitutional issue raised for the first time in an appeal before it. However, such circumstances "would . . . be rare and . . . would have to be exceptional."[14]

[12] *The AParty and Another v Minister for Home Affairs and Others* [2009] ZACC 4 at para 56.

[13] Section 168(3) of the Constitution.

[14] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 44.

[301] The applicant has not demonstrated the existence of exceptional circumstances.

[302] There are two further considerations which militate against granting leave to appeal. The first relates to the prospects of success.

[303] As is clear from the arbitration agreement, the parties could not agree on the value of the work performed by Bopanang. To this extent they agreed on arbitration and defined as one of the purposes of the arbitration to "determine the value of the work that has been done by [Bopanang]" (Clause 1 of the arbitration agreement). With this purpose in mind, they looked for an arbitrator with skills in evaluating work done. They agreed on Mr Andrews, a practising quantity surveyor and a project manager from Johannesburg. In order to enable the arbitrator to carry out his mandate effectively, they gave him the power "to require from any of the parties to make such further documentation available as he may require" (Clause 5); they authorised him "to liaise with ESKOM . . . and to request any documentation" from Eskom (Clause 6); and, in turn, they authorised Eskom to make available to him any documentation that he required (Clause 6). Perhaps more importantly, they gave the arbitrator the power to inspect and measure work done on the site (Clause 7). And, as O'Regan ADCJ finds, neither clause 5 nor 6 expressly stated that the documentation received by the arbitrator would be made available to the parties.

[304] This was an investigative arbitration where the arbitrator had to play an active role in identifying and requesting information that was required for the purposes of

carrying out his mandate. I therefore agree with the High Court that Mphaphuli misconceived the nature of the proceedings before the arbitrator. This was not a formal hearing where evidence was to be led and the arbitrator was obliged to receive submissions from the parties. The arbitrator had to inspect and re-measure the work done. The arbitrator's qualification bears this out.

[305] And for the reasons advanced by O'Regan ADCJ, I agree that the arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of arbitration as opposed to a formal, adversarial one.

[306] My colleague O'Regan ADCJ has analysed the facts and reached conclusions on the nature of the arbitration process involved here, the "secret" meetings, the failure to disclose all correspondence and the alleged ignoring of pleadings or arbitral mandate. I find her analysis and conclusions persuasive. However, in the view I take of the matter, it is sufficient for me to say that her analysis and conclusions amply demonstrate that Mphaphuli has no prospects of success in the intended appeal.

[307] The other consideration relates to the ultimate dispute between the parties. The judgments by my colleagues amply demonstrate that this case is essentially about the proper meaning and application of an arbitration agreement between the parties. Reduced to its essence, this case is therefore about whether or not the arbitrator's award draws its essence from the arbitration agreement. As is apparent from what I

have said above, the purpose of raising the constitutional issues was merely to get the opportunity of a further appeal. This, in my view, cannot be countenanced.

[308] For all these reasons, I consider that it is not in the interests of justice to grant leave to appeal. The application therefore falls to be dismissed with costs including the costs of two counsel.

Counsel for the applicant:	Advocate G Marcus SC and Advocate S Budlender instructed by Knowles Hussain Lindsay Inc.
Counsel for the first respondent:	Advocate BC Stoop instructed by Barnard Inc.
Counsel for the second respondent:	Advocate F du Toit SC instructed by Schulz Lewis Inc.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/09
[2010] ZACC 4

RYAN ALBUTT	Applicant
and	
CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION	First Respondent
KHULUMANI SUPPORT GROUP	Second Respondent
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE	Third Respondent
INSTITUTE FOR JUSTICE AND RECONCILIATION	Fourth Respondent
SOUTH AFRICAN HISTORY ARCHIVES TRUST	Fifth Respondent
HUMAN RIGHTS MEDIA CENTRE	Sixth Respondent
FREEDOM OF EXPRESSION INSTITUTE	Seventh Respondent
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL	

DEVELOPMENT Ninth Respondent

GERHARDUS JOHANNES TALJAARD Tenth Respondent

AREND CHRISTIAAN DE WAAL Eleventh Respondent

WILLEM JACOBUS PETRUS JACOBS Twelfth Respondent

HANS JACOB WESSELS Thirteenth Respondent

RYNO ADRIAAN ROSSOUW Fourteenth Respondent

JOHANNESS BENJAMIN VAN DER WESTHUIZEN Fifteenth Respondent

Heard on : 10 November 2009

Decided on : 23 February 2010

JUDGMENT

NGCOBO CJ:

Introduction

[1] This case concerns the power of the President to grant pardon under section 84(2)(j) of the Constitution to people who claim that they were convicted of offences which they committed with a political motive. Section 84(2)(j) provides that the

President is responsible for "pardoning or reprieving offenders . . .". The question we are asked to decide is whether the President is required, prior to the exercise of the power to grant pardon to this group of convicted prisoners, to afford the victims of these offences a hearing. This case arises out of an application for leave to appeal directly to this Court and an application for direct access brought to this Court by the applicant, Mr Albutt.

[2] The application for leave to appeal is directed at an order of the North Gauteng High Court, Pretoria (High Court)[1] granting an interim interdict. That interdict prevented the President from granting any pardon under section 84(2)(j) pursuant to a special dispensation process for presidential pardon for political offences, pending the finalisation of the main application foreshadowed in Part B of the Notice of Motion.[2] The application for direct access is for an order declaring invalid section 1 of the

[1] *Centre for the Study of Violence and Reconciliation and Others v President of the Republic of South Africa and Others* Case No 15320/09, North Gauteng High Court, Pretoria, 29 April 2009, as yet unreported.

[2] In Part B of the Notice of Motion the first to seventh respondents in this application sought the following:

> "1. The first respondent is interdicted from granting any pardon in terms of the '*Special dispensation for Presidential pardons for political offences*'.
>
> 2. (Alternatively to paragraph 1) The first respondent is interdicted from granting any pardon in terms of the '*Special dispensation for Presidential pardons for political offences*' unless and until the victims of the offence(s) in question, and other persons who were affected by such offence(s):
>
> 2.1 have been given access to the relevant application for a pardon and the proceedings and recommendations of the Pardons Reference Group in that regard; and
>
> 2.2 have been given an opportunity to make representations in that regard to the first respondent.
>
> 3. The first respondent is ordered (and the second respondent is ordered, only in the event of his opposing this application, jointly and severally) to pay the costs of this application.
>
> 4. Further or alternative relief."

Promotion of Administrative Justice Act, 2000 (PAJA).[3] This relief is sought in the event this Court finds that, upon its proper construction, section 1 of PAJA[4] defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j).

[3] The President and the Minister for Justice and Constitutional Development (the Minister) support both applications. For convenience I shall refer to the President and the Minister as "the state". A coalition of non-governmental organisations (the NGOs) resists both applications. In these proceedings they are the first to the seventh respondents.[5]

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[3] 3 of 2000.

[4] Section 1 of PAJA provides:

> "In this Act, unless the context indicates otherwise—
>
> 'administrative action' means any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—
>
> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution".

[5] In order of appearance they are: the Centre for the Study of Violence and Reconciliation, the Khulumani Support Group, the International Centre for Transitional Justice, the Institute for Justice and Reconciliation, the South African History Archives Trust, the Human Rights Media Centre and the Freedom of Expression Institute.

Factual background

[4] On 21 November 2007, former President Mbeki announced a special dispensation for applicants for pardon who claimed that they were convicted of offences that were politically motivated. This dispensation was aimed at dealing with the "unfinished business" of the Truth and Reconciliation Commission (the TRC).[6] This "unfinished business" included "the question of amnesty for many South Africans who had not participated in the TRC process for a number of reasons".[7] As the former President explained:

> "As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business'."[8]

[5] The former President also announced the establishment of a multiparty Pardon Reference Group (the PRG) which would assist him in the discharge of his constitutional responsibility to consider requests made for pardons by offenders who fall within the special dispensation process. Persons who qualified for pardon under this process were "[p]ersons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999" and who had not applied

[6] Address by President of South Africa, Thabo Mbeki to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons, Cape Town, 21 November 2007 available at http://www.thepresidency.gov.za/president/sp/2007/sp11211540.htm (accessed on 15 December 2009).

[7] Id.

[8] Id.

for amnesty by the TRC.[9] Originally, requests for pardons pursuant to this process had to be made between 15 January and 15 April 2008, but this period was later extended to 31 May 2008. The PRG was formally constituted on 18 January 2008. Pursuant to its Terms of Reference, one of its responsibilities was to "[c]onsider each application for pardon and make recommendations to the President."[10] And the PRG had the power to develop its own rules and procedures.[11] The PRG had a limited lifespan which did not extend beyond 30 November 2008.

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[9] Item 7 of the Terms of Reference for a Special Dispensation on Presidential Pardoning Process Relating to Certain Offenders sets out who qualified for pardons:

> "7.1 Persons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999; and
>
> 7.2 Comply with the pre-determined criteria and procedures as set out in the application form, may apply to the President for pardon in the prescribed manner.
>
> 7.3 A person will only qualify for consideration for pardon if—
>
> (a) he or she
>
> (i) is presently serving a sentence of imprisonment;
>
> (ii) was sentenced to a term of imprisonment or a fine for an offence which arose from or is related to, an act or omission associated with a political objective committed in the course of the conflicts of the past;
>
> (b) the offence referred to in paragraph (a) was committed on or before the date of the inauguration of the President on 16 June 1999; and
>
> (c) his or her application for pardon is accompanied by a prescribed affidavit or affirmation deposed to or affirmed by a person authorized by a political party or organization, institution, liberation movement or body, in which it is confirmed that the act or omission which constituted the offence in question, occurred under the instruction of, or in the execution of an order, instruction, command, direction, advice, plan or project of, or on behalf of, or with the approval of, or in furtherance, promotion or achievement of the policies, objectives or interests of, the said party, organization, institution, liberation movement or body of which the applicant was a member, agent or a supporter."

[10] Item 2.3 of the Terms of Reference for the PRG.

[11] The NGOs attached to their founding affidavit an undated document, which is apparently part of a larger document. The part that is attached deals with criteria, rules and procedures for making recommendations to the President. According to this document the only means of verifying the version of an applicant for pardon is "a copy of the judgment" which "is . . . discussed as a verification tool in order to compare and contrast the version

[6] In announcing the special dispensation, the President also explained how he would deal with applications for pardon, stating that he would "seriously consider the recommendations made to him by the Reference Group".[12] However, he emphasised that he would "form an independent opinion on the basis of the facts/information placed before him" to decide whether to grant or refuse a pardon.[13] He stated that in so doing he would—

> "be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process".[14]

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submitted by the applicant." See para 4.1 no. 6 Criteria, Rules and Procedure Used for Purposes of Making Recommendation in each Application for a Pardon. This document does not make any provision for the victims to be heard. In addition, this document sets out the main criteria for making recommendations to the President, namely, whether the applicant is indeed a political offender and whether the release of the applicant would not endanger society. In addition, it lists the Norgaard Principles that would be taken into account in determining the two main criteria. C(i)–(v) of the Norgaard Principles are as follows:

> "i. The motive of the offender – i.e. was it a political motive (e.g. to change the established order) or a personal motive (e.g. to settle a private grudge).
>
> ii. The context in which the offence was committed, especially whether the offence was committed in the course of or as part of a political uprising or disturbance.
>
> iii. The nature of the political objective (e.g. whether to force a change in policy or to overthrow the Government).
>
> iv. The legal and factual nature of the offence, including its gravity (e.g. rape could never be regarded as a political offence).
>
> v. The object of the offence (e.g. whether it was committed against Government property or personnel or directed primarily against private property or individuals)."

[12] President Mbeki's Address above n 6.

[13] Id.

[14] Id.

[7] The Explanatory Memorandum, which the Department of Justice and Constitutional Development issued to explain the special dispensation process, reiterated that the President would be guided by these principles, values, criteria and objectives in considering applications for pardon. Neither the statement by the former President, nor the Terms of Reference for the PRG and the Explanatory Memorandum, dealt with the question whether the victims of offences in respect of which a pardon was sought under the special dispensation were entitled to make representations.

[8] Beginning in February 2008, the NGOs made numerous attempts to secure the participation of the victims in the special dispensation process. These attempts were finally rejected by the PRG during August 2008 when it told the NGOs that neither its Terms of Reference nor any law compelled it to call for input from the public, in particular, from the victims. The PRG referred the NGOs to the President as the "custodian of the [pardon] process" who could take such considerations into account.[15] Subsequent approaches to the Minister and the President were also unsuccessful. During March 2009, the Office of the President in effect declined the request for victim participation in the special dispensation and refused to furnish any undertaking in this regard. Litigation ensued.

[15] Letter from Dr JT Delport, Chairperson of the PRG to Dr Hugo van der Merwe, Transitional Justice Programme Manager, Centre for the Study of Violence and Reconciliation, 7 August 2008.

[9] The NGOs launched an urgent application in the High Court for an interdict preventing the President from granting any pardons in terms of the special dispensation process until the finalisation of the main application. The NGOs challenged the exclusion of victims from participating in the special dispensation process mainly on the grounds that it was inconsistent with section 33 of the Constitution,[16] the provisions of PAJA and the common law duty to act fairly. The application was resisted by the state on various grounds, including that the NGOs lacked standing and that the victims had no right to be heard when the President exercises the power to grant pardon under section 84(2)(j). The applicant and six other convicted prisoners[17] sought, and were granted, leave to intervene. They resisted the application on the same grounds as the state, but included non-joinder of other applicants for pardon as an additional ground.

High Court

[10] The High Court found that the NGOs had standing because they were acting on behalf of victims who could not act in their own name, in the interests of victims, and

[16] Section 33 of the Constitution of the Republic of South Africa, 1996 provides in relevant part:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[17] The applicant and the interveners were co-accused in a trial arising from certain events that took place in Kuruman in the Northern Cape in 1995. Municipal workers who were on a peaceful strike were severely assaulted with lethal weapons. The applicant and the interveners indiscriminately smashed cars of innocent bystanders and pursued and assaulted other black persons who had nothing to do with the striking workers. Among those assaulted were women and elderly persons. See *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) at para 12. They were sentenced to various terms of imprisonment. Another intervener was Mr JB van der Westhuizen who had been convicted in connection with a bomb blast in a Worcester supermarket on Christmas Eve in 1996 that killed four people and injured 67. All the interveners had applied for political pardon. The interveners did not take part in the proceedings in this Court.

also in the public interest. On the non-joinder issue, the High Court held that non-joinder was not fatal to the application. It reasoned that it was not necessary to serve the papers on all applicants who had applied for pardon prior to the hearing of the matter. Only those applicants for pardon who had been recommended for pardon had to be served. As the NGOs did not know the identity of those applicants, it was not possible to serve the papers on them. The High Court accordingly ordered the government to provide the NGOs with a list of applicants who had been recommended for pardon; that the NGOs serve the papers on those applicants for pardon; and that the Minister make the other applicants for pardon aware of the proceedings.[18]

[11] On the central issue of whether the victims had the right to participate in the special dispensation process, the High Court answered this question in the affirmative. Its conclusion rests on at least three legs: (a) upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j),[19] and hence the President is subject to the procedural requirements imposed by PAJA; (b) the effect of parole and pardon is the same and there is no justification for allowing victims of crime to be heard prior to a prisoner being released on parole but to deny victims a hearing when a prisoner is being considered for pardon;[20]

[18] *Centre for the Study of Violence and Reconciliation* above n 1 at 33.

[19] Id at 25-6.

[20] Id at 27.

and (c) the President was bound by his commitment to be guided by the principles of the TRC.[21] The Court reasoned:

> "[T]he President prior to releasing a prisoner on pardon, must have considered all the relevant information relating to the said prisoner. The said information should include, *inter alia*, the prisoner's application, the inputs of victims and/or families of that particular crime and any other relevant information which might come from any interested party. The inputs from the other interested parties will enable the President to verify the facts stated by the applicant in the [pardon] application form."[22]

[12] The High Court concluded that the victims of crime have a right to be heard prior to the exercise of the power to grant pardon under section 84(2)(j).

[13] The High Court accordingly granted an order interdicting the President from granting any pardons in terms of the special dispensation pending the finalisation of the main application. The state sought leave from the High Court to appeal to the Full Court of the High Court, alternatively, to the Supreme Court of Appeal. This application, which is apparently still pending in the High Court, prompted the applicant to seek leave from this Court to appeal directly to it. As indicated earlier, the applicant has also launched an application for direct access to this Court.[23]

[21] Id at 30.

[22] Id at 27-8 with the substitution of "pardon" for "parole".

[23] Above at [1].

[14] These proceedings are a sequel.

[15] It is convenient to consider first the application for leave to appeal.

Procedural and preliminary issues

[16] The central issue presented in the application for leave to appeal is whether the victims of the offences for which pardon is sought under the special dispensation process are entitled to be heard prior to the exercise of the power to grant pardon. However, to reach this issue we must first decide whether—

a) condonation should be granted to the applicant for the late filing of his application for leave to appeal and to the NGOs for the late filing of their answering affidavit;

b) leave to appeal directly to this Court should be granted;

c) the NGOs have standing; and

d) the High Court should have non-suited the NGOs for failure to join the applicants for pardon under the special dispensation.

[17] I propose to deal with the procedural and preliminary issues first.

Should condonation be granted?

[18] The application for leave to appeal was late by some nine days. The explanation for this delay is that initially the applicant was content to proceed with the main

application. However, when the President sought leave to appeal to the Full Court of the High Court or the Supreme Court of Appeal, he became concerned about the delay this might entail and decided to appeal directly to this Court. The NGOs do not persist with their objection to the granting of condonation to the applicant. The NGOs were late by one day in filing their answering affidavit to the application for leave to appeal, and their application for condonation is not opposed by the applicant and the state.

[19] In the case of the applicant, the period of delay is minimal, there is a satisfactory explanation for the delay and there is no suggestion of prejudice. In the case of the NGOs, the delay is minimal. In these circumstances, condonation should be granted to both the applicant and the NGOs. An order to this effect will therefore be made.

Should leave to appeal be granted?

[20] The question whether leave to appeal should be granted depends upon whether (a) the application raises a constitutional matter and (b) it is in the interests of justice to grant leave. The application raises questions of considerable constitutional importance concerning the powers of the President to grant pardon under section 84(2)(j). Indeed, the NGOs do not contest that the application raises a constitutional matter. However, the NGOs contend that it is not in the interests of justice to grant leave to appeal.

[21] The NGOs made much of the non-appealability of the High Court order, since it took the form of an interim interdict. They submit that it lacked the three attributes of an

appealable order, that (a) it must be final in effect, and not susceptible to alteration by the court of first instance; (b) it must be definitive of the rights of the parties; and (c) it must have the effect of disposing of at least a substantial portion of the relief sought in the main application.[24] The NGOs submit that it is well-established that the granting of an interim interdict is not appealable under the Supreme Court Act, 1959.[25] While acknowledging that the test for leave to appeal to this Court does not require the satisfaction of these criteria, they submit that this Court should not entertain appeals against orders which have no final effect on the dispute between the parties. They submit that the order sought to be appealed against is such an order.

[22] What must be emphasised at the outset is that the interim nature of the order is not in itself determinative of whether it is in the interests of justice to grant leave to appeal. It is a factor that is relevant to the overall enquiry into the interests of justice. This is so because section 167(6)(b) of the Constitution prescribes the interests of justice as the standard for granting leave to appeal directly to this Court.[26] The question for

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[24] See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 6 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J.

[25] 59 of 1959.

[26] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> . . .
> (b) to appeal directly to the Constitutional Court from any other court."

See also section 16(2) of the Constitutional Court Complementary Act Amendment Act 79 of 1997, which provides:

> "The rules shall, when it is in the interests of justice and with leave of the Court, allow a person—
>
> (a) to bring a matter directly to the Court; or
> (b) to appeal directly to the Court from any other court."

determination, therefore, is whether it is in the interests of justice to grant leave to the applicant to appeal against the order of the interim interdict pending the finalisation of the main application.

[23] What is in the interests of justice must be determined in the light of the facts of each case.[27] The policy considerations that inform the non-appealability of interlocutory orders under the common law and section 20 of the Supreme Court Act are relevant, but not decisive, in this enquiry.[28] However, it will not generally be in the interests of justice for this Court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties.[29] There are sound policy considerations for this. It is indeed "undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance."[30] This consideration must of course be balanced against the fact that a final determination of the main dispute between the parties, which decisively contributes to its final resolution, might be more expeditious and cost-effective.

See also *Khumalo* above n 24 at para 7 and *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC) at para 6.

[27] *TAC (No 1)* above n 26 at para 8 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[28] See *Khumalo* above n 24 at para 8; and *TAC (No 1)* above n 26 at para 8.

[29] *Khumalo* above n 24 at para 8.

[30] See *TAC No 1* above n 26 at para 9 and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[24] Ultimately, when determining whether it is in the interests of justice to grant leave to appeal against an interim interdict, the following considerations, while not exhaustive, are relevant:

a) the facts of the case;

b) the nature of the interim order and, in particular, the effect of upholding the interim order on the main application;

c) the desirability of having the views of an appellate court on the matter;

d) whether the matter is appealable;

e) the importance of a determination of the constitutional issues raised in the interim order;

f) whether the issues raised by the interim order require urgent resolution; and

g) the prospects of success.[31]

[25] The NGOs submit that the order of the High Court is clearly interlocutory and has no final effect on the dispute between the parties. Our courts have held that, in determining whether an order is final in effect, what matters is not only the form of the order "but also, and predominantly[,] its effect".[32] An interim interdict has a final effect if it disposes of any issue or portion of an issue in the main application; put differently, if it "anticipates or precludes some of the relief which would or might be given at the

[31] See *Khumalo* above n 24 at para 10.

[32] *Metlika Trading Ltd and Others v Commissioner for SARS* [2004] 4 All SA 410 (SCA) at para 23; *Zweni* above n 24 at 532H-I and *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

hearing".[33] An examination of the issues raised in the interim interdict proceedings and the manner in which they were dealt with may help to determine whether the court meant to express a final decision on those issues, that is, whether it intended to dispose finally of those issues or any part thereof.[34]

[26] The order made by the High Court rests mainly on two findings of law: (a) the exercise of the power to grant pardon constitutes administrative action; and (b) the victims of crime have a right to be heard prior to the President's decision to grant pardon under section 84(2)(j). These definitive findings of law by the High Court dispose of the issue whether victims have a right to be heard prior to the exercise of the power to grant pardon, an issue foreshadowed in the alternative relief sought by the NGOs in the main application. The order of the High Court is therefore final in effect; it is definitive of the rights of the victims to be heard prior to the decision whether to grant pardon; and it has the effect of disposing of the alternative relief claimed by the NGOs in the main application, although in theory it remains susceptible to alteration by the High Court.[35]

[27] There are further considerations which weigh in favour of the granting of leave to appeal. There is significant public interest in determining whether the President should hear victims of political offences prior to granting pardon in relation to those offences.

[33] *Metlika Trading* above n 32 at para 21 citing *Pretoria Garrison Institutes v Danish Variety Products (Pty.), Limited* 1948 (1) SA 839 (A) at 870. See also *Zweni* above n 24 at 532J-533A with the substitution of "any" for "substantial".

[34] *African Wanderers Football Club (Pty.) Ltd. v Wanderers Football Club* 1977 (2) SA 38 (A) at 46C.

[35] See *Zweni* above n 24 at 532I-533A and *Pretoria Garrison Institutes* above n 33 at 870.

This is so because of the close relationship between the TRC process and the special dispensation process. There are some 2 114 applications for pardon in respect of political offences that are pending. There are, no doubt, other applications for pardon in relation to other offences that are pending. The record indicates that some of the applications for pardon in respect of political offences have been pending since 2002. While there is no right to a pardon, the applicants for pardon are at least entitled to have their applications considered without delay.[36]

[28] In addition, the decision of the High Court has cast grave doubt over the power of the President to decide applications for pardon without calling for the views of victims. It is clear from the judgment of the High Court that its conclusion on section 84(2)(j) goes beyond the special dispensation process and relates to the exercise of the power under section 84(2)(j) in general. It is desirable and in the public interest that this issue be resolved as soon as possible to enable the President to carry out his constitutional obligations without delay. While the views of the Supreme Court of Appeal or the Full Court of the High Court would no doubt have been of benefit to this Court, delays caused by the appeal process would be prejudicial to the public interest.

[36] Section 237 of the Constitution. See *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25 (30 September 2009), as yet unreported, at para 30.

[29] Moreover, this is not a case where the prospects of success are necessarily determinative of the interests of justice.[37] The issue raised in the application for leave to appeal is of considerable constitutional importance concerning the powers of the President to grant political pardon under section 84(2)(j). It is an issue which goes to the "unfinished business" of nation-building and national reconciliation. It is an issue which calls for an early and definitive decision of this Court.

[30] For all these reasons, I am satisfied that it is in the interests of justice that leave to appeal be granted to the applicant to appeal directly to this Court. An order to this effect will therefore be made.

[31] There are two additional preliminary issues to address before considering the main issue in the appeal. The one relates to standing, and the other relates to the non-joinder of other applicants for political pardon.

Standing

[32] The applicant makes a qualified concession in relation to standing. While accepting that the NGOs have standing, he nevertheless contends that they were only entitled to seek declaratory relief and were not entitled to seek an order preventing the President from granting pardons. In support of this contention, the applicant submits that

[37] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12 and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10.

each application for pardon must be considered individually to determine whether it should be allowed to proceed. This is necessary, so the argument goes, because certain victims and perpetrators may well have become reconciled and victims might want their perpetrators to be pardoned. The applicant submits that in these circumstances it would be unfair to prevent all special dispensation pardons from being granted.

[33] The concession that the NGOs have standing was properly made. Our Constitution adopts a broad approach to standing,[38] in particular, when it comes to the violation of rights in the Bill of Rights.[39] This is apparent from the standing accorded to persons who act in the public interest. This ground is much broader than the other grounds of standing contained in section 38.[40] The NGOs have standing on at least two grounds.[41]

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[38] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 229.

[39] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[40] See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 15.

[41] Organisations similar to the NGOs have been found to have standing before this Court. See, for example, *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at paras 20-2 and *Lawyers for Human Rights* above n 40 at paras 14-8.

[34] First, they are litigating in the public interest under section 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under section 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations.

[35] The primary purpose of the litigation is to safeguard and vindicate the asserted right of the victims of the offences in respect of which pardons are sought to have an opportunity to be heard. A declaratory order without an interdict would not have been effective in protecting the rights of victims, in particular, those who might want to oppose the granting of a pardon. Having regard to the interests which the NGOs seek to protect, and the basis for their standing, there is simply no reason for limiting the relief they could seek to a declaratory order. I conclude that the NGOs have standing to seek the interim order interdicting the granting of pardons.

Non-joinder

[36] The applicant does not pursue the issue of non-joinder. He properly conceded that the interests of other applicants seeking pardon, who are not before this Court, were adequately looked after. Indeed, the interest that the applicant has in this case is identical to that of other applicants for pardon who are not before this Court.

[37] With these preliminary issues out of the way, I now turn to consider the central question presented in this appeal, namely, whether the victims of political offences in respect of which pardons may be granted under the special dispensation are entitled to a hearing prior to the exercise of the power to grant pardon.

The contentions of the parties

[38] The NGOs contend that the victims of the offences in respect of which pardons are sought under the special dispensation process are entitled to be heard. They challenge the decision to exclude the victims from participating in the special dispensation process on three main grounds. First, they contend that the decision to exclude the victims from participating in the special dispensation process is irrational. They submit that it is not rationally related to the objectives which the dispensation seeks to achieve, namely, national unity and national reconciliation. Second, they contend that the context-specific nature of the special dispensation process requires the President to give the victims an opportunity to be heard prior to making a decision to grant a pardon. Third, they contend that the exercise of the power to grant pardon constitutes administrative action under section 1 of PAJA and that this attracts the duty to afford the victims a hearing.

[39] The applicant and the state challenge the right of victims to be heard when the President exercises the power to grant pardon. First, they deny the charge of irrationality pointing out the differences between the amnesty process and pardon. Second, they contend that the exercise of the power under section 84(2)(j) is executive action and does not constitute administrative action. They submit that, properly construed, the definition of administrative action in section 1 of PAJA excludes the power to grant pardon. Third, confronted by what was described as incoherence in section 1 of PAJA, and, in the event of this Court finding that, upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon, counsel for the applicant submit that PAJA is unconstitutional. This submission forms the basis of the application for direct access. The argument advanced by the state was substantially the same.

[40] In the course of oral argument the applicant also advanced two contentions which it will be convenient to dispose of before addressing the main questions presented in the case. The first concerned compliance with section 101(1)(b) of the Constitution,[42] and the other raised the question whether the President had in fact taken a decision to refuse to afford the victims a hearing.

[42] Section 101(1) of the Constitution provides:

> "A decision by the President must be in writing if it—
> . . .
> (b) has legal consequences."

The argument based on section 101(1)(b)

[41] The applicant submits that we should not pay any attention to what the former President said in Parliament because it was not in writing and, accordingly, has no legal consequence under section 101(1)(b). For purposes of disposing of this argument, it is not necessary to explore the meaning and scope of section 101(1)(b). Suffice it to say that, after announcing the special dispensation process, the President took concrete steps to give effect to this process.

[42] He established the PRG; its terms of reference were adopted in writing; the PRG adopted its criteria and procedures for making recommendations to the President; an Explanatory Memorandum was issued to inform the public of the special dispensation process, its objectives and the criteria, principles and the values that would guide the President in considering the applications; and the PRG has indeed made recommendations to the President. Apart from this, neither the President nor the Minister has taken up this point. On the contrary, former President Motlanthe, who deposed to an affidavit in these proceedings, declared under oath that he "intend[ed] to deal with applications for pardon . . . in line with the approach outlined by the then President [Mbeki]."

[43] In these circumstances, it can hardly be suggested that this Court should ignore what the President not only said, but also did to give effect to his speech. Whatever the

meaning and scope of section 101(1)(b), I am satisfied that this Court can rely on what the President said in order to determine the issues raised in this case. The argument of the applicant based on section 101(1)(b) must therefore be rejected.

Did the President take a decision to deny the victims a hearing?

[44] In the course of oral argument, there was some assertion by the applicant, albeit in a faint tone, that the President had not taken a decision to deny the victims a hearing. As I understand the argument, it was based on a statement in the affidavit of former President Motlanthe to the effect that although the PRG had refused to receive representations from the victims, this did not mean that the President would not allow representations from the victims. This statement, which was argumentative in tone, was not accompanied by an offer to afford the victims the opportunity to make representations.

[45] This argument faces two insurmountable hurdles. The first is that it ignores the tenor of the letter dated 13 March 2009 from the Office of the President. That letter was in response to a request to allow victims to participate in the special dispensation process. It is clear from this letter that the victims were not going to be allowed to make representations. Were it to be otherwise, it would have been an easy matter for the Office of the President to inform the victims that they would be allowed to make representations. This did not happen. On the contrary, and this is the second hurdle, both

in the High Court and in this Court, the state took the stance that the victims were not entitled to make representations.

[46] The matter must thus be approached on the footing that the Office of the President took the decision that the victims would not be allowed to make representations. It is this decision which the NGOs are challenging.

Questions presented

[47] This decision is challenged on three main grounds, namely that—

(a) the decision to exclude the victims from participating in the special dispensation process is irrational;

(b) the context-specific features of the special dispensation process requires the President to give the victims a hearing; and

(c) the exercise of the power to grant pardon constitutes administrative action and therefore triggers the duty to hear people affected.

[48] I will consider each of these issues in turn.

Is the decision to exclude the victims from participating in the special dispensation process irrational?

[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the

rule of law.[43] More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality".[44] It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.

[50] All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants.[45] To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process.[46] If it is not, it falls short of the standard that is demanded by the Constitution.

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[43] See *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 32.

[44] *Chonco* above n 36 at para 30 (footnote omitted). See also *SARFU* above n 43 at para 148 and *Fedsure* above n 43 at paras 56-8.

[45] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 116 and *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 12.

[46] *Fedsure* above n 43 at para 58 and *Affordable Medicines* above n 43 at para 49.

[51] The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j).

[52] The applicant very properly concedes that this Court has the constitutional authority to examine whether the means adopted by the President are rationally related to the objective sought to be achieved by granting pardons to those convicted prisoners who claim to have committed offences with a political motive. I did not understand the state to contend otherwise. Nor is there any issue about the constitutional authority of the President to exercise his power to grant pardon as contemplated in the special dispensation process. Indeed under section 83(c) of the Constitution, the President has a duty to promote "the unity of the nation and that which will advance the Republic." The question for determination is reduced to whether the decision to exclude victims from

participating in the special dispensation process is rationally related to the objectives that the President set out when he announced the process.

[53] When former President Mbeki announced the special dispensation process, he outlined its objectives and the criteria and the principles that would guide the decision-making process. The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the "principles and values which underpin the Constitution", including the "principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process".[47] But what are the principles, criteria and spirit that inspired and underpinned the amnesty process?

[54] These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognised early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. The epilogue to the interim Constitution expresses this philosophy:

> "The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. . . . In

[47] President Mbeki's Address above n 6.

> order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives".[48]

[55] It is apparent from both the address by former President Mbeki and the Explanatory Memorandum that the special dispensation process had the same objectives as the TRC, namely, nation-building and national reconciliation. While the TRC process sought to achieve this through amnesty, the special dispensation seeks to achieve these objectives through pardons. As former President Mbeki explained when he announced the special dispensation process: "consideration has therefore been given to the use of the Presidential pardon to deal with [the] 'unfinished business' [of the TRC]."[49] The submission on behalf of the state that the NGOs are mistaken when they contend that the special dispensation was designed to deal with the "unfinished business" of the TRC cannot, therefore, be sustained.

[56] The participation of victims was fundamental to the amnesty process. The process encouraged victims and their dependants "to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones".[50] But the truth of what really happened could only be known if those who were responsible for gross violations of human rights were encouraged to disclose it with the incentive that they would not be

[48] Constitution of the Republic of South Africa Act 200 of 1993, under the title "National Unity and Reconciliation".

[49] President Mbeki's Address above n 6.

[50] *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17.

punished. Thus, the participation of both the victims and the perpetrators was crucial to the achievement of the twin objectives of rebuilding a nation torn apart by an evil system and promoting reconciliation between the people of South Africa.

[57] Indeed, as this Court observed in *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others*:

> "With [the] incentive [that the perpetrator will not receive punishment] what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[51]

[58] In its report, the TRC emphasised the importance of the participation of victims and perpetrators in the achievement of national reconciliation:

> "By telling their stories, both victims and perpetrators gave meaning to the multilayered experiences of the South African story. These personal truths were communicated to the broader public by the media. In the (South) African context, where value continues to be attached to oral tradition, the process of story telling was particularly important. Indeed, this aspect is a distinctive and unique feature of the legislation governing the Commission, setting it apart from the mandates of truth commissions elsewhere. . . . The

[51] Id.

> stories told to the Commission were not presented as arguments or claims in a court of law. Rather, they provided unique insights into the pain of South Africa's past, often touching the hearts of all that heard them.
>
> By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a 'narrative truth'. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless."[52]

[59] The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: "In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation."[53]

[60] What is plain from what I have said above is that the victims of gross human rights violations were at the centre of the TRC process. As the TRC observed:

> "One of the unique features of the Act was that it provided guiding principles on how the Commission should deal with victims. These principles constituted the essence of the Commission's commitment to restorative justice. The Act required that the Commission help restore the human and civil dignity of victims 'by granting them an opportunity to

[52] The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report Volume 1* (Juta & Co Ltd, Cape Town 1998) 112.

[53] Id at 107.

> relate their own accounts of the violations of which they are the victim'. Through the public unburdening of their grief – which would have been impossible within the context of an adversarial search for objective and corroborative evidence – those who were violated received public recognition that they had been wronged."[54] (Footnote omitted.)

[61] Excluding victims from participation keeps victims and their dependants ignorant about what precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation. The principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.

[62] Counsel for the state sought to justify the exclusion of victim participation on the grounds that there are important differences between the amnesty process and the special dispensation process. Much effort and time was spent on this aspect. One of the differences that was drawn to our attention is that in the case of a pardon, victims already had the opportunity to participate in the criminal proceedings. By contrast, the TRC process by and large dealt with individuals who had neither been tried and convicted nor sentenced in respect of the offences for which amnesty was sought. The state argues that

[54] Id at 128.

there was therefore no prior victim participation, and precisely for this reason, the amnesty process required the participation of victims.

[63] There are difficulties with this submission. First, it is premised on the assumption that the amnesty process dealt only with perpetrators who had not been convicted. This premise is false. The amnesty process dealt with both persons who had not been tried and those who had been convicted and sentenced. One need only look at the provisions of the Promotion of National Unity and Reconciliation Act, 1995[55] (the Truth and Reconciliation Act) that deals with convicted persons.[56] Indeed, once it is accepted, as it must be, that the amnesty process also dealt with persons who had been convicted and sentenced, the submission loses its force.

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[55] 34 of 1995.

[56] Section 20(8) provides:

> "If any person—
>
> (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
>
> (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,
>
> the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released."

Section 20(10) provides:

> "Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public."

[64] Second, it does not pay sufficient attention to the fundamental difference between criminal proceedings and the pardon process. The question in a criminal trial is whether the accused is guilty of the crime charged and, if so, what sentence should be imposed. By contrast, in the pardon process the question is whether, notwithstanding the conviction and sentence, the applicant should be granted a pardon. In particular, the question in the context of the special dispensation process is whether the offence in respect of which a pardon is sought was committed with a political motive.

[65] Third, it misconceives the rationale for victim participation in the TRC amnesty process. Victims participated in the amnesty process not because they did not have a prior opportunity to participate in any criminal proceedings, but because their participation was fundamental to the objectives of the TRC process, namely, nation-building and national reconciliation. Indeed, it is difficult to fathom how these objectives could be achieved if the victims of gross violations of human rights were excluded from the amnesty process. The amnesty process encouraged victims to come forward to tell their stories and to help them to discover the truth by encouraging the perpetrators, in return for amnesty, to disclose the truth of what they did. This was crucial to "creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which inform[ed] the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue [to the interim Constitution]".[57]

[57] *Azapo* above n 50 at para 17.

[66] Finally, the argument based on the differences between the amnesty process and the special dispensation process misconceives the argument advanced by the NGOs. The NGOs do not contend that the amnesty process and the special dispensation are similar. They contend that the President made a commitment to apply the principles, criteria and spirit that inspired and underpinned the TRC process, especially as they relate to amnesty, including the principles and objectives of nation-building and national reconciliation. They submit that the President must be held to these principles which former President Mbeki said would guide him in deciding whether to grant or refuse pardons. The NGOs submit that it is these principles which require victim participation in the special dispensation process.

[67] Apart from these difficulties with their argument, the differences identified by the applicant and the state do not explain why, having undertaken to apply the principles and values which underpinned the amnesty process, it was decided to disregard those principles and values. The differences between the amnesty and pardon processes were known at the time when the former President made his speech in Parliament. Despite these differences, the President decided that the principles and values that underpinned the amnesty process would be applied to the special dispensation process. These differences therefore provide no basis for disregarding the values and the principles that the former President had stated would be applied to the special dispensation process.

[68] Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process.

[69] In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational.

Do the special features of the special dispensation process require the President to hear the victims?

[70] Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought. It is difficult to fathom how the President can establish the truth about the motive with which a crime was committed without hearing the victim of that crime.

Decisions based on the perpetrators' versions and their supporting political parties are more likely to be arbitrary, considering the President's objective of determining whether a pardon applicant qualifies for a pardon for an allegedly politically motivated crime. It is not inconceivable that a victim may want to make representations to demonstrate that the crime committed was not of a political nature, but due to other motives.

[71] A process which permits political party representatives and their members, to the exclusion of the victims, to consider whether a pardon should be granted in an offence with a political motive is entirely inconsistent with the principles and values that underlie our Constitution. Some of the principles and values that underpin our Constitution are the principles of accountability, responsiveness and openness.[58] And one of the principles that underpinned the amnesty process was the participation of victims in seeking to achieve national unity and national reconciliation. It is these principles and values that must underpin the special dispensation process as former President Mbeki stated. To do otherwise is to undermine the TRC process and is contrary to the objective of promoting national unity and national reconciliation.

[72] In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the

[58] See section 1(d) of the Constitution.

victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.

[73] The NGOs also advance an attractive argument for the proposition that, having regard to the objectives of the special dispensation process, the common law duty to act fairly requires the President to afford the victims of crimes in respect of which a pardon is sought a hearing before a decision to grant a pardon.[59] In the light of the conclusion that I have already reached, it is not necessary to deal with this argument.

[74] For all these reasons, I conclude that the decision to exclude victims of the crimes in respect of which pardons were sought under the special dispensation process was irrational. The victims of these crimes are entitled to be given the opportunity to be heard before the President makes a decision to grant pardon under the special dispensation.

[75] Lest there be a misunderstanding of the scope of this conclusion, I had better stress the obvious. This case is concerned with applications for pardon under the special dispensation. What I have said in this judgment therefore applies to this category of applications for pardon only. What distinguishes this category from others not before us is that the crimes in respect of which pardons are sought are alleged to have been committed with a political motive; the objective of these pardons is to promote national

[59] See, for example, *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (Ngcobo J dissenting) at paras 172-207.

unity and reconciliation; and the crimes concerned were committed in a particular historical context. Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether victims of other categories of applications for pardon are entitled to be heard. That question is left open.

[76] It is this category of pardons that was before the High Court. The High Court does not appear to have paid attention to the fundamental difference between the category of pardons in issue in this case and other categories of applications for pardon. Its conclusion, as I have pointed out above, went beyond this category and purported to deal with applications for pardon in general. In doing so, the High Court erred. So too, when it relied upon the provisions of PAJA to hold that the victims of the crimes in respect of which pardons are sought are entitled to a hearing before the decision whether to grant a pardon is made. These findings by the High Court were not necessary and cannot be allowed to stand.

[77] Finally, the applicant contends that, if the NGOs obtained the relief they sought, the resulting procedural requirements would impractically encumber the special dispensation process. This is incorrect. This judgment does not imply or entail that, in affording a hearing to the victims of those applying for pardon under the special dispensation process; the President is bound to replicate the procedures, investigations and hearings of the TRC. The final relief the NGOs sought was merely "an opportunity

to make representations".[60] Their counsel expressly concede that, after the names of those pardon applicants who had been recommended for approval were made known, a general notice inviting submissions to the President from victims of the offences in question might suffice. It is abundantly established that what the opportunity to make representations requires depends on the context,[61] and it is not necessary to try to signify in advance what the opportunity for representations will require. It is enough to say that cumbersome impediments to the due despatch of the pardon process are not entailed.

[78] The next question is whether, in the light of this conclusion, it is desirable that we should reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action.

Should we reach the argument based on PAJA?

[79] One of the grounds upon which the NGOs urge us to find that the victims are entitled to a hearing is that the exercise of the power to pardon constitutes administrative action. This is one of the bases upon which the High Court made its order. The applicant and the state challenge this finding by the High Court, contending that upon its proper construction, section 1 of PAJA does not include the exercise of the power to pardon as administrative action. If it does, they maintain, then section 1 of PAJA is inconsistent

[60] Above n 2.

[61] See, for example, *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 113-4 and *SARFU* above n 43 at para 219 and cases cited therein.

with the Constitution. For their part, the NGOs submit that Parliament may extend a right granted by the Constitution and, in doing so, does not trespass into the province of the executive. We have had the benefit of the submissions of the parties on PAJA and its constitutionality.

[80] If one has regard to our jurisprudence, there is a substantial measure of doubt as to whether the exercise of the pardon power constitutes administrative action.[62] Yet if this question is decided in the negative, a more difficult question arises, namely, whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon. And if the answer to this question is in the affirmative, more complex questions arise. Those questions are whether: (a) PAJA merely regulates the exercise of the power or whether in effect it reclassifies executive action as administrative action; and (b) whether it is constitutionally permissible for the legislature to do either of these. The question that must be answered on this score is whether having answered the central question presented in this case, we should now venture into all of these difficult questions.

[81] What must be stressed here is the point that I have already made: this case concerns applications for pardon that are brought under the special dispensation, the question being whether the victims of the crimes that fall under this category of applications for pardon are entitled to a hearing. Once this question is answered in the

[62] *SARFU* above n 43 at paras 145-6.

affirmative in the light of the context-specific features of the special dispensation, it is not necessary to consider the question whether the exercise of the power to grant pardon under section 84(2)(j) constitutes administrative action. That broad general question was not before the High Court, which should not have posed and answered it, and we need not answer it in this case. Nor should we reach the question whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon under section 84(2)(j).

[82] Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case. It may well be said that the President is anxious to know whether the exercise of the power to grant pardon constitutes administrative action and whether PAJA applies to applications for pardon. The anxiety of the President should adequately be addressed by what I have said above, namely, that the High Court erred in reaching these questions.

[83] In the event, I conclude that it is not necessary for us to reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action and whether upon its proper construction, PAJA includes within its ambit the power to grant pardon under section 84(2)(j). These questions must be left open for another day when a proper occasion to determine them is presented.

[84] In the result no order should be made on the application for direct access which was conditional upon us reaching PAJA. In respect of that application, I consider it just and equitable that each party should bear its own costs.

Costs

[85] The issues that were raised in both the application for leave to appeal and the application for direct access are matters of considerable importance. As I have said, earlier, they concern the exercise of the power to grant pardon, in particular, the question whether the victims of the offences in respect of which the special dispensation process applies, are entitled to a hearing before a decision is made to grant pardon. The NGOs have succeeded in relation to the application for leave to appeal. They are entitled to their costs. The applicant entered the fray to safeguard his interest and those of other applicants seeking pardons who were not in court. In doing so, the applicant helped to put before the Court the perspective of the applicants for pardon. The applicant has,

however, not succeeded. I think it would not be just and equitable to require him to pay the costs of the NGOs. That leaves the state to pay the costs of the NGOs.[63]

[86] I have already concluded that no order should be made on the application for direct access and that each party must pay its own costs.

Order

[87] In the event the following order is made:

(a) Condonation is granted to the applicant for the late filing of the application for leave to appeal.

(b) Condonation is granted to the first to seventh respondents for the late filing of their answering affidavit.

(c) The application for leave to appeal is upheld.

(d) The appeal is dismissed.

(e) The President and the Minister for Justice and Constitutional Development are ordered to pay the costs of the first to seventh respondents. These costs will include costs consequent on the employment of two counsel.

(f) No order is made on the application for direct access.

[63] See, for example, *Affordable Medicines* above n 43 at para 138 and *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-3.

(g) There will be no order as to costs on the application for direct access.

Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Ngcobo CJ.

FRONEMAN J:

[88] I respectfully concur in the Chief Justice's judgment and only wish to add some comments in further support of his judgment. The judgment builds upon the fundamental understanding that under the Constitution, the President must always act in accordance with the rule of law, even when exercising executive functions.[1] It extends our understanding of what the rule of law requires of the President in the particular circumstances of this case. It does so, in the main, by determining the impact and meaning of the rule of law in the context of our recent history – the political strife that preceded and accompanied the birth of our democracy – and in particular the amnesty

[1] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

process put in place to assist in achieving national unity and reconciliation. The judgment draws its essence from the participatory process of the Truth and Reconciliation Committee (TRC). In so doing it gives content to the exercise of pardon in a manner which distinguishes it from notions of the nature and exercise of executive pardon powers elsewhere.[2]

[89] Some would find the broadened understanding of what the rule of law requires of us in these circumstances unpersuasive merely for the reason that it goes beyond the understanding of executive pardon powers elsewhere. Others might find those historical notions expedient in advancing a conception of executive power unconstrained by the rule of law. In my view it will contribute to a deeper understanding and acceptance of the rule of law if the content given to it in the main judgment also finds resonance, not only in our recent history, but also in pre-colonial history and in our own conception of democracy. And it does.

[90] This Court has held that the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy.[3] That holds true even for the executive function at stake here. Promoting national unity is an ongoing

[2] See, for example, *de Freitas v Benny* [1976] AC 239 (PC); *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL); *Burt v Governor-General* 1992 (3) NZLR 672 and *Biddle v Perovich* 274 US 480 (1927).

[3] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 121 and *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 40.

process in terms of the Constitution.[4] While it may be necessary for this process of national unity "not to punish those who have flagrantly violated the law",[5] it needs to be remembered that this flies in the face of what is conventionally associated with the rule of law.[6] In this regard the presidential pardon power in relation to offences that may have an impact on national unity have characteristics similar to the amnesty process, where individual participation of victims was the only rational means of attempting to effect that purpose. Counsel for the applicant argued that the requirement of victim participation was met through the process set in place by the President which involved all the political parties represented in Parliament. Put differently, the argument was that representative democracy was sufficient in the circumstances. It is not. It would be irrational to treat similar processes relating to past violations of the law for a political motive – amnesty and "national unity" pardons – differently, by regarding individual victim participation as essential to the one process, but not to the other.

[91] The notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper "punishment" for offenders in traditional African society. It was an expression of the participatory democracy practiced in those societies. That is my understanding of African tradition.[7] The main judgment therefore finds

[4] See section 83(c) of the Constitution.

[5] *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 23.

[6] Id.

[7] There is much literature on the subject, but a personal expression on the matter can be found in Mandela *Long Walk to Freedom, The Autobiography of Nelson Mandela* (Macdonald Purnell (Pty) Ltd, Randburg 1994) 20. See

support in the African legacy of participation of citizens in affairs of the society, not as direct authority for its particular application to the facts of this case, but as further legitimisation that it accords with a tradition that runs deep in the lives of many people in this country. It is indeed difficult to escape the conclusion that this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process. Without it the amnesty process would have been impossible, or at least it would have been immeasurably more difficult than it was. The same can be said for the ongoing duty to promote national unity.

[92] In the main judgment it is emphasised that the ruling does not in any way speak to pardon issues beyond the confines of the facts of this case. The same goes for these additional comments. I consider it important to demonstrate that the "pervasive demands for participatory living"[8] is one with deep roots in pre-colonial history, not that its past application should bind us in finding what is required for the present:

> "We do not have to be born in a country with a long democratic history to choose that path today. The significance of history in this respect lies rather in the more general understanding that established traditions continue to exert some influence on people's ideas, that they can inspire or deter, and they have to be taken into account whether we are moved by them, or wish to resist and transcend them, or . . . want to examine and

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also, for example, the description of the Gacaca courts of Rwanda in Amnesty International, *Rwanda Gacaca: A question of justice*, AI Index AFR 47/007/2002 and Villa-Vicencio "Transitional justice and human rights in Africa" in Bösl and Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009) 41-3.

[8] Sen *The Idea of Justice* (Harvard University Press, Cambridge 2009) 322.

> scrutinize what we should take from the past and what we must reject, in the light of our contemporary concerns and priorities."[9]

Cameron J and Van der Westhuizen J concur in the judgment of Froneman J.

[9] Id at 332.

For the Applicant:	Advocate NB Tuchten SC, Advocate N Riley and Advocate M Witz instructed by Snaid & Edworthy Attorneys.
For the First to Seventh Respondents:	Advocate G Budlender SC, Advocate Karrisha Pillay, Advocate H Varney and Advocate L Kubukeli instructed by the Legal Resources Centre.
For the Eighth and Ninth Respondents:	Advocate MTK Moerane SC, Advocate IV Maleka SC and Advocate L Gcabashe instructed by the State Attorney.
For the Fifteenth Respondent:	Advocate TJ Botha instructed by Lombards Attorneys.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/11
[2012] ZACC 24

In the matter between:

DEMOCRATIC ALLIANCE — Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Third Respondent

MENZI SIMELANE — Fourth Respondent

Heard on : 8 May 2012

Decided on : 5 October 2012

JUDGMENT

YACOOB ADCJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J concurring):

Introduction

[1] This case requires a decision on whether the appointment of Mr Menzi Simelane[1] as the National Director of Public Prosecutions (National Director) of our country by the President of the Republic of South Africa[2] is within the bounds of the Constitution. The Minister for Justice and Constitutional Development[3] (Minister) and Mr Simelane appeal against a judgment and order of the Supreme Court of Appeal,[4] which concluded that the appointment of the National Director was constitutionally wanting in that the process for appointment and, consequently, the appointment itself was irrational and invalid. The High Court[5] held that, while the appointment of Mr Simelane as the National Director raised some concerns, it could not be said that the conduct of the President fell foul of the Constitution.

[2] The order of the Supreme Court of Appeal reads:

> "1. The appeal succeeds and the first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellant's costs, including the costs of three counsel.
> 2. The order of the court below is set aside and substituted as follows:
> '(a) It is declared that the decision of the President of the Republic of South Africa, the first respondent, taken on or about Wednesday 25 November 2009, purportedly in terms of s 179 of the Constitution of the Republic of South Africa (the Constitution), read with ss 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint

[1] The fourth respondent.

[2] The first respondent.

[3] The second respondent.

[4] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) (SCA judgment).

[5] *Democratic Alliance v President of the Republic of South Africa and Others* [2010] ZAGPPHC 194.

> Mr Menzi Simelane, the fourth respondent, as the National Director of Public Prosecutions (the appointment), is inconsistent with the Constitution and invalid.
>
> (b) The appointment is reviewed and set aside.
>
> (c) The first, second and fourth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the appellants costs, including the costs of two counsel'."

[3] The Constitution provides that an order of constitutional invalidity of any conduct of the President has no force unless it is confirmed by this Court.[6] The order of the Supreme Court of Appeal declared invalid the conduct of the President. The Democratic Alliance[7] applies for confirmation of the order of the Supreme Court of Appeal. The Minister opposes the application. The President opposed the application in the High Court and in the Supreme Court of Appeal but has decided not to participate in these proceedings.[8]

The facts broadly

[4] The facts and circumstances that form the basis upon which the Democratic Alliance contends for the unconstitutionality of the appointment of the National Director are separately set out in detail later, in relation to each argument advanced. A broad outline of the facts will suffice at this stage.

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[6] Section 172(2)(a) provides:

> "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."

[7] The applicant.

[8] The President initially opposed confirmation but withdrew shortly afterwards.

a. Mr Simelane, in his capacity as the Director-General of the Department for Justice and Constitutional Development (Director-General),[9] was intimately involved in a dispute concerning the proper role of the then National Director, Mr Vusi Pikoli. The dispute related to the powers and duties of the Minister for Justice and Constitutional Development and the National Director.

b. Mr Pikoli was suspended by the then President[10] on 23 September 2007.

c. Shortly after that, on 3 October 2007, Mr Mbeki appointed a commission of enquiry[11] headed by a former Speaker of Parliament, Dr Frene Ginwala (Ginwala Commission) to inquire into Mr Pikoli's fitness to hold office as the National Director.

d. Mr Simelane presented the government's submissions to, and gave evidence under oath before, the Ginwala Commission.

e. The report of the Ginwala Commission criticised with some severity the approach by Mr Simelane in making government's submissions as well as the credibility of his evidence.

[9] A position he occupied from June 2005 to October 2009.

[10] Mr Thabo Mbeki.

[11] Section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998 (Act) provides:

> "The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."

f. The then Minister for Justice and Constitutional Development,[12] Mr Enver Surty, requested the Public Service Commission[13] to investigate Mr Simelane's conduct during the Ginwala Commission.[14]

g. The Public Service Commission, in a detailed report, recommended disciplinary proceedings against Mr Simelane arising out of his conduct and evidence before the Ginwala Commission.[15]

h. The Minister[16] rejected the recommendations of the Public Service Commission.[17]

i. The President appointed Mr Simelane as the National Director two days after the Minister rejected the Public Service Commission recommendations.

j. Mr Simelane had been appointed as the Deputy National Director of Public Prosecutions a month and a half earlier.[18]

k. This appointment took place in the wake of Mr Pikoli's dismissal[19] by the then President[20] and the settlement of a case brought by Mr Pikoli to challenge his dismissal in terms of which Mr Pikoli agreed to be relieved of his position.

[12] The predecessor of the present Minister.

[13] A constitutional institution created by section 196 of the Constitution.

[14] The request was made on 10 December 2008.

[15] The Report of the Public Service Commission is dated April 2009.

[16] Mr Jeff Radebe, who had succeeded Minister Surty as Minister for Justice and Constitutional Development.

[17] On 23 November 2009.

[18] On 6 October 2009.

[19] On 8 December 2008.

[20] Mr Kgalema Motlanthe.

l. The General Council of the Bar subsequently[21] began an investigation into Mr Simelane's fitness as an advocate arising at least out of Mr Simelane's conduct during the Ginwala Commission.

[5] The constitutional setting will be discussed in more detail later. But to understand the judgment of the Supreme Court of Appeal, it is enough to say that the appointment was made by the President as head of the National Executive in terms of the Constitution,[22] which requires national legislation to ensure that the National Director is appropriately qualified. That national legislation is the Act and provides that the National Director must be a person fit and proper for the job.[23]

The Supreme Court of Appeal

[6] The Supreme Court of Appeal considered that the President erred in four respects and that these mistakes rendered the process by which the decision to appoint Mr Simelane had been taken and, consequently, the decision itself irrational and invalid. The first was that, according to the President, he had firm views about Mr Simelane being the right person to be appointed the National Director even before he had considered whether Mr Simelane was a fit and proper person for the job. Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Mr Simelane was a fit and proper person for appointment justified the conclusion that he was indeed a fit and proper person. The correct approach,

[21] In December 2009.

[22] Section 179(1)(a).

[23] Section 9(1)(b) of the Act.

according to the Supreme Court of Appeal, was for the President to determine positively whether Mr Simelane was a fit and proper person. This the President did not do. Third, the President disregarded the criticisms of Mr Simelane made by the Ginwala Commission, on the tenuous basis that the Commission had not been appointed to investigate Mr Simelane, but Mr Pikoli. Last, the recommendations of the Public Service Commission that the Ginwala Commission's criticisms merited a disciplinary enquiry against Mr Simelane were too lightly brushed aside.[24]

[7] The Supreme Court of Appeal was of the view that the fact that the Ginwala Commission's comments were not taken into account was in itself enough to set aside the appointment as irrational.

Submissions in this Court

[8] The Minister reiterates the argument advanced in the Supreme Court of Appeal that neither the Constitution nor the Act prescribes any procedure for the appointment of the National Director. This being so, it was for the President to determine the process. This he did, so it is submitted. That process was described in the Minister's written argument as including an "*assessment and evaluation of the qualities, strengths and weakness of the person whom the President had identified for appointment.*" (Emphasis added.) The Minister stresses that the rationality requirement is not onerous, and submits that the test employed by the Supreme Court of Appeal went beyond rationality, and amounted to an unauthorised intrusion into

[24] The Supreme Court of Appeal in fact said that the President and the Minister "were too easily dismissive" of the attitude of the Public Service Commission.

presidential and executive territory. The Supreme Court of Appeal, says the Minister, applied the reasonableness standard appropriate for administrative action cases under PAJA,[25] instead of testing presidential executive action by reference to rationality alone. According to the Minister a court would, on the application of the proper test, be entitled to set aside the appointment only if it concluded that Mr Simelane was not a fit and proper person to have been appointed. Reliance is also placed on the separation of powers requiring a more deferential approach. It is contended that the President has a wide, subjective discretion in making the appointment and that it should be understood that the National Director is a political appointee who has a substantial policy-related role as distinct from other Directors of Public Prosecutions.

[9] The Minister addresses directly only one of the findings of the Supreme Court of Appeal set out earlier:[26] that the finding of the Court that the President had firm views about the appointment of Mr Simelane before he considered whether Mr Simelane should be appointed is incorrect. It is contended that the President said this after having considered the provisions of section 9(1)(b) in the process of Mr Simelane's appointment as Deputy National Director of Public Prosecutions. The

[25] In terms of section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in order to give effect to procedurally fair administrative action, the administrator must fulfil certain requirements. In terms of section 4(4)(a) an administrator may depart from the requirements if it is reasonable and justifiable to do so. In determining whether the departure is reasonable and justifiable the administrator must take into account the factors mentioned in section 4(4)(b). These factors are:

> "i) the objects of the empowering provision;
>
> ii) the nature and purpose of, and the need to take, the administrative action;
>
> iii) the likely effect of the administrative action;
>
> iv) the urgency of taking the administrative action or the urgency of the matter; and
>
> v) the need to promote an efficient administration and good governance."

[26] See [6] and [7] above.

only response by the Minister to the other findings of the Supreme Court of Appeal is that the Court glossed over other indications that Mr Simelane was fit and proper of which the Minister was aware. It is also asserted that the Ginwala Commission was not a court and that the Minister was right that Mr Simelane should have had the opportunity to respond to these matters before adverse inferences were drawn against him.

[10] Mr Simelane broadly aligns himself with the Minister, clarifying however that he was not a party to the process of his appointment.

[11] The Democratic Alliance supports the reasoning and conclusion of the Supreme Court of Appeal concerning rationality. It contends in addition that the evidence showed that Mr Simelane was not a fit and proper person to be appointed National Director, which it argues is an objective jurisdictional fact antecedent to appointment, and that the President had an ulterior purpose in appointing him. The Minister and Mr Simelane take issue with these submissions too.

The issues

[12] It is common cause, and rightly so, that the decision of the President was an executive decision and that the decision had to be rational. The Democratic Alliance is of the view that it is unnecessary to decide the question whether the decision by the President constituted executive or administrative action, because even in terms of the former, rationality is a requirement under the principle of legality. The issues this

Court must traverse, after setting out the constitutional and statutory provisions that bear on the President's decision, are now defined:

a. The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.

b. The requirements of rationality concerned in particular with—

    i. the distinction between reasonableness and rationality and the relationship between means and ends;

    ii. whether the process as well as the ultimate decision must be rational;

    iii. the consequences for rationality if relevant factors are ignored; and

    iv. rationality and the separation of powers.

c. An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred.

d. If the decision is found to be rational in this sense then we must evaluate whether—

    i. the evidence shows that Mr Simelane is a fit and proper person to be appointed the National Director; and

    ii. the President had an ulterior purpose in making the appointment.

A conclusion that the appointment by the President of Mr Simelane as National Director was irrational, in the sense that the means employed to make the appointment were not rationally connected to the purpose for which the power had been conferred upon the President, would render it unnecessary to decide the issues in sub-paragraph (d) above.

The Constitution and the Act

[13] The appointment of the National Director is governed by section 179 of the Constitution and certain provisions of the Act. I set out those features that, in my view, are material to our decision:

a. The Constitution demands a single national prosecuting authority headed by a National Director of Public Prosecutions appointed by the President and Directors of Public Prosecutions appointed in terms of an Act of Parliament.[27] Section 10 of the Act requires the President to appoint the National Director according to section 179 of the Constitution.[28]

[27] Section 179(1) provides:

> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[28] Section 10 provides:

> "The President must, in accordance with section 179 of the *Constitution*, appoint the National Director."

b. Section 179 obliges national legislation to ensure that Directors of Public Prosecutions are appropriately qualified.[29] There was some suggestion, on the basis that section 179 makes a continuous distinction between National Directors and other Directors, that the Constitution does not require the National Director to be appropriately qualified. I am prepared to accept that the reference to Directors being appropriately qualified may be construed as a reference to Directors of Public Prosecutions and not the National Director. All this means is that the requirement that the National Director must be appropriately qualified is not expressly stated in section 179. This cannot mean that the Constitution does not require the National Director to be appropriately qualified. That proposition, in my view, simply has to be stated to be rejected. The Constitution by necessary implication requires the National Director to be appropriately qualified.

c. Section 9 of the Act determines these qualifications.[30] For present purposes, the only relevant prescribed qualification is that a person

[29] Section 179(3) provides:

> "National legislation must ensure that the Directors of Public Prosecutions—
>
> (a) are appropriately qualified; and
>
> (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5)."

[30] Section 9 provides:

> "(1) Any person to be appointed as *National Directo*r, *Deputy National Director* or *Director* must—
>
> (a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and
>
> (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
>
> (2) Any person to be appointed as the *National Director* must be a South African citizen."

appointed as a Director of Public Prosecutions, including the National Director, "must . . . be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned."

d. National legislation is required to ensure that the prosecuting authority, and this includes the National Director, performs its functions without fear, favour or prejudice.[31] The Act does this.[32]

e. The National Director has the power to institute criminal proceedings on behalf of the State[33] and must determine prosecution policy after consultation with the Directors of Public Prosecutions and with the concurrence of the Minister.[34] The National Director is also obliged to issue[35] and enforce[36] policy directives to be observed in the prosecution

[31] Section 179(4) provides:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[32] Section 32(1)(a) provides:

> "A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law."

[33] Section 179(2) provides:

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[34] Section 179(5)(a) provides:

> "The National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process".

[35] Section 179(5)(b) provides:

> "The National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process".

[36] Section 179(5)(c) provides:

> "The National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not complied with".

process and has the power to review a decision whether to prosecute or not.[37] These powers and duties are extensive and their proper exercise and performance is crucial to the attainment of criminal justice in our country. And the attainment of an effective criminal justice system is in turn vital to our democracy.

f. The Constitution and the Act oblige the Minister to exercise final responsibility over the prosecuting authority.[38] The Act also obliges the National Director to provide certain information concerning prosecutions if the Minister requests it.[39]

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[37] Section 179(5)(d) provides:

> "The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
>
> (i) The accused person.
>
> (ii) The complainant.
>
> (iii) Any other person or party whom the National Director considers to be relevant."

[38] Section 179(6) provides:

> "The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority."

Section 33(1) of the Act provides:

> "The *Minister* shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*."

[39] Section 33(2) of the Act provides:

> "To enable the *Minister* to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*—
>
> (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
>
> (b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
>
> (c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21(1)(a);

g. The President, the Minister and all other organs of state are not to interfere improperly with, hinder or obstruct the prosecuting authority.[40]

Is fitness and propriety an objective requirement?

[14] The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment. My approach is somewhat different. Questions as to whether and how the rationality requirement would apply if the criteria were merely subjective are, to my mind, complex. I therefore think it is appropriate to determine first whether the Supreme Court of Appeal was correct in concluding that the requirements represented objective jurisdictional facts.

[15] The Minister and Mr Simelane contend that the President has a wide discretion in the appointment of the National Director. It follows, so they submit, that it is for the President to make the decision – which involves a value judgment – and the

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(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21(1)(b);

(e) submit the reports contemplated in section 34 to the *Minister*; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority*."

[40] Section 32(1)(b) of the Act provides:

"Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

requirement that the person appointed "must be a fit and proper person with due regard to his experience, conscientiousness and integrity" is thus not an objective one.

[16] In developing the point, the Minister places considerable emphasis on the fact that the role of the prosecuting authority was policy driven and that the National Director was what was referred to in argument as "a political appointee". It is true that the National Director is appointed by the President. It does not follow that this renders the incumbent of that office "a political appointee". I endorse the statement in *Legal Soldier*,[41] describing the office of the National Director as a "non-political chief executive officer directly appointed by the President":

> "The most important change brought about by s 179 . . . is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various Attorneys-General, whose activities such Minister coordinated and to whom they reported. What s 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President."[42]

[17] The Minister also relied on the following statement in *Geuking*:[43]

> "The President in deciding whether to consent to the surrender of a person under s 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what

[41] *Minister of Defence v Potsane and Another*; *Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* [2001] ZACC 12; 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 (CC) (*Legal Soldier*).

[42] Id at para 19.

[43] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

> matters are appropriate or relevant for that purpose. The courts could intervene only if the President were to abuse the power vested in him or use it in a manner contrary to the provisions of the Constitution."[44] (Footnote omitted.)

[18] *Geuking* is not on point. It was concerned with a provision of the Extradition Act[45] to the effect that the President has to consent to extradition before it can validly take place. The Extradition Act lays down no criteria for the granting of the consent of the President.

[19] The present case is comparable with that part of *SARFU*[46] in which this Court held, drawing on the Appellate Division,[47] that the requirement that a matter must be one of "public concern" before the Commissions Act[48] applies to it, is an objective one:

> "In determining whether the subject-matter of the commission's investigation is indeed a 'matter of public concern', the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of 'public concern' be interpreted so as to promote the spirit, purport and objects of the

[44] Id at para 27.

[45] 67 of 1962. Section 3(2) of the Extradition Act provides:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

[46] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

[47] *Garment Workers' Union v Schoeman, NO and Others* 1949 (2) SA 455 (A) at 463.

[48] Commissions Act 8 of 1947. See Section 1(1).

> Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."[49] (Footnotes omitted.)

[20] For the reasons stated above and for the reasons that follow, I agree with the Supreme Court of Appeal that the requirement is an objective jurisdictional fact.

[21] The starting point is the Constitution itself. It requires that the National Director must be appropriately qualified and leaves it to an Act of Parliament to determine the qualification in detail. The Constitution does not, in its terms, leave the determination of appropriate qualification to the President. It obliges the Legislature to ensure that the National Director is appropriately qualified. The Legislature, in my view, had the obligation to determine qualifications that must be present before an appointment could be made.

[22] Second, and as the Supreme Court of Appeal correctly points out,[50] the Act itself does not say that the candidate for appointment as National Director should be fit and proper "in the President's view". The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as

[49] *SARFU* above n 46 at para 171.

[50] SCA judgment above n 4 at para 116.

the Supreme Court of Appeal again pointed out, the section "is couched in imperative terms. The appointee 'must' be a fit and proper person."[51]

[23] Third, it is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.

[24] Another factor that points to the criteria being objective is the statement of this Court concerning the constitutional provision that the national prosecuting authority must perform its functions without fear, favour or prejudice:

> "NT 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."[52]

A construction that renders the determination of the qualification criteria to the President's subjective opinion is not in keeping with the constitutional guarantee of

[51] Id. See also section 9(1)(b) of the Act.

[52] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 146.

prosecutorial independence. The interpretation that these requirements are objective jurisdictional facts that must exist before the appointment is made is more consistent with the constitutional guarantee.

[25] The fifth relevant consideration is that the National Director can be suspended by the President on the basis, amongst other things, that the person appointed is not a fit and proper person, and can be removed from office by the President after a commission of enquiry. The President's decision stands unless Parliament takes another view.[53] If the President is the sole determinant of fitness and propriety, then

[53] Section 12(5)-(7) of the Act provides:

> "(5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).
>
> (6)(a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—
>
> (i) for misconduct;
>
> (ii) on account of continued ill-health;
>
> (iii) on account of incapacity to carry out his or her duties of office efficiently; or
>
> (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
>
> (b) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.
>
> (c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.
>
> (d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.
>
> (e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.
>
> (7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the

the spectre is raised of President A appointing someone as National Director on the subjective belief that the person concerned is indeed fit and proper and President B suspending or removing that person from office in the subjective belief, equally genuine, that the incumbent is neither fit nor proper. Neither the Constitution nor the Act could have contemplated that the position of the National Director would be so vulnerable to opinion.

[26] The final reason revolves around the importance of this portfolio in the context of our democracy. It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are, as I have said earlier, fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.[54]

Rationality

[27] The Minister and Mr Simelane accept that the "executive" is "constrained by the principle that [it] may exercise no power and perform no function beyond that conferred . . . by law"[55] and that the power must not be misconstrued.[56] It is also

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same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President."

[54] Section 209(2) of the Constitution.

[55] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[56] *SARFU* above n 46 at para 148. This case was concerned with the President's decision as Head of State and not as head of the National Executive but the principle remains valid. The proposition is also to be found in

accepted that the decision must be rationally related to the purpose for which the power was conferred.[57] Otherwise the exercise of the power would be arbitrary and at odds with the Constitution.[58] I agree.

[28] The four issues concerning rationality mentioned earlier[59] nevertheless require brief exploration.

Reasonableness and rationality

[29] It must be emphasised that it is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself. In the constitutional era reasonableness in the administrative law context has been authoritatively stated in *Bato Star*:[60]

> "In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then

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Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 81.

[57] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 75 and *Masetlha* above n 56.

[58] *Masetlha* id.

[59] See [12 b] above.

[60] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

> be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[61] (Footnotes omitted.)

[30] While there may be some overlap between the reasonableness and rationality evaluations, these tools are best understood as being conceptually different. As was said in *Albutt*:[62]

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[63]

[31] It was held in that case that the means employed in the process of determining whether the President should pardon people who had been convicted of certain offences, namely not to give victims or their families an opportunity to be heard, was not rationally related to the purpose of determining whether pardons should be granted.[64] On the other hand, it was held in *Poverty Alleviation*[65] that the test laid

[61] Id at para 44.

[62] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[63] Id at para 51.

[64] Id at paras 70-4.

down in *Merafong*[66] should be applied, and that the legislation aimed at transferring a part of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape was "rationally connected to a legitimate governmental end."[67] In other words, the means employed, namely the transfer of a part of Matatiele from one province to another, was rationally related to the purpose of improving conditions for the residents of that part of Matatiele on the basis that the governmental purpose could be achieved in more than one way and that it was not for the Court to decide which way was better. The decision in *Albutt* was not concerned with the evaluation of two different methods of achieving the purpose but with whether not giving the victims or their families the opportunity to be heard was rationally concerned with the governmental purpose in issue in that case.[68]

[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to

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[65] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Poverty Alleviation*) at para 66.

[66] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) (*Merafong*) at para 114:

> "What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is."

[67] Above n 65 at para 76.

[68] Compare Price "Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt"* (2010) 127 *SALJ* 580.

achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.

Decision or process?

[33] The Democratic Alliance submitted that the irrationality ground covers irrationality in process as well as on the merits. The Minister and Mr Simelane did not appear fervently to embrace this proposition but did not advance any cogent alternative submission against it. *Chonco 1*,[69] concerned with the power of the President, as Head of State, to grant pardons under the Constitution,[70] elucidated the rationality requirement in the process of granting pardons:

> "In *SARFU,* this court, affirming *Hugo,* held that the powers s 84(2) confers on the President as Head of State originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive. The powers granted by sj 84(2) are now clearly original constitutional powers. Section 84(2)(j) is the source of the power, function and obligation to decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in

[69] *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) (*Chonco 1*). This case is referred to as *Chonco 1* because of the two decisions concerning consequential cases that involved the same parties.

[70] In terms of section 84(2)(j).

> accordance with the principle of legality, diligently and without delay. That decision rests solely with the President."[71] (Footnotes omitted.)

[34] It follows that both the process by which the decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition.[72] The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard.

[35] Mr Simelane points out that this case is not concerned with pardons. He argues further that cases involving pardons are distinguishable from the present case.[73] While I agree that this case is not concerned with pardons, there is no basis for the suggestion that the proposition in *Albutt* that decisions by the President as Head of State should be rational both in process and in the final decision should not apply here. It is true that the decision by the President in this case was made as head of the National Executive. It is illogical to suggest that while decisions by the President as Head of State must be rational in process and outcome, decisions of the President as head of the National Executive should be rational only in outcome and not in so far as they relate to the process.

[71] Above n 69 at para 30.

[72] Above n 62.

[73] The Democratic Alliance relies on the case of *Albutt* above n 62, which was also concerned with pardons but the argument applies equally to the case of *Chonco 1* above n 69, which in my view is on point.

[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.

[37] This conclusion addresses the differences that emerged in argument on whether the decision needs to be rational or whether the process resulting in the decision should also have been rational for an executive decision to stand. A related question, if the process is to be rationally related to the purpose for which the power has been conferred, is whether each step in the process must be so rationally related. The parties were ultimately in agreement that, while each and every step in the process resulting in the decision need not be rationally viewed in isolation, the rationality of the steps taken have implications for whether the ultimate executive decision is rational. In my view, the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the

absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.

Rationality and ignoring relevant factors

[38] The Supreme Court of Appeal held that the President, by not taking into account the findings of the Ginwala Commission, ignored a relevant factor. This formulation takes us to the question of whether the seminal statement in *Johannesburg Stock Exchange*[74] concerning administrative action in the pre-constitutional era is at all relevant to the rationality evaluation:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735F–G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B–C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F–G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."[75]

[39] This Court in *SARFU* said that "the exercise of the President's constitutional power to appoint a commission of enquiry is not directly governed by the principle in

[74] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

[75] Id at 152A-D.

the *Johannesburg Stock Exchange* case."[76] It follows that this principle would not directly govern the President's power to appoint the National Director either. That is not to say that ignoring relevant factors can have nothing to do with rationality. If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.

[40] I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is

[76] *SARFU* above n 46 at para 224.

inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.

Rationality and the separation of powers

[41] I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect.[77] If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large. As O'Regan J helpfully explained:

> "A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose."[78]

[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: it has been described by this

[77] See *Albutt* above n 62 at para 51; *Affordable Medicines* above n 57 at para 73; *Bato Star* above n 60 at para 48 and *Pharmaceutical Manufacturers* above n 57 at para 90.

[78] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 35.

Court as the "minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries".[79] And the rationale for this test is "to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other."[80]

[43] And *Affordable Medicines* said:

> "The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society."[81]

This applies equally to executive decisions.

[44] It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an

[79] *Pharmaceutical Manufacturers* above n 57 at para 78.

[80] *Affordable Medicines* above n 57 at para 83. See also *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 44.

[81] *Affordable Medicines* id at para 86.

administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.

[45] It is now possible to consider the crux of this case to decide whether the President acted rationally in appointing Mr Simelane as the National Director and whether the President's failure to take into account the findings in relation to, and the evidence of, Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power was conferred.

Did the President act rationally?

[46] The Democratic Alliance relied mainly on the findings of the Ginwala Commission and the evidence given by Mr Simelane at that enquiry as the basis for the submission that the President did not act rationally. The conclusions of the Ginwala Commission on Mr Simelane's evidence and the evidence itself raised questions that threw so much doubt on Mr Simelane's credibility and integrity, so the argument went, that it rendered the appointment irrational.

[47] The President relied on Mr Simelane's curriculum vitae, which indicated broadly that he had been the Competition Commissioner for a period of a little more

than 5 years[82] and that he had been Director-General for a period of a little more than 4 years.[83] He also relied on his personal knowledge of Mr Simelane's personal and professional qualities, though we do not have much detail about the precise contours of this knowledge. The President also relied on the advice of the Minister to the effect that from the Minister's personal knowledge of Mr Simelane he was a fit and proper person to be appointed National Director. The Minister, who was familiar with both the Ginwala Commission and the Public Service Commission recommendations, advised the President, in effect, that there was no need for him to interrogate these documents and that he would advise that Mr Simelane be appointed, despite the recommendations made by the Ginwala Commission and the Public Service Commission. The basis on which the advice was given will be evaluated later in this judgment.

[48] The report of Mr Simelane's evidence in the Ginwala Commission and the question of whether the President was right in not taking it into account can properly be considered if we have in mind the purpose for which the power was conferred.

The purpose of the power

[49] The provisions of the Constitution and the Act must be taken together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power upon the President was to ensure that the person appointed as National Director is sufficiently conscientious and has the integrity

[82] From February 2000 to May 2005.

[83] From June 2005 to October 2009.

required to be entrusted with the responsibilities of the office. In particular, to ensure that—

a. the prosecuting authority performs its functions honestly and without fear, favour or prejudice;
b. decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;
c. prosecution policy is determined honestly and is appropriate to the needs of our country;
d. the criminal justice system in so far as it concerns prosecutions is fairly administered;
e. any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and
f. all Directors of Public Prosecutions carry out their functions honestly and fairly. [84]

It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director.

The Ginwala Commission findings

[50] In the executive summary of the Ginwala report,[85] Dr Ginwala said of Mr Simelane:

[84] See [13] above.

> "I need to draw attention to the conduct of the DG: Justice in this Enquiry. In general his conduct left much to be desired. His testimony was contradictory and without basis in fact or in law. The DG: Justice was responsible for preparing Government's original submission to the Enquiry in which the allegations against Adv Pikoli's fitness to hold office were first amplified. Several of the allegations levelled against Adv Pikoli were shown to be baseless, and the DG: Justice was forced to retract several allegations against Adv Pikoli during his cross-examination."[86]

[51] In the report of the Ginwala Commission itself, Dr Ginwala said of Mr Simelane:

> "I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA.
>
> All these complaints against Adv Pikoli were spurious, and are rejected [as being] without substance, and may have been motivated by personal issues.
>
> With regard to the original Government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter of suspension, as well as the terms of reference. This further reflects the DG: Justice's

[85] Ginwala "Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions" (November 2008), http://www.info.gov.za/view/DownloadFileAction?id=93423, accessed on 27 September 2012.

[86] Id at para 15.

> disregard and lack of appreciation and respect for the import for an Enquiry established by the President."[87]

[52] These extracts from the report of the Ginwala Commission ought to have been cause for great concern. Indeed, these comments represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's appointment to the position of National Director. Any failure to take into account these comments, or any decision to ignore them and to proceed with Mr Simelane's appointment without more, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility. The Minister did in fact study the Ginwala Commission Report to the extent that it related to Mr Simelane before advising the President. He also studied the report of the Public Service Commission[88] and representations that had been made to him by Mr Simelane's legal team in relation to that report. We must also look at Mr Simelane's evidence at the enquiry, the Public Service Commission's recommendations and, to some extent, the representations made by Mr Simelane's legal team, in order to determine whether the President acted rightly in not taking the evidence before the Commission into account.

Ginwala Commission: Mr Simelane's evidence

[53] The Democratic Alliance relies specifically on four aspects of the evidence of Mr Simelane:

[87] Id at paras 320-2.

[88] See [4 g] above.

a. Mr Simelane's failure to disclose a letter that had been drafted by him and sent by the Minister consequent upon a letter received by the Minister from the then President[89] (to Mr Pikoli) together with Mr Simelane's evidence relating to the contents of the letter he had drafted;
b. Mr Simelane's failure to disclose the former President's letter to Mr Pikoli's attorneys in response to their request for certain documents;
c. Mr Simelane's failure to disclose a legal opinion that had been obtained by him and which was adverse to his opinion concerning the relationship between the National Director and the Director-General.
d. Mr Simelane's evidence accusing Mr Pikoli of dishonesty.

The non-disclosure and content of Minister Mabandla's letter

[54] During the week immediately before Mr Pikoli's suspension, President Mbeki wrote a letter (the former President's letter) to the then Minister[90] requiring her to obtain certain information from Mr Pikoli concerning the intended arrest and prosecution of Mr J Selebi who was, at the time, the National Commissioner of the South African Police Service. The letter in relevant part reads:

> "In view of the constitutional responsibilities of the President with regard to the Office of the National Commissioner of the police service, I deem it appropriate that you obtain the necessary information from the National Director of Public Prosecution regarding the intended arrest and prosecution of the National Commissioner. This would enable me to take such informed decisions as may be necessary with regard to the National Commissioner."

[89] Mr Thabo Mbeki.

[90] Ms Bridgette Mabandla (Minister Mabandla).

It is apparent that the President's request was one for further information and did not request Minister Mabandla to give any instructions to the prosecuting authority in relation to the arrest or prosecution of Mr Selebi.

[55] It is common cause that Mr Simelane drafted Minister Mabandla's letter to Mr Pikoli consequent upon the former President's letter. The salient parts of the letter read:

> "[I]n order for me to exercise my responsibilities as required by the Constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any activity that constitutes a crime in terms of the laws of South Africa. In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account including the public interest. Therefore, I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue."

[56] There is no dispute that this letter was not disclosed to the Ginwala Commission. It is transparent that the letter, seen in isolation, can be nothing but conduct by Minister Mabandla amounting to improper interference with, as well as

hindrance and obstruction of, the National Director of Public Prosecutions in the exercise, carrying out or performance of his powers, duties and functions.[91]

[57] Mr Pikoli replied to this part of the letter in the following terms:

> "Finally your letter may be construed as an instruction to the NPA not to proceed with the arrest and preferring of charges against Mr Selebi until you have satisfied yourself that sufficient information and evidence exist to warrant such steps, and that such a prosecution would be in the public interest. I wish to point out respectfully that if indeed it were an instruction, it would be unlawful, it would place me in a position where I would have to act in breach of the oath of office I took".

[58] This reply too was not disclosed. It must be remembered that one of the issues pertinent to the Ginwala Commission was whether there had been any interference in contravention of section 32(1)(b) of the Act. It was in this context that Mr Simelane's evidence concerning the non-disclosure and content must be understood.

[59] Two aspects of the evidence are relevant here:

a. His evidence surrounding the non-disclosure of the document is absorbing indeed:

> "Adv Trengove: Did you know about the minister's letter of 18th September 2007 instructing Mr Pikoli not [to] proceed with the arrest and prosecution until she was satisfied that it was in the public interest? Did you know about that?
>
> Adv Simelane: Yes.

[91] In contravention of section 32(1)(b) of the Act, quoted above n 40.

Adv Trengove: And did you know that the letter and instruction was given on the 18th of September . . . did you know that?

Adv Simelane: Yes.

Adv Trengove: And did you know that Mr Pikoli refused to comply with that instruction?

Adv Simelane: Yes I remember his response, yes I think I read it once.

Adv Trengove: And do you know that he contended that if indeed it was such an instruction, that it would be unconstitutional?

Adv Simelane: Yes I recall that from his response.

Adv Trengove: Why didn't you disclose these events in the government's papers?

Adv Simelane: Because these are the details that wasn't necessary to disclose, because what was taken into account was not the reason why Mr Pikoli was insistent on proceeding in the manner that he had intended to proceed. What was at issue was the manner in which he proposed to do it, having regard to the representations that had been made earlier that Rev Chikane also spoke to and what implications for national security would be there if it was pursued in the manner that he had intended at that time.

Adv Trengove: Are you suggesting that these events were not relevant to the suspension of Mr Pikoli?

Adv Simelane: No.

Adv Trengove: No what?

Adv Simelane: I am not suggesting that these events were irrelevant for the suspension of Pikoli.

Adv Trengove: Sorry you have a double negative in there which makes your answer ambiguous. Are you saying that these events were irrelevant or they were relevant?

Adv Simelane: I am not saying they were irrelevant.

Adv Trengove: You are not saying they were irrelevant. Do you concede they were relevant to his suspension?

Adv Simelane: They were considered and they were part of it, so they would be relevant.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: They were relevant and they were considered in that context.

Adv Trengove: Do you concede that they were highly relevant?

Adv Simelane: I am not sure whether it makes a difference if they were highly, or very highly or very very highly.

Adv Trengove: Which adjective would you use?

Adv Simelane: They were important.

Adv Trengove: Important, but not disclosed.

. . .

Adv Trengove: I want to suggest to you that an honest preparation of the government's papers would have disclosed the letter and Mr Pikoli's refusal to obey the unlawful instruction a mere four days before his suspension.

Adv Simelane: I disagree and I object to the suggestion that the preparation of government's submission may have been dishonest or was dishonest. It was honest in its preparation and we, in its preparation we did not leave out that which we believed needed to be put there. This was part of the context

in which that submission was prepared. So there is nothing dishonest that went into that preparation. That would be my submission."

b. The evidence concerning content, too, is interesting:

"Adv Trengove: Important but not disclosed.

Adv Simelane: Because they constituted part of the detail of what was, or were the main reasons. And one of which linked to that was the issue of national security.

Adv Trengove: They weren't part of the detail. They were an unconstitutional and unlawful attempt to interfere with the performance by Mr Pikoli of his constitutional duty.

Adv Simelane: Those are your instructions, I disagree.

Adv Trengove: I beg your pardon.

Adv Simelane: I am saying those are your instructions, I disagree.

Adv Trengove: I see. Why do you disagree? Was it a lawful instruction given by the minister?

Adv Simelane: The instruction, if you say that was an instruction, to me it was not saying Mr Pikoli cannot carry out what he wanted to do. So I don't read, I don't recall the letter like that.

Adv Trengove: Well let me read you the critical sentence . . . :

'I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against National Commissioner of Police Service, you shall not pursue the route have taken steps to pursue.'

Is that not an instruction to stop the proposed arrest and prosecution of Mr Selebi?

Adv Simelane: No I don't read it like that because I read it in the context . . . (intervenes)

Adv Trengove: You don't like it?

Adv Simelane: No I said I don't read it like that.

Adv Trengove: I see.

Adv Simelane: Yes.

Adv Trengove: How did you read it, as a request?

Adv Simelane: Well, I read it contextually, contextually in that it's a letter that asked for a report first so that the minister could then advise the president in exercise of her responsibilities over this institution and therefore she was then saying until Mr Pikoli then gives that report which she had requested, he shouldn't pursue that route that he intended to take.

Adv Trengove: Whatever her justification for it, it was an instruction not to go ahead, correct?

Adv Simelane: Until he gave that report yes.

Adv Trengove: No, not until he gave that report, until she was satisfied there was enough evidence . . . (intervenes)

Adv Simelane: Because she would be satisfied when she receives a report with the necessary information from Mr Pikoli, that's what she asked for.

Adv Trengove: No, no, she demanded the information, but said: You stop your intended arrest and prosecution until I am satisfied that there is enough

> evidence for you to go ahead. That is an arrogation of a constitutional function that belongs to Mr Pikoli, correct?
>
> Adv Simelane: No I don't read it to say that he, Mr Pikoli couldn't carry through what he wanted to do. I don't read it the way you are reading it.
>
> Adv Trengove: Why did you not disclose this letter to this commission?
>
> Adv Simelane: Because this letter together with the point on which you have questioned me I have said were part of the issue of national security that had to be considered."

[60] I have already said that Minister Mabandla's letter appears to constitute a contravention of the Act as an improper interference with the prosecuting authority. Mr Simelane's attempt to explain its content and justify his own draft is revealing.

[61] If he did understand what he drafted he should have known that, at the very least, the letter was capable of the construction that it constituted improper interference and if he did not begin to see this possibility the question whether he would resist interference by others requires some explanation and answer. It is probable that he did indeed understand what he drafted.

[62] Mr Simelane, having conceded that the letter was both relevant and important, found himself driven to irrelevancies in the attempt to explain the failure to disclose it. These extracts reflect on Mr Simelane's credibility and conscientiousness. They are material. Any decision by any person aware of this evidence to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the

face of it and in the absence of any explanation from that person, irrational. In other words, not taking the evidence into account was not, on the face of it, rationally related to the purpose of appointing a National Director, sufficiently conscientious and credible to resist interference with his office.

[63] Almost all this evidence was also in the Public Service Commission Report. The Minister says he evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. In fact, he considered it carefully and came to the conclusion that no disciplinary enquiry should be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it.

Failure to disclose the then President's letter

[64] About a month after Mr Pikoli's suspension[92] his attorney wrote a letter to Mr Simelane, Minister Mabandla and to the Presidency requesting certain information. The letter, to the extent relevant, reads:

> "One of the issues in the inquiry is whether the President or anybody in the Presidency, the Minister of Justice or anybody in her Ministry or you or anybody in your Department interfered with the NPA's investigation and prosecution of the National Commissioner of Police Mr Selebi. Adv Pikoli informs us that there was such interference in the immediate run up to his suspension on 23 September 2007. . . . May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi which you or your Department may have sent to or received from the President or anybody in the Presidency at any time since 15 September, the Minister of Justice or anybody in her Ministry at any time since 15 September . . ."

[92] On 22 October 2007.

[65] The former President's letter of 17 September 2007 was not disclosed. We would do well to examine Mr Simelane's evidence under cross-examination:

"Adv Trengove: . . . if I may just pick it up in the opening sentence in paragraph 3:

> 'May we please have copies of all communications and documents relating to the investigation and prosecution of Mr Selebi which you or your office sent to or received from the president or anybody in The Presidency at any time since 15 September 2007.'

Do you see that?

Adv Simelane: Yes.

Adv Trengove: That squarely covered the president's letter to the minister of 17 September 2007, correct?

Adv Simelane: Yes if you mention that letter yes.

Adv Trengove: Now let's go then to your response to that letter . . . ?

Adv Simelane: Yes.

Adv Trengove: It's your response, it's dated the 1st November and it is addressed to Mr Moosajee of Deneys Reitz. . . .

. . .

Adv Trengove: . . . Then you go on in the next paragraph:

> 'We are not in possession of any documents relating to the investigation of the National Commissioner of Police, save for

> reports prepared by your client. Our information is that the investigation against the national commissioner is ongoing.'

Was that statement true?

Adv Simelane: My understanding is that the investigation was ongoing.

Adv Trengove: Why do you ignore the critical part of this statement? You denied that you were in possession . . . of any of the documents requested of you, correct?

Adv Simelane: Well save for the reports that were submitted yes.

Adv Trengove: Yes. Why did you not disclose the president's letter to the minister which was specifically sought?

Adv Simelane: Well I wasn't informed about the letter, I became aware of the letter much later.

. . .

Adv Trengove: I still don't have it. I understand that you say you haven't seen the president's letter. Is my understanding also correct that you say you had heard about that letter however?

Adv Simelane: Yes because the minister, yes had received the letter.

Adv Trengove: Now then why didn't you disclose it?

Adv Simelane: Well the way we, the way I read the request and understood the request, it was for any information that related to this investigation. I didn't read the president's letter to be one of those that they requested.

Adv Trengove: I see. So you thought about the president's letter but concluded that it wasn't covered by the request?

Adv Simelane: No, I mean I was aware of it as I said, I heard that it was there.

Adv Trengove: Yes.

Adv Simelane: But I focused on the previous correspondence and the reports that were sent. Hence I drafted the letter in this way, because I read the request from the attorneys to be requiring that only.

Adv Trengove: Are you saying that you thought the president's letter fell outside the request?

Adv Simelane: Yes I didn't read it to fall within this particular request.

Adv Trengove: Well, why don't you go back to the request of the minister . . .

> 'May we please have copies of all communications and other documents relating to the investigation and prosecution of Mr Selebi, which you or your office sent to or received from the president.'

How can there be any ambiguity about its meaning?

Adv Simelane: I think we read this narrowly. I didn't read it to include this.

Adv Trengove: No, no you can't read it honestly and believe that the president's letter falls outside of it.

Adv Simelane: No I didn't read it to include.

Adv Trengove: I beg your pardon?

Adv Simelane: I didn't read it to, I didn't understand it to fall into this.

Adv Trengove: How did you understand it so as to exclude the letter from the president?

Adv Simelane: No I didn't read the request to be including in its ambit a letter of that type from the president, that's why I would not have . . . (intervenes)

Adv Trengove: But the request is very simple, it says to the minister: Minister, did you receive any communication from the president concerning the Selebi investigation at any time after 15 September. Now how can there be any doubt about the fact that the president's letter fell squarely within the terms of that request?

Adv Simelane: Look I didn't read it to be requiring a letter like that. So if you are saying in your view it should have been included, I can understand that interpretation.

Adv Trengove: My view is irrelevant, but we are going to submit to this inquiry that the concealment of that letter could only have been dishonest. Do you have any response to it?

Adv Simelane: No I don't think so, because we have sought to explain to this inquiry why it was felt that that letter need not be disclosed.

. . .

Adv Trengove: No, this has got nothing to do with permission, this has got to do with honesty and dishonesty. You said: We have no such a document in our possession. And I want to know who decided to tell that lie, you or the minister?

Adv Simelane: We didn't, I don't think it is a lie, because . . . (intervenes).

. . .

Adv Simelane: I think as I said I was aware that the minister had received a letter from the president, because she mentioned it. So I was aware of the letter but I hadn't seen the letter.

Adv Trengove: Won't you just answer my question though?

Adv Simelane: I don't understand, that the letter was privileged. We had always had that view that the letter was privileged.

> Adv Trengove: And is that why you denied that you had it?
>
> Adv Simelane: No we didn't, we didn't deny that the letter was there, we didn't make reference to it in our response, as I said because I didn't understand the request to be inclusive of that particular letter.
>
> Adv Trengove: You see because I want to suggest to you that if privilege was your issue or excuse, then the honest response would have been: Yes we have correspondence from The Presidency, but we refuse to give it to you because it is privileged. That would have been the honest response. It is not honest to say we don't have anything of the kind. Do you understand that?
>
> Adv Simelane: Yes I think we could have, if I had instructions to make reference to the letter and it was given to me, I would have then made reference to it."

[66] After some cross-examination, Mr Simelane conceded without qualification that the request by Mr Pikoli's lawyers squarely covered the letter of the then-President to Minister Mabandla. But then the trouble began. According to the record, Mr Simelane tried to evade the question whether the statement that the Presidency, the then Minister and Mr Simelane himself were "not in possession of any documents relating to the investigation of the National Commissioner of Police" was true. He then said that the statement was true. When pertinently asked why the letter had not been disclosed he said variously that the letter had not been disclosed because he became aware of the letter much later, that he was aware of the letter but thought it was not covered by the request, that he had known about the letter but had focused on the previous correspondence and reports that had been sent, that he considered the letter to be a privileged document, that he had no instructions to make reference to the letter (presumably from Minister Mabandla) and, most importantly, that he did not

"read" the President's letter to be one of those that had been requested. The last reason necessarily implies that he in fact read the former President's letter.

[67] All these statements cannot be true. If he read the letter, he must have known about it and if he knew about it he could not say he got to know about it much later. If he did not know about the letter, he could not have read it, could not have thought that it was privileged, could not have focused on something else and could not have been waiting for instructions.[93] It is inconceivable that the former President's letter was not in his possession when he drafted the follow up letter to Mr Pikoli, on behalf of himself, Minister Mabandla and the Presidency, presumably on instruction from Minister Mabandla.

[68] We must remember that Mr Simelane wrote this letter to the attorney saying that there was no relevant document in his possession more than a month after he had drafted the letter that had been sent to Mr Pikoli consequent upon the former President's letter.[94] Either Mr Simelane drafted the response on behalf of Minister Mabandla without reading the former President's letter or he had it in his possession and read it. If he did not have the letter when he wrote the reply, this raises serious questions about his conscientiousness. If he did indeed have the letter, sharp questions about his dishonesty rear their heads.

[93] At [64] and [65] above.

[94] The letter to Mr Pikoli consequent upon the receipt by Minister Mabandla of the former President's letter was drafted on behalf of Minister Mabandla and was dated 18 September 2007 while the letter by Mr Simelane to Mr Pikoli's attorneys was dated 1 November 2007.

[69] On the face of it, the contradictions reflect on Mr Simelane's credibility, integrity and conscientiousness. They were and remain material. Any decision, by any person aware of this evidence, to ignore it in the decision-making process involving Mr Simelane's credibility would have been, on the face of it and in the absence of any explanation from that person, not rationally related to the purpose for which the power was conferred.

[70] All but an irrelevant three and a half lines of this evidence was in the Public Service Commission Report. The Minister evaluated this report in the light of the criticisms made of it by Mr Simelane's lawyers. Indeed he studied it carefully and decided that the disciplinary enquiry recommended by the Public Service Commission should not be instituted. He must have been aware of this evidence but decided to ignore it and to advise the President to ignore it. Absent any sound explanation, a decision to ignore this evidence or the failure to take it into account would be irrational in the sense of not being rationally connected to the purpose for which the power was conferred.

Failure to disclose legal opinion

[71] It is common cause that Mr Simelane obtained a legal opinion that was to some extent adverse to his view on the relative roles of the National Director and the Director-General. His evidence on this score and his disclosure only during cross-examination of the fact that he had secured that legal opinion is illuminating:

"Adv Trengove: I want to turn to a different topic and that is the difference of opinion that existed between yourself and Mr Pikoli about your role in the NPA. You are acquainted with that topic, is that correct?

Adv Simelane: Yes.

Adv Trengove: And you are aware of the fact that part of the complaint against Mr Pikoli is based on your evidence to the effect that he did not permit you to play the role in the NPA that you believed you were entitled and obliged to do.

Adv Simelane: Yes.

Adv Trengove: Correct. There was a difference of opinion between yourself and Mr Pikoli. Mr Pikoli's opinion was that he alone had the final say in the management of the NPA. Is that correct? I am not sure that your microphone is switched on, could you perhaps check?

Adv Simelane: Yes that was his opinion.

Adv Trengove: And in fact he insisted that the constitutional independence of the prosecuting service required that to be so, correct?

Adv Simelane: Yes in respect of prosecutorial decisions, yes that's what he said.

. . .

Adv Trengove: That was your opinion that you are the accounting officer and in that capacity that you have all the powers and duties of the PFMA, Public Finance Management Act, Sections 38 to 43 confer on an accounting officer, is that correct?

Adv Simelane: Yes that's my argument.

. . .

Adv Trengove: You say in paragraph 13 [in your supplementary affidavit] that part 2 of the PFMA, comprising Sections 38 to 43, deals with the responsibilities of accounting officers. Am I correct in my understanding that your contention in other words is that your responsibilities were those spelt out in Sections 38 to 43?

Adv Simelane: Yes of the accounting officer, yes.

Adv Trengove: And you go on:

> 'One such responsibility is to ensure the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.'

Correct?

Adv Simelane: Yes.

. . .

Adv Trengove: Have you taken legal advice on the issue?

Adv Simelane: It's pretty straightforward, it doesn't need legal advice in my view.

Adv Trengove: Won't you answer the question. Have you taken legal advice on the question?

Adv Simelane: No."

And then a few minutes later after discussion of another topic:

"Adv Trengove: You said you took no legal advice on this issue, correct.

Adv Simelane: No, I don't remember really getting counsel opinion on it. No in fact, yes I think you are quite right, we actually did, we got the opinion of Adv Maleka, yes now I recall and Adv Khoza, yes we did.

Adv Trengove: Mr Simelane, you said you took no advice. You repeated that same answer and then when you saw me turning up a document you changed your mind.

Adv Simelane: No you are quite wrong. What I was trying to recall was what the opinion was and it actually covered quite a lot of issues, more than this one specific issue. So I am correcting myself that we did actually get an opinion on a whole range of issues about the role of the NDPP. If I recall that was our opinion yes.

. . .

Adv Trengove: Yes. You were intimately involved in the preparations of the papers.

Adv Simelane: Absolutely.

Adv Trengove: And in those papers one of the grounds, one of the accusations against Mr Pikoli is precisely this difference of opinion between you and him, correct?

Adv Simelane: Yes.

Adv Trengove: And yet you don't tell the commission that you have taken legal advice on the question.

Adv Simelane: Sorry can you repeat that, I didn't hear it nicely.

Adv Trengove: You don't disclose to the commission that you had taken legal advice on the question.

Adv Simelane: No I didn't think there was a need to disclose that I took legal advice on the particular issue."

[72] The Minister tries to justify this about-face by saying that Mr Simelane is entitled, when he remembers something, to change his mind and say that he has done so. This attempt is, in my view, in vain.

[73] One of the important purposes of the Ginwala Commission was precisely to investigate this difference of view and to express a view on it. Mr Simelane must have deliberately taken the decision to obtain the legal opinion. He could in all probability not have forgotten about it. Absent any explanation, his failure to disclose a legal opinion adverse to his (and I may say adverse to the case he was making before the Commission) was seemingly aimed at misleading the Commission. His denial that he had obtained that legal opinion would, absent any explanation, be dishonest. What is more, when asked why the opinion had not been disclosed to the Commission, Mr Simelane did not say that he had forgotten to include it but rather that he did not think there was a need to disclose that he took advice on the issue. How does this statement square with conscientiousness? Important questions remain unanswered once again.

[74] This evidence too, reflected in the Report of the Public Service Commission, must have been known to the Minister and was ignored. The decision to ignore and the advice to the President to ignore relevant indications of dishonesty that could detract from the credibility, integrity and conscientiousness of Mr Simelane would, in the circumstances, be irrational unless there were a proper reason for ignoring it.

Improper accusation of dishonesty

[75] Mr Simelane did not accuse Mr Pikoli of dishonesty in any papers before the Commission until he was cross-examined. He then tried to improve his case by falsely accusing Mr Pikoli of dishonesty:

"Adv Trengove: Now that was the difference between you and Mr Pikoli. He insisted that he was the head and had the final say. You insisted that in your capacity as accounting officer there are certain matters in which you had the final say, correct?

Adv Simelane: Yes.

Adv Trengove: Now in fairness to you and in fairness to Mr Pikoli, could you please turn to the comment that you make, on page 3, at the foot of the page, where you say in the very last line on page 3 in paragraph 8 you say the following, you are speaking about this difference between yourself and Mr Pikoli and you say:

> 'However, having said that I wish to state that there was no acrimony between Pikoli and I as the differences between us were purely professional.'

Is that correct?

Adv Simelane: Yes that's correct.

Adv Trengove: So Mr Simelane as I understand you on this score you do not accuse Mr Pikoli of anything worse than that he held a view which differed from yours, correct?

Adv Simelane: Yes and the consequences that flow from that view.

Adv Trengove: Oh yes, but you accept that he genuinely held a different view from yours, correct?

Adv Simelane: Yes he held a different view.

Adv Trengove: And accepting that you differed from him on the law, given his perception of the law he acted entirely as he thought the law required him to do, correct?

Adv Simelane: I think with respect to the responsibilities of the accounting officer I was of the view and still am of the view that Mr Pikoli actually has a much better

understanding and shares the same understanding that I share on the responsibilities of the accounting officer.

Adv Trengove: I see, so what you are really saying is that he was dishonest?

Adv Simelane: Well what I am saying is that he knows the correct position and in my discussions with him he, in fact he has even indicated on no less than two occasions that I am the accounting officer and therefore I should deal with . . . (intervenes)

Adv Trengove: Are you saying that he was dishonest? That he said he knew one thing, but said another, is that what you are saying?

Adv Simelane: Well if you call that dishonesty then so be it, but he definitely on no less than two occasions made it clear to me that you are the accounting officer, you deal with the issues.

Adv Trengove: Are you suggesting that while he insisted to have the final say in the management of the NPA, he actually knew that you had the final say as accounting officer?

Adv Simelane: On the issues of accounting officer, yes he definitely knew, he was in that position.

Adv Trengove: Now that's a very serious accusation because that's an accusation of dishonesty, correct?

Adv Simelane: If that's what you call it, but I can't tell you . . . (intervenes)

Adv Trengove: No, no not what I call it. You do know what the difference is between honesty and dishonesty, don't you Mr Simelane?

Adv Simelane: Yes I think I know the difference.

Adv Trengove: And the evidence of what you are now giving, the implication of what you are now saying is that Mr Pikoli was dishonest on this score.

Adv Simelane: Well the point is that he deliberately argued that he is not, that the accounting officer is not responsible for the part 2 of the PFMA that you have just cited, if his evidence would be that those are not the responsibilities of the accounting officer, I disagreed with him there and I disagree with him today.

Adv Trengove: I am not asking you what the position would be if he said that or if he said this. I am asking you whether you are saying that Mr Pikoli was dishonest on this score. You were there, I wasn't. Was he dishonest or was it a purely professional difference of opinion on the law?

Adv Simelane: It was a different view and it is a dishonest view in my opinion for Mr Pikoli to argue that he does not know and he doesn't agree that the accounting officer has those responsibilities in part 2 that you cited.

Adv Trengove: It was dishonest for him to argue that you say?

Adv Simelane: Yes.

Adv Trengove: I see. Now that's a very serious accusation to make against the NDPP, correct?

Adv Simelane: Oh yes, it's a serious accusation.

Adv Trengove: Yes. Why did you never in any of your affidavits say anything of the kind?

Adv Simelane: Say what? I think I stated it in the affidavits clearly that we differed on that particular point.

Adv Moroka: Chair, if Mr Trengove would refrain from interrupting the witness. He is entitled to finish his answer.

Adv Trengove: Mr Simelane, you never in any of your affidavits suggested that Mr Pikoli was dishonest on this score, correct?

Adv Simelane: I never used the word dishonest in the affidavits.

Adv Trengove: By whatever name you did not accuse him of dishonesty, duplicity, or whatever you might call it, correct?

Adv Simelane: No I didn't accuse him of dishonesty in the affidavit.

Adv Trengove: The only thing you said in your affidavit was:

> 'I wish to state that there was no acrimony between Pikoli and I and the difference between us was purely professional.'

That means an honest difference of opinion between two professional people, correct?

Adv Simelane: A difference of opinion and a professional one, yes.

Adv Trengove: I want to suggest to you Mr Simelane your current evidence that Mr Pikoli dishonestly pretended to hold one view when in fact he knew better, is a fabrication in the witness box this morning, because otherwise you would have raised it in the affidavits.

Adv Simelane: I disagree."

[76] Again this evidence raises questions that require urgent answers about Mr Simelane's integrity and conscientiousness. Unless there is a proper explanation for the contradiction in his overall testimony about whether there was a genuine difference of opinion between him and Mr Pikoli or whether Mr Pikoli was being dishonest in holding his opinion, there is cause for grave concern. Absent the resolution of this issue, the evidence could not be ignored without affecting the rationality of the decision.

[77] This evidence was not contained in the report of the Public Service Commission and the Minister may not in fact have seen it. But having known of the evidence that Mr Simelane gave that is referred to in the report of the Public Service Commission, the Minister ought to have seen to it that Mr Simelane's evidence was subjected to closer examination. The decision not to do so in the light of the Report of the Public Service Commission is irrational. If the evidence had been subjected to closer scrutiny this aspect of the matter would undoubtedly have been discovered. Once this had happened, any decision not to investigate the matter further in the process of making the appointment would not have been rationally linked to the purpose for which the power to appoint had been conferred.

Summary of consequences of the Ginwala Commission criticisms and evidence

[78] In my view all the criticisms of the evidence and approach of Mr Simelane by the Ginwala Commission have, on the face of it, a sufficient basis in the evidence before it. So are all the criticisms expressed of Mr Simelane in the Report of the Public Service Commission. The President, on the advice of the Minister, decided to ignore the submissions in the Public Service Commission Report too. These were not to be taken into account. The reasons why he did so are important.

[79] We must now evaluate the reasons why the Minister decided to ignore the criticisms by the Ginwala Commission, the evidence before the Ginwala Commission as well as the recommendations of the Public Service Commission and to advise the President to ignore these matters in the process of making the appointment.

The Minister's reasons

[80] The first reason given is that the Public Service Commission had not given Mr Simelane an opportunity to be heard. Mr Simelane had been heard in the Ginwala Commission and had been given every opportunity to defend his position. If the Minister had decided to commence a disciplinary enquiry against Mr Simelane, he would have been given a hearing there once again. In any event, it was not the Public Service Commission that had the power to institute disciplinary proceedings against Mr Simelane. That decision had been made after Mr Simelane had been heard. The fact that Mr Simelane had not been given a hearing before the Public Service Commission had made its recommendations to the Minister is no reason for not instituting disciplinary proceedings particularly because Mr Simelane had been heard by the Minister.

[81] The second reason given was that he agreed with the submissions made to him by Mr Simelane's lawyers consequent upon the recommendations of the Public Service Commission. These submissions were aimed at and succeeded in persuading the Minister not to institute disciplinary proceedings against Mr Simelane. They were technical and legalistic in nature. They were intent upon establishing that Mr Simelane's conduct was not hit by the relevant legislation. Nowhere in these submissions to the Minister is it said, nor could it have been credibly said, that Mr Simelane's integrity and honesty had been left untouched and that he had come out of the process morally unscathed. Indeed, Mr Simelane's lawyers submitted that if

their submissions on whether Mr Simelane's conduct fell within conduct prohibited by law, he should be counselled and that disciplinary proceedings should nevertheless not be instituted against him. This was an admission by Mr Simelane's legal representatives that his conduct before the Ginwala Commission was less than desirable. It seems that the Minister ignored submissions by Mr Simelane's legal representatives conceding that his credibility was not wholly intact after evidence at the Ginwala Commission had been given. This too could not have been rationally related to the purpose for which the power had been given.

[82] Thirdly, having decided not to accept the recommendations of the Public Service Commission, and in effect not to give Mr Simelane an opportunity to explain, the Minister reasons that it was not right for Mr Simelane's conduct at the Ginwala Commission to be held against him because Mr Simelane had not been given an opportunity to respond to the Public Service Commission and because the allegations had not been proved absent an enquiry. Quite apart from the fact that it was the Minister's decision that resulted in the fact that Mr Simelane had not been able to defend himself in an enquiry, the Minister's statement is a concession that if the allegations against Mr Simelane continued to stand after being tested, they would be of a kind that would reflect badly on him. And the Minister is right in this.

[83] The fourth basis on which the findings and evidence were not taken into account is that the Commission was not investigating Mr Simelane but Mr Pikoli. This reason is also unacceptable because it implies that dishonesty on the part of a

senior state official before a commission of enquiry, where the enquiry is not directly about the person concerned, can be disregarded.

[84] The last reason given is that the Ginwala Commission is not a court. This is an irrelevant consideration. It does not matter for the purposes of evaluation of credibility whether a person is dishonest and devious to a court, to a commission of enquiry, to an employer or to anyone else for that matter. Dishonesty is dishonesty wherever it occurs. And it is much worse when the person who had been dishonest is a senior government employee who gave evidence under oath. Although not a court, the Ginwala Commission was about as important a non-judicial fact-finding forum as can be imagined.

[85] The reasons given by the Minister for ignoring these indications of dishonesty, albeit prima facie, in the evidence of Mr Simelane before the Ginwala Commission, the evaluation of his evidence by that Commission, and the recommendations of the Public Service Commission did not in all circumstances hold any water. Indeed, they do not disturb my original conclusion that the failure to take these indications into account were not rationally related to the purpose for which the power to appoint a fit and proper person as a National Director were given.

Conclusion

[86] The difficulties concerning Mr Simelane's evidence that appear from a study of the records of the Ginwala Commission were and remain highly relevant to

Mr Simelane's credibility, honesty, integrity and conscientiousness. The Minister's advice to the President to ignore these matters and to appoint Mr Simelane without more was unfortunate. The material was relevant. The President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.

[87] And the President decided to heed that advice. The President knew that there had been a commission of enquiry but he accepted the Minister's reasoning that the Commission's findings should be disregarded because the enquiry had not been appointed to investigate Mr Simelane. Though the President said that he accepted the findings of the Commission, this acceptance appears to have been qualified by his reliance on the circumstance that the Commission had not been appointed to investigate Mr Simelane. The President appears to be saying therefore that he accepted the findings of the Commission only to the extent that they related to Mr Pikoli.

[88] The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr Simelane's honesty and conscientiousness. This he should have done despite his knowledge of Mr Simelane as a person. There is no rational relationship between ignoring the findings of the Ginwala Commission without more and the purpose for which the power had been given.

[89] The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside.

[90] This is not to say that Mr Simelane cannot validly be appointed National Director. He may have an explanation and may well be able to persuade the President that he is a fit and proper person and should be appointed.

[91] Given this finding, it is unnecessary for this Court to determine whether Mr Simelane is in fact a fit and proper person to be appointed as the National Director or whether the President had an ulterior purpose in making the appointment. There is no finding in relation to these issues.

Remedy

[92] There is no merit in the contention by the Minister that Mr Simelane should stay in office and the matter should be referred back to the President for reconsideration. Mr Simelane is suspended and an Acting National Director has been appointed. There is accordingly no reason for our decision to have prospective effect alone.

[93] However, in these circumstances, we should make an order that the invalidity of Mr Simelane's appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid.[95]

Costs

[94] There is no reason why costs should not follow the result. The second respondent, the Minister, who opposed confirmation of the Supreme Court of Appeal order, must pay the costs. The Democratic Alliance had four counsel. In my view, the costs of two counsel in this Court are appropriate.[96]

[95] *Order*

The following order is made:

1. The appeal is dismissed.
2. The second respondent must pay the applicant's costs in this Court, including the costs of two counsel.

[95] It is not clear from the papers whether the processes followed were those appropriate to the performance of functions by the President as Head of State or as the head of the national executive. Section 179(1)(a) requires the President to appoint the National Director in his capacity as "head of the national executive". Section 84(2)(e) applies to appointments the President makes, in the words of the section, "other than as head of the national executive". There is a difference between the two provisions. See *Chonco 1* above n 69 at paras 28-40.

[96] No appropriate basis has been advanced not to interfere with the unusual costs order granted by the Supreme Court of Appeal, which included the costs of three counsel.

3. The declaration of invalidity by the Supreme Court of Appeal of the decision of the President of the Republic of South Africa, the First Respondent, taken on 25 November 2009, purportedly in terms of section 179 of the Constitution, read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998, to appoint Mr Menzi Simelane, the Fourth Respondent, as the National Director of Public Prosecutions is confirmed.
4. Decisions taken and acts performed by Mr Menzi Simelane in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.

ZONDO AJ:

[96] Subject to what follows below, I agree with the order and reasoning of the main judgment.

[97] In paragraph 81 of the main judgment it is implied that there was no need for, or, no obligation on, the Public Service Commission (PSC) to afford Mr Simelane an opportunity to be heard either prior to or after it had concluded its investigation into Mr Simelane's conduct and made its recommendation that the Minister for Justice and Constitutional Development (Minister) take disciplinary action against Mr Simelane.

The main judgment makes this point in response to the Minister's view that the PSC should have given Mr Simelane an opportunity to be heard but the PSC refused to do so. The Minister criticised the PSC's failure or refusal to give Mr Simelane an opportunity to be heard as a breach of the *audi alteram partem* rule which is entrenched in our law. He said it violated Mr Simelane's right to be heard. The main judgment implies that this is not so.

[98] I am unable to say that a statutory body such as the PSC[97] is not obliged to give a person whose conduct it is asked to investigate (and in regard to which it must make recommendations) an opportunity to be heard before it can conclude its investigations or, at any rate, before it makes its recommendations to an authority that has to make a decision such as the decision the PSC recommended in this case. Experience shows that, generally speaking, statutory bodies such as the PSC usually give affected persons an opportunity to be heard before they conclude their investigations and make recommendations.[98] The main judgment says that Mr Simelane had already been heard in the enquiry into the conduct of Mr Pikoli under the National Prosecuting Authority Act[99] (Ginwala Inquiry) and he was going to be heard once again in the disciplinary inquiry.

[97] The PSC is established in terms of section 196(1) of the Constitution which provides that "[t]here is a single Public Service Commission for the Republic." In terms of section 196(4)(f) the PSC has the power to, of its own accord or on receipt of a complaint, investigate, evaluate and monitor the public service sector particularly in relation to its personnel. The Public Service Commission Act 46 of 1997 provides further for the powers, functions and operation of the PSC.

[98] For example, commissions of inquiry as contemplated in the Commissions Act 8 of 1947.

[99] 32 of 1998. See section 12(6)(a).

[99] In my view the main judgment fails to appreciate that, if Mr Simelane was entitled to a hearing, the PSC should have heard him not only on whether there were grounds to believe that he had prima facie done wrong but also on what steps, if any, the PSC had to recommend be taken by the Minister. The Ginwala Inquiry had nothing to do with hearing Mr Simelane on what steps, if any, the Minister should take concerning his conduct. Accordingly, it would be incorrect to suggest that the Ginwala Commission provided Mr Simelane with the kind of opportunity to be heard to which the Minister was referring.[100]

[100] The main judgment also says that Mr Simelane was going to be heard once again in the disciplinary enquiry. This was if the PSC's recommendation was accepted and implemented. I also do not think that this answers the criticism of the PSC on the *audi alteram partem* point. The opportunity to be heard that Mr Simelane was going to be afforded in the disciplinary inquiry, if one was established, would have focused on whether or not he was guilty of the allegations of misconduct that would have been brought against him and on what the appropriate sanction would be if he was found guilty. That focus is rather different from the focus of the opportunity to be heard to which he may have been entitled to be given by the PSC. As I have said, the focus of the latter opportunity would in part have been on what steps the PSC should recommend be taken by the Minister against Mr Simelane if, prima facie, there were grounds for some steps to be taken against him.

[100] An example of a case where the opportunity to be heard that was given to workers did not cover the critical issue on which they should have been heard is *Zondi and Others v Administrator, Natal, and Others* 1991 (3) SA 583 (A) at 591D-G.

[101] In the light of the above, although I incline towards the view that a statutory body such as the PSC is required to observe the *audi alteram partem* rule in a case such as this, it is, in my view, not necessary on the facts of this case to express a definitive view. I am prepared to assume, without deciding, in the Minister's favour that the PSC was obliged to have given Mr Simelane an opportunity to be heard. However, when one approaches the matter on this footing, it does not follow that the PSC's failure to give Mr Simelane an opportunity to be heard necessarily has the consequence that the Minister could ignore the PSC's findings and recommendations. Since the authority to initiate a disciplinary process vested in the Minister[101] and Mr Simelane's lawyers had submitted their representations to him, the Minister was obliged to take into account both the PSC's report as well as Mr Simelane's representations and decide whether he should initiate a disciplinary process. It seems that this is what the Minister did but he came to the conclusion that there were no grounds to initiate a disciplinary process. In regard to that conclusion I am in agreement with the finding of the main judgment.

[101] Sections 3(7)(b), 16A(1)(a) and 16B(1)(a), read together with the definitions provided for in section 1 of the Public Service Act, 1994 make it clear that the power to initiate a disciplinary process against the Head of the Department for Justice and Constitutional Development lies with the Minister.

For the Applicant:	Advocate O Rogers SC, Advocate A Katz SC, Advocate D Borgström and Advocate N Mayosi instructed by Minde Shapiro and Smith Inc.
For the Second Respondent:	Advocate M T K Moerane SC, Advocate L Gcabashe and Advocate P Jara (Pupil) instructed by the State Attorney.
For the Fourth Respondent:	Advocate D Unterhalter SC, Advocate G Malindi SC, Advocate I Goodman and Advocate L K Adebola-Ramadi (Pupil) instructed by the State Attorney.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 99/13

In the matter between:

COOL IDEAS 1186 CC Applicant

and

ANNE CHRISTINE HUBBARD First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

Neutral citation: *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 5 February 2014

Decided on: 5 June 2014

Summary: Housing Consumers Protection Measures Act 95 of 1998 – section 10(1) – requires registration of home builder to receive consideration for work done – no infringement of unregistered home builder's rights to property and to access to courts

Application to have arbitration award made an order of court – statutory prohibition precluding court from making arbitral award an order of court – would amount to a court sanctioning an illegality

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. The applications for condonation are granted.

2. The application for leave to appeal is granted.

3. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MAJIEDT AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring):

Introduction

[1] In most instances a home is the most valuable asset in a person's estate. The Legislature sought to protect housing consumers by enacting the Housing Consumers Protection Measures Act[1] (Housing Protection Act). This matter concerns the interpretation of section 10(1)(b) of the Act. Related thereto, it questions whether that provision infringes Cool Ideas' right not to be arbitrarily deprived of property in terms of section 25 of the Constitution and its right to have access to courts in terms of section 34 of the Constitution. I must at the outset record that no relief was sought

[1] 95 of 1998.

either in the courts below or in this Court to have the section struck down as constitutionally invalid.

[2] The applicant, Cool Ideas 1186 CC (Cool Ideas), a duly registered close corporation primarily engaged in property development, seeks leave to appeal against a judgment of the Supreme Court of Appeal. The majority in that Court upheld an appeal against a judgment of the South Gauteng High Court, Johannesburg (High Court) which granted Cool Ideas' application to have an arbitration award in its favour against the first respondent, Ms Anne Christine Hubbard, a home owner, made an order of court in terms of section 31 of the Arbitration Act.[2] The second respondent is the Minister of Justice and Constitutional Development (Minister), cited because the relief sought might implicate the constitutionality of legislation. The Minister took no part in the proceedings in the High Court, the Supreme Court of Appeal or in this Court.

Condonation

[3] Cool Ideas applies for condonation of the late filing of its application for leave to appeal in this Court as well as for the late lodging of its summary of substantial facts. There was opposition only to the first application, but this was abandoned at the hearing.

[2] 42 of 1965.

[4] The explanation proffered for the failure to comply with the time limits is satisfactory and no prejudice has ensued. It is consequently in the interests of justice to grant both applications.

Background

[5] On 13 February 2006 Cool Ideas and Ms Hubbard entered into a building contract. Cool Ideas undertook to construct a residence for Ms Hubbard for consideration of R2 695 600.[3] Cool Ideas enlisted the services of Velvori Construction CC (Velvori) to execute the building project. At the time that it entered into the building contract, Cool Ideas was not registered as a home builder in terms of section 10 of the Housing Protection Act. However, Velvori was duly registered as a home builder with the capacity to undertake the construction of a home. The building project was also enrolled by Velvori as required by section 14[4] of the Housing Protection Act.

[6] The project commenced, payments were made and received and the building works achieved practical completion in October 2008. Ms Hubbard then raised

[3] Cool Ideas subdivided a piece of land to which it had obtained rights and sold a portion of it to Ms Hubbard.

[4] Section 14 reads:

> "(1) A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless—
>
> (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
>
> (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and
>
> (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder."

certain issues regarding the quality of elements of the building works, refused to make the final payment due on the building project and claimed payment of R1 200 000 as the cost of remedial work. Ms Hubbard invoked the arbitration clause contained in the building contract and initiated arbitration proceedings to seek payment for contractual damages from Cool Ideas.

[7] On 12 February 2010 the parties agreed to the appointment of an arbitrator, Mr Charles Cook, an architect, to determine the dispute. Ms Hubbard claimed compensation on the basis of defective workmanship, relocation costs, penalties and certain compliance-type certificates. Cool Ideas counterclaimed for the portion of the contract sum which remained outstanding, namely an amount of approximately R550 000. The arbitration agreement, among other things, recorded that:

> "The arbitration will be held in terms of the Arbitration Act 42 of 1965. The arbitrator's award shall be final and binding. There shall be no appeal against the arbitrator's award".

[8] The arbitration proceedings culminated on 15 April 2010 in an award in favour of Cool Ideas. The relevant part of the award reads that "[Ms Hubbard] is to pay the Respondent [Cool Ideas] the sum of R550 211 inclusive of VAT".[5]

[5] The terms of the order, in relevant part, are:

> "32.2. Interest to be paid by the Claimant on R1 101 333.36 from 7 November 2007 to the date of payment at the rate of 2% greater than the minimum lending rate charged by the Claimant's bank to its client, compounded monthly, the start date being 7 November 2007;
>
> 32.3. Costs are awarded in favour of the Respondent;
>
> . . .

[9] Ms Hubbard failed to satisfy the arbitration award. On 16 November 2010 she wrote to Cool Ideas contending that it was not entitled to claim remuneration under the building contract because it was not registered as a home builder in terms of the Housing Protection Act. She contended that Cool Ideas was not entitled to apply to have the award of the arbitrator made an order of court, since it would receive remuneration in direct conflict with the provisions of the Housing Protection Act.

[10] Cool Ideas was of the view that it was not necessary to register as a home builder in terms of the Housing Protection Act because that Act required both the enrolment of a building project that was subject to its provisions and the registration of a home builder. Cool Ideas contended that, in doing so, it distinguishes between two categories of home builders. The first is where the home builder has the capacity to undertake the physical construction of the home, as did Velvori. The second is where the home builder does not have this capacity and has to appoint a subcontractor. Cool Ideas argued that it falls into this latter category. It also averred that, upon enquiry to the National Home Builders' Registration Council (NHBRC), Cool Ideas was informed that it was not necessary for it to register as a home builder before commencing construction.

32.5. Any amounts due and remaining unpaid by the due date as set out in paragraph 32.2 herein shall accrue interest as for a judgment date at the rate of 15.5% per annum compounded monthly from the date due for payment."

[11] Subsequently, Cool Ideas applied to the High Court to make the arbitral award an order of court in terms of section 31[6] of the Arbitration Act.

High Court

[12] Ms Hubbard opposed the application and averred that, in terms of section 10(1) of the Housing Protection Act, Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person defined as a housing consumer. Section 10(1) reads as follows:

> "No person shall—
>
> (a) carry on the business of a home builder; or
>
> (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,
>
> unless that person is a registered home builder."

[13] Between the delivery of the answering affidavit and the replying affidavit during the High Court proceedings, Cool Ideas applied for and was registered as a home builder in terms of section 10(6)(b)[7] of the Housing Protection Act.

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[6] "Award may be made an order of Court—

> (1) an award may, on application to the court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
>
> (2) the court to which the application is so made, may, before making the award an order of the court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
>
> (3) an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[7] "The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between—

> (a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and
>
> (b) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a)."

[14] During the High Court proceedings, Ms Hubbard submitted that the arbitral award was incapable of enforcement and that it was void from the outset. She made neither a case for a remittal of the dispute to the arbitrator in terms of section 32(2) of the Arbitration Act, nor for setting aside of the arbitrator's decision in terms of section 33. The High Court was of the view that Ms Hubbard raised her defence in a manner which had the effect of an appeal in that the arbitrator erred on a point of law.

[15] Cool Ideas submitted that Ms Hubbard was precluded from raising new issues for the first time. In this regard counsel placed reliance on *York Timbers*[8] and *Lufuno Mphaphuli.*[9] The High Court upheld this submission and stated that, had the issue been raised as an exception at the arbitration stage, Cool Ideas would have been afforded the opportunity to deal with the point and the arbitrator may well have allowed an amendment. The question of non-registration could then have been traversed during the arbitration.

[16] The High Court held that there is no authority for the proposition that section 31(1) of the Arbitration Act confers a discretion on the court to refuse the application if it finds the award to be incorrect.

[8] *South African Forestry Co Ltd v York Timbers Ltd* 2001 (4) SA 884 (T).

[9] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Lufuno Mphaphuli*).

[17] The High Court held further that a significant feature of this case was that by the time Cool Ideas wished to make the arbitral award an order of court, it had registered as a home builder in terms of the Housing Protection Act. In this regard the High Court cited section 14A(1) which is headed "Late enrolment and non-declared late enrolment". It reads:

> "Where a home builder—
>
> (a) in contravention of section 14 submits an application for the enrolment of a home to the Council after construction has started; or
>
> (b) does not declare the fact that construction has commenced at the time of enrolment and the Council becomes aware of that fact,
>
> the Council shall require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC Technical Requirements and shall take prudent measures, contemplated in section 16(1), to manage the risks pertaining to the fund."

[18] The High Court held that the Housing Protection Act envisions a situation where late registration is permissible after the building has commenced and therefore the peremptory provisions of section 10 are to be read with those in section 14A.

[19] The High Court further held that the work was done by Velvori, a registered home builder as required by the Housing Protection Act. To preclude Cool Ideas from its claim at that stage would be giving effect to form over substance. The substance of its claim at that stage was that it was a registered home builder and that at the time it executed the building work it did so in cooperation with the subcontractor, Velvori.

[20] The High Court made the arbitral award an order of court in accordance with section 31 of the Arbitration Act. Ms Hubbard appealed to the Supreme Court of Appeal.

Supreme Court of Appeal

[21] The majority in the Supreme Court of Appeal held that the purpose of section 10 was to protect consumers.[10] It held that section 10(7) required that both Cool Ideas and the subcontractor had to be registered as home builders in terms of the Housing Protection Act. That section reads as follows:

> "A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a)".

[22] While section 10 did not nullify the contract between Ms Hubbard and Cool Ideas, it nevertheless disentitled unregistered home builders from receiving consideration. Importantly, section 21[11] creates an offence for non-compliance with section 10(1) and (2) of the Housing Protection Act. Enforcing the arbitral award, in

[10] *Hubbard v Cool Ideas 1186 CC* [2013] ZASCA 71; 2013 (5) SA 112 (SCA) (Supreme Court of Appeal judgment).

[11] Section 21 reads:

> "(1) Any person who—
>
> (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
>
> (b) contravenes a provision of section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or 19(5),
>
> and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge.
>
> (2) Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act."

the majority's view, would be to give effect to an unlawful situation and provide legal sanction to the mischief the Housing Protection Act seeks to prevent. The majority rejected the High Court's finding that the Housing Protection Act envisioned a situation where late registration is permissible after the building has commenced in terms of section 14A. In respect of the arbitration award, the majority rejected the proposition on behalf of Cool Ideas that due deference should be shown to arbitration awards by our courts. In doing so, the majority emphasised that it was not seized with the question whether an arbitration award should be set aside, but rather with the enquiry whether it is legally tenable to make an arbitration award an order of court where to do so would amount to sanctioning the breach of a clear statutory prohibition. The appeal was upheld with costs. Willis JA, dissenting, took the contrary view that a refusal to make the arbitral award an order of court would lead to an unjust result.

Issues for determination

[23] The issues for determination in this Court are:

(a) the interpretation of section 10(1)(b) of the Housing Protection Act;

(b) whether Cool Ideas has been arbitrarily deprived of its property;

(c) whether the building contract remains valid;

(d) whether equity considerations are applicable; and

(e) whether a refusal to make the arbitral award an order of court constitutes a denial of the right of access to courts.

In this Court

Jurisdiction and leave to appeal

[24] Cool Ideas predicated its application initially on this Court's jurisdiction as it existed prior to the Constitution Seventeenth Amendment Act[12] (Amendment Act), which commenced on 23 August 2013. Later it changed tack and amended its notice of motion to seek a determination of a non-constitutional issue in terms of the extended general jurisdiction brought about by section 167(3)(b)(ii)[13] of the Amendment Act. The primary issue for determination is the correct interpretation of section 10(1)(b) of the Housing Protection Act. However, two constitutional issues were raised in the original application to deal with this issue, namely: (a) that section 10(1)(b) of the Housing Protection Act amounts to an arbitrary deprivation of property as envisaged in section 25(1) of the Constitution;[14] and (b) that the Supreme Court of Appeal's refusal to make the arbitration award an order of court infringed Cool Ideas' right of access to courts in terms of section 34 of the Constitution.[15]

[25] Apart from the fact that the original application for leave to appeal had been filed in this Court on 30 July 2013, almost one month prior to the commencement of

[12] 72 of 2012.

[13] Section 167(3)(b)(ii) in its amended form now reads as follows:

> "The Constitutional Court . . . may decide . . . any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court".

[14] Section 25(1) read as follows:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[15] Section 34 reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."

the amended section 167(3)(b)(ii), there is no need for this Court to exercise its extended general jurisdiction (assuming it could do so), since constitutional issues plainly arise here. It is therefore not necessary to decide whether this Court has extended jurisdiction in terms of the amended section.[16]

[26] It is furthermore in the interests of justice to decide these constitutional issues, since they arise as a consequence of the Supreme Court of Appeal's majority judgment. This matter requires us to interpret section 10(1)(b) of the Housing Protection Act and to subject it to scrutiny through the lens of the rights contained in sections 25(1) and 34 of the Constitution. These issues were not directly raised in the Supreme Court of Appeal. There are reasonable prospects of success and leave to appeal should consequently be granted.

The merits

[27] The interpretation of section 10(1)(b) of the Housing Protection Act requires a careful consideration of the scheme of the Act and its objects measured against the rights embodied in sections 25 and 34 of the Constitution. The nub of the dispute concerns the question whether section 10(1)(b) should be interpreted, as Cool Ideas contends, to mean that an unregistered home builder can receive payment for work done as long as registration has been effected by the time that payment is sought. Put differently, Cool Ideas contends that registration is not a prerequisite for a home

[16] *Ferris and Another v Firstrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at para 8.

builder to commence (and complete) construction, as long as registration has been effected by the time the home builder seeks payment.

Proper meaning of section 10(1)(b) of the Housing Protection Act[17]

[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.[18] There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;[19]

(b) the relevant statutory provision must be properly contextualised;[20] and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).[21]

I turn to an analysis of the legislative scheme of the Housing Protection Act, against the backdrop of these principles.

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[17] The provisions of section 10(1) are set out in [12] above.

[18] See *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 37; *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (*S v Zuma*) at paras 13-4; and *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543.

[19] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC) at paras 84-6 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 5.

[20] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39; and *Bhana v Dőnges NO and Another* 1950 (4) SA 653 (A) at 664E-H.

[21] *Garvas* above n 18 at para 37.

The scheme of the statute

[29] The purpose of the Housing Protection Act is to protect housing consumers. This appears from the name and preamble of the statute.[22] Unsurprisingly, this aspect was not in issue before us. The entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded. The statute is not capable of being construed as permitting after-the-fact registration of a home builder when construction has already commenced (or may even have been completed) when it seeks payment from the housing consumer. It is necessary to discuss in some detail the various provisions of the Housing Protection Act which support this conclusion.

[30] Section 3 sets out the objects of the NHBRC. The ultimate objective is the regulation of the building industry[23] through, amongst other things, the protection of the housing consumer and maintaining minimum standards for home builders. The protection is optimally achieved in requiring the registration of home builders upfront and not during the course of or at the end of construction. The impugned provision must therefore be interpreted thus. To hold otherwise would be to defeat the primary objective of the statute. The contrary argument would in effect leave a housing consumer who is faced with defective workmanship on his or her house unprotected in

[22] The preamble to the Housing Protection Act states:

> "To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters connected therewith."

[23] Section 3(b).

respect of a civil remedy in terms of the Housing Protection Act until such time as the home builder registers with a view to recovering payment for its services rendered, should such a home builder ever choose to do so.

[31] Section 5 sets out the wide-ranging powers of the NHBRC. Section 13 contains important safeguards in favour of the housing consumer. Unless there has been compliance with certain provisions,[24] a home builder is prohibited from demanding or receiving from a housing consumer a deposit for the construction of a home.[25] I deal with these sections in more detail below.

[32] Chapter V deals with legal enforcement and, in a similar vein, affords housing consumers extensive protection through the imposition of the requirement on home builders to register with the NHBRC. Lastly, section 21 creates statutory offences for contravention of section 10(1) and (2). It provides for sentences of a fine not exceeding R25 000 or imprisonment for a period not exceeding one year, on each charge.

[33] These provisions lead one to the ineluctable conclusion that the statute envisions registration of a home builder before construction commences. Moreover, the relevant section itself says so in plain language.[26] These prohibitions are stark and

[24] Section 13(1) and (2).

[25] Section 13(7)(a).

[26] See above [12].

explicit. Equally clear is the purpose of these provisions (as is the case with the statute as a whole), namely to protect housing consumers.

[34] The possibility of belated registration, advanced by Cool Ideas, would be inimical to the clear objective of the legislation. It would also violate the clear language and meaning of section 10(1)(b). Much emphasis was laid on behalf of Cool Ideas on the use of the word "receive" in section 10(1)(b) in support of this converse proposition. That emphasis is misplaced. Section 10(1)(a) and (b) and 10(2) must be read together and, as stated, contextually and purposively with regard to the statute as a whole. This section requires the registration of persons or entities that carry on the business of a home builder, and those that have entered into an agreement with a housing consumer in respect of the sale or construction of a house. In this instance, it is not permissible to extract one word from the section and then to rely upon it as support for the interpretation which Cool Ideas contends for in circumstances where it plainly controverts not only the plain, unambiguous text of section 10(1) and (2), but also the clear purpose of that section and of the statute as a whole.

[35] The further submission that Cool Ideas' non-registration was in any event cured by the fact that Velvori – which did the actual construction work – had been duly registered as a home builder, is devoid of merit. This is so given the plain and unequivocal requirement in section 10(7).[27]

[27] See above [21].

[36] It is of some significance that while, as the majority in the Supreme Court of Appeal correctly observed, section 14A allows for the late enrolment of a home after construction has commenced, there is no corresponding relaxation of the registration requirement to be found in section 10(1)(b). This too evinces a clear intention by the Legislature that registration should occur prior to and not during or at the end of construction.

[37] Accordingly, the interpretation given by the Supreme Court of Appeal to section 10(1)(b) of the Housing Protection Act, namely that registration is a prerequisite for building works to be undertaken by a home builder, must be upheld. Failure to register would result in the home builder being ineligible to seek consideration for work done in terms of a building agreement. It is convenient to discuss whether this interpretation amounts to an arbitrary deprivation of Cool Ideas' property. I think not.

Arbitrary deprivation of property

[38] The starting point of this enquiry must be whether there has been a deprivation of Cool Ideas' property.[28] It is common cause that there has been deprivation – Cool Ideas would not be able to enforce a claim based on unjustified enrichment, for the reasons mentioned below.[29] The outstanding balance of R550 000 would thus remain unpaid. This Court held in *Opperman* that the right to restitution of money

[28] See above n 14.

[29] Joubert et al (eds) *LAWSA* (reissue) vol 9 at para 209(d) and the cases cited there.

paid based on unjustified enrichment constitutes property for purposes of section 25(1) of the Constitution.[30]

[39] The next question is whether the deprivation of Cool Ideas' right to sue on unjustified enrichment is arbitrary. The answer to this question is inextricably linked to the discussion of the purpose of the Housing Protection Act, the legislative scheme as a whole and the interpretation of section 10(1)(b), set out above.

[40] In *FNB v CSARS*,[31] this Court set out the test for arbitrariness. It held that there will be an arbitrary deprivation of property if the law referred to in section 25(1) lacks adequate reason for the deprivation in question or is procedurally unfair.[32] Ackermann J then laid down guidelines for determining the requirement of sufficient reason for the deprivation.[33] In essence they entail an analysis of the means employed and the ends sought to be achieved as well as a consideration of the nature of the property and the extent of the deprivation.

[41] This approach was referred to with approval in *Opperman*.[34] As was the case in *Opperman*, the deprivation in this matter is not merely partial in nature. It deprives the unregistered home builder, Cool Ideas, of its right to payment and there must

[30] *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 63.

[31] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB v CSARS*).

[32] Id at para 100.

[33] Id.

[34] *Opperman* above n 30 at paras 68-72.

consequently be compelling reasons for it. Proportionality between the means and the end would therefore have to feature prominently in this enquiry.[35] But, unlike *Opperman*'s factual matrix and ultimate findings, here the means justify the end, that is, there is a rational connection between the depriving statutory provision and its purpose. The purpose of the legislation has been set out above and is not in issue.

[42] There can be no doubt that the protection of housing consumers is a necessary and legitimate legislative objective. The means of protection is through the establishment of a fund to compensate housing consumers for defective work by home builders. Registration is a prerequisite for the construction of a home. Registration, quite apart from its protection objective, is also aimed at bringing home builders into the statutory fold of the NHBRC with all its wide-ranging powers and, secondly, to contribute towards the funding of the NHBRC through registration fees.

[43] The crisp issue is whether the penalisation for failure to register, namely the deprivation of consideration for services rendered by the home builder, is proportionate to the purpose of protecting housing consumers, that is, do the means of deprivation justify the ends of protection? I think they do. The purpose for deprivation is compelling. Moreover, it is a simple process of registration which is required. There is nothing overly complicated or onerous. The important consequences brought about by registration have been dealt with above. It is not necessary to regurgitate them. It would suffice to reiterate their importance by

[35] See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) at para 49.

demonstrating the invidious position a housing consumer who has unwittingly contracted with an unregistered home builder would find herself in. There would be no safeguards under section 13, which places certain important obligations on the home builder and which also provides evidentiary aid to the housing consumer by way of the deeming provisions in section 13(2)(a). Most importantly, the housing consumer would have no recourse to the NHBRC Fund and no claim for restitution against the unregistered home builder. The deprivation effected by section 10(1)(b) is aimed at a limited target, namely those home builders who fail to register.

[44] I am satisfied that section 10(1)(b) is aimed at achieving a legitimate and important statutory purpose and that there is a rational, proportional connection between the statutory prohibition and its purpose. There is accordingly no arbitrariness in the deprivation and thus no violation of section 25 of the Constitution. I turn next to a discussion of whether the underlying building contract remains valid.

The continued validity of the building contract

[45] By invoking the arbitration clause in terms of the building contract, the parties entered into a separate arbitration agreement on 3 April 2009[36] (it will be recalled that the building contract had been concluded on 13 February 2006). This fell outside of the ambit of the building contract. My Colleague Jafta J does not draw this distinction. The arbitrator derives his powers not from the building contract (as Jafta J

[36] Clause 14.1 of the building contract reads:

> "Any dispute arising between the parties out of and during the currency of the contract or upon termination thereof may be referred to arbitration."

appears to suggest), but from the arbitration agreement. The arbitrator himself acknowledged this fact.[37] It is noteworthy that at the time of the commencement of the arbitration agreement on 12 February 2010, Cool Ideas was still not registered as a home builder for the purposes of section 10 of the Housing Protection Act.[38]

[46] Although I find below that the building contract remained valid, a distinction needs to be drawn between the building contract and the arbitration agreement.[39] It is the contents of the arbitration agreement that are before this Court. The arbitration agreement required the arbitrator to arbitrate on alleged defective work by Cool Ideas which occurred whilst Cool Ideas was engaged in the construction of a home for Ms Hubbard. Both the arbitration agreement and the building contract are subject to the legislative framework of the Housing Protection Act.

[47] The Supreme Court of Appeal correctly found that the underlying building contract remains valid, notwithstanding its finding that Cool Ideas was not entitled to payment due to its failure to register as required by section 10(1)(b). It reasoned, correctly so, that the prohibitions in section 10(1) and (2) are not directed at the

[37] As appears from paragraph 4 of the arbitral award which reads:

> "The terms and conditions of my appointment as Arbitrator were set down in a document headed Arbitration Agreement dated 3rd April 2009 reference CDC/va/1459 (the Arbitration Agreement) and ultimately agreed to and signed by the parties".

[38] Cool Ideas only registered as a home builder in terms of the Housing Protection Act after it applied to the High Court to have the arbitral award confirmed as an order of court.

[39] See in this regard *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and Others* [1993] 3 ALL E.R. 897 where the Court, in upholding an appeal in which it determined whether an arbitration clause is a separate and autonomous contract, held that, "as a matter of practice, the principle [of severability of an arbitration clause from the principle agreement which contains it] has been sustained by the terms and implications of arbitration conventions and rules". (Parenthesis in original.) See also *David Taylor & Son v Barnett Trading Co* [1953] 1 ALL E.R. 843.

validity of construction contracts, but at the unregistered home builder who is barred from receiving any consideration for work done absent any prior registration as a home builder. There is nothing in the legislative scheme which suggests that the building contract is invalidated by these statutory prohibitions.

[48] I have already set out the main provisions of the Housing Protection Act. The legislative scheme rests upon a written building contract between a registered home builder and a housing consumer.[40] Section 13(1) places a statutory obligation upon the home builder to ensure that a written agreement is concluded and that the formalities in that regard are met.[41] Section 13(2)(a) lends further assistance to the housing consumer as against the home builder by importing deeming provisions into the written agreement against the latter, enforceable in a court.[42] And, of some

[40] See above [29].

[41] "A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder—

(a) shall be in writing and signed by the parties;

(b) shall set out all material terms, including the financial obligations of the housing consumer; and

(c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body."

[42] "The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court that—

(a) the home, depending on whether it has been constructed or is to be constructed—

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with—

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1)".

significance is the fact that these provisions in section 13 may not be waived.[43] It is difficult to conceive how, given this importance of the written building contract in the legislative scheme, the entire agreement must be invalidated by the conclusion that an unregistered home builder is not entitled to seek payment for work done in terms of section 10(1)(b). It would be tantamount to a futile exercise if the Legislature were to enact a statutory prohibition against the remuneration of an unregistered home builder when the entire legislative scheme renders the building contract between the housing consumer and the home builder void from the outset. For this reason I find myself in respectful disagreement with Jafta J where he states that there is "nothing in the text of section 10(1), or other sections of the Act, which indicates that the underlying contract should remain unaffected."[44] It is inconceivable that the Legislature would specifically enact a provision such as section 13 to protect consumers but then render their contract invalid – a provision which stipulates various protective measures for the benefit of housing consumers. These include enforceable warranties by way of the deeming provision in section 13(2). These may not be waived. The Legislature is not likely to have provided for their inclusion in a building contract if the very same enactment renders the building contract invalid.

[49] The Housing Protection Act is, for good reasons, nuanced in its purpose and scheme. The underlying building contract must remain extant in order to render protection to the housing consumer in respect of what has already been erected and to

[43] Section 13(6) reads:

> "Any provision in an agreement contemplated in subsection (1) that excludes or waives any provision of this section shall be null and void."

[44] See [96] of the judgment of Jafta J.

the home builder for what has already been received. The parties are therefore entitled to retain what has been done or given, as the case may be. No restitution is legally tenable in these circumstances, as would have been the case with an invalid agreement. Thus, Cool Ideas would not be entitled to file suit against Ms Hubbard for unjustified enrichment, since the material element of performance without legal basis (*sine causa*) is lacking – the building agreement remains a valid *causa*.

[50] It is of considerable importance to note that both parties approached the matter in this Court and in the courts below on the basis that the underlying building contract remained valid. The statements[45] by Jafta J that Ms Hubbard had challenged the arbitral award on the basis that it is invalid because the building contract itself is invalid are, with respect, not borne out by the extract quoted by Jafta J in his judgment,[46] or by any other part of the record. On the contrary, in response to the averment by Cool Ideas in its founding affidavit in this Court that the Supreme Court of Appeal correctly found that the building contract remains valid, Ms Hubbard stated as follows in her opposing affidavit:

> "I do not dispute that the failure on the part of Cool Ideas to have registered as a home builder in terms of the Housing [Protection] Act did not in itself render our building agreement void."

Counsel for both parties argued the matter before us on this basis, and correctly so.

[45] See [73] of the judgment of Jafta J.

[46] At [72].

[51] In summary: the underlying building contract remains valid and extant. This is so even though Cool Ideas is in law precluded from seeking consideration for the work done, due to its failure to register as a home builder prior to the commencement of the building works.

Equity considerations

[52] Cool Ideas contended that it would be inequitable for Ms Hubbard to be absolved from complying with the arbitrator's award and from paying the outstanding approximately R550 000 due to Cool Ideas. I am of the view that equity considerations do not apply. But even if they do, as my Colleague Froneman J suggests, the law cannot countenance a situation where, on a case by case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality. The following dictum by Kentridge AJ in *S v Zuma* is apposite:

> "[I]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[47]

It is for this reason that I am in respectful disagreement with Froneman J in his interpretation of section 10(1)(b) and the reasoning behind it. The plain import of section 10(1)(b) is that regardless of how much work has been done by the unregistered home builder, no consideration is payable by the housing consumer.

[47] *S v Zuma* above n 18 at para 18.

Does the refusal to make the arbitral award an order of court infringe Cool Ideas' right of access to courts?

[53] The majority in the Supreme Court of Appeal refused to make the arbitral award an order of court on the basis that to do so would amount to sanctioning an illegality and would subvert the legitimate purpose of the section by lending the court's imprimatur to the very mischief which the statute seeks to prevent. Our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect.[48] Making the arbitral award an order of court would undoubtedly amount to the court sanctioning the illegality which section 10(1)(b) imposes.

[54] Moreover, section 21 of the Housing Protection Act provides that non-compliance with the particular section constitutes a criminal offence. It is imperative to take cognisance of the fact that we are not concerned here with the setting aside of the arbitrator's award on one of the three grounds listed in section 33 of the Arbitration Act, namely: misconduct by the arbitrator, gross irregularity in the proceedings, or where an arbitral award has been improperly obtained. Nor are we concerned with a remittal to the arbitrator in terms of section 32. This matter concerns the provisions of section 31 of the Arbitration Act in terms whereof an arbitral award may be made an order of court.[49]

[48] *Schierhout v Minister of Justice* 1926 AD 99 at 109. See also *Hoisain v Town Clerk, Wynberg* 1916 AD 236.

[49] See above n 6.

[55] What we are seized with here is therefore not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a plain statutory prohibition. What is more, as stated at the outset, there is no challenge to the section's constitutional validity. It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law. To do so would amount to undermining the purpose of the legislation.

[56] That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to "be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."[50] Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute.

[57] So it will often be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. But it will not always be so. The

[50] *Lufuno Mphaphuli* above n 9 at para 235.

force of the prohibition must be weighed against the important goals of private arbitration that this Court has recognised.[51]

[58] Against this backdrop I turn to consider whether this particular arbitral award is contrary to public policy. In my view it is. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution[52] and, as stated, to make the arbitral award an order of court in the present instance would undermine that very principle. Cool Ideas has placed extensive reliance on *Lufuno Mphaphuli*[53] and the principle of party autonomy in voluntary arbitrations.[54] While these are important considerations, I fail to see how they assist Cool Ideas here. Generally speaking, party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award would constitute a criminal offence, as is the case here. I turn next to a brief discussion of *Lufuno Mphaphuli* to demonstrate why – although its reasoning is not irrelevant here – it is distinguishable from the present case.

[59] *Lufuno Mphaphuli* concerned a private arbitration between Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), an electrical infrastructure contractor company, and Bopanang Construction CC (Bopanang), a close corporation engaged in similar business. Differences arose between the parties in respect of performance in terms of

[51] Id at para 236.

[52] Sections 1(c) and 165(2).

[53] Above n 9.

[54] Reference was made in this regard to Christie "Arbitration: Party Autonomy or Curial Intervention: The Historical Background" 1994 *SALJ* 143.

a written agreement in terms whereof Mphaphuli had engaged the services of Bopanang as a subcontractor to undertake certain work on its behalf for Eskom in rural Limpopo. The dispute was referred to arbitration before Mr Andrews, the respondent, a quantity surveyor and project manager. The arbitrator found for Bopanang, who sought to have the award made an order of court in terms of section 31(1) of the Arbitration Act. Mphaphuli opposed this application and launched a separate application in terms of section 32(2) of the Arbitration Act for the review and setting aside of the award and for remittal to the arbitrator. Bopanang succeeded in the High Court, but Mphaphuli did not; its applications for condonation failing for, inter alia, lack of merits in the main action. Mphaphuli met with the same fate in the Supreme Court of Appeal. In this Court the central issues were the interaction between the section 34 right of access to courts and private arbitrations as well as the question whether, and to what extent, parties who enter into an arbitration agreement are to be taken to have waived their constitutional right to a fair and impartial hearing and, lastly, the role of courts in confirming or setting aside arbitration awards. The statements in *Lufuno Mphaphuli* must be seen in their proper perspective. This is so because *Lufuno Mphaphuli* concerned the setting aside of an arbitration award in terms of section 33(2) of the Arbitration Act. As the majority in the Supreme Court of Appeal correctly held, it is important to remind oneself that this is not the case before us. We are concerned with whether making an arbitration award an order of court is permissible in circumstances where to do so would be to sanction a clear statutory prohibition. Some of the same considerations apply in this context. A court's refusal to enforce an arbitration award will also erode, to some extent, the

utility of the arbitration process. But where a court is called upon actively to facilitate an illegality there is a need for greater caution.

[60] The refusal to make the arbitral award an order of court for the strongly persuasive reasons advanced by the majority in the Supreme Court of Appeal is required by public policy in this case. The court would otherwise be contravening a clear statutory criminal prohibition enacted for a particularly laudable and important purpose: the protection of housing consumers.

[61] At common law an arbitral award should not be executed if the particular matter is repugnant to arbitration.[55] Furthermore, Cool Ideas sought to draw an analogy with the Recognition and Enforcement of Foreign Arbitral Awards Act[56] and the UNCITRAL Model Law on International Commercial Arbitration.[57] But, to the extent that those instruments have any applicability here, they tell against Cool Ideas. Both empower a court to refuse to enforce an arbitral award if to do so "would be contrary to public policy" in South Africa. For the reasons I have given, enforcing this arbitral award in violation of a statutory prohibition backed by a criminal sanction would be contrary to public policy. This is also the approach adopted by academic

[55] Voet 4.8.24.

[56] 40 of 1977. Section 4(1)(a)(ii) reads:

> "A court may refuse to grant an application for an order of court in terms of section 3 if the court finds that . . . enforcement of the award concerned would be contrary to public policy in the Republic".

[57] 1985. Article 36(1)(b)(ii) provides:

> "Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that . . . the recognition or enforcement of the award would be contrary to the public policy of this State."

writers. Thus, for instance, Butler and Finsen argue that if an arbitral award is "illegal or contrary to public policy" a court may not enforce it.[58]

[62] In the premises, Cool Ideas' reliance on the infringement of its section-34 right is misconceived. Its access to courts was not denied by the Supreme Court of Appeal majority but, in truth and in fact, the principle of legality, so fundamental to our constitutional project, was correctly upheld. Cool Ideas has been afforded a full and proper opportunity to have all the issues ventilated in the High Court and in the Supreme Court of Appeal. The section-34 challenge must consequently fail.

Costs

[63] In this instance I see no reason to deviate from the standard rule that costs should follow the result. Accordingly, Ms Hubbard is entitled to the costs of this application, including the costs consequent upon the employment of two counsel.

Order

[64] The following order is made:

1. The applications for condonation are granted.
2. The application for leave to appeal is granted.
3. The appeal is dismissed with costs, including the costs of two counsel.

[58] Butler and Finsen *Arbitration in South Africa: Law and Practice* (Juta & Co Ltd, Cape Town 1993) at 263.

JAFTA J (Zondo J concurring):

[65] I have read the judgment of my Colleague Majiedt AJ (main judgment). While I agree with the order proposed and some of the reasons underpinning it, I am unable to agree with some of the findings made. I do not agree that on 3 April 2009, Cool Ideas and Ms Hubbard concluded a separate arbitration agreement.

[66] I also disagree with the finding that the contract between the parties remains valid. In my view, properly construed, the prohibitions in section 10(1)(a) and (b) read with section 21(1)(b), nullify the contract even though no specific reference is made to it in those provisions. Flowing from this finding, my approach to the matter differs from the main judgment.

Background

[67] The primary question is whether the arbitration award should have been made an order of court for purposes of enforcement. The award arose from a building contract concluded by the parties in February 2006. In terms of that contract, Cool Ideas undertook to build a residential house for Ms Hubbard, who undertook to pay R2 695 600 for the construction. Furthermore, the parties agreed that any dispute arising from the contract would be submitted to arbitration. Clause 14 of the contract provided:

"Arbitration

14.1 Any dispute arising between the parties out of and during the currency of the contract or upon termination thereof may be referred to arbitration.

14.2 The arbitrator shall be appointed at the request of either party by the president for the time being of the Master Builders Association having jurisdiction in the area or by the president of the Building Industries Federation (SA), whose decision will be final and binding on both parties".

[68] Cool Ideas did not carry out the construction itself, but subcontracted Velvori Construction CC to build the house. At the relevant time, Velvori Construction was registered in terms of the Housing Protection Act but Cool Ideas was not.

[69] As is usual in contracts of this kind, disputes arose that led to claims being made by each party against the other. Ms Hubbard claimed the sum of R1 231 300.50 which she said was the cost of remedial work as she complained that there were defects in the building. Cool Ideas counterclaimed the balance of the contract price which was in the amount of R550 211, plus VAT and interest at an agreed rate.

[70] Mr Charles Cook, an architect and valuer, was appointed as the arbitrator. The disputes were submitted to the arbitrator for determination. In October 2010, the arbitrator issued an award in favour of Cool Ideas. In terms of the award, Ms Hubbard was ordered to pay the amount claimed by Cool Ideas. She was also directed to pay the costs occasioned by the arbitration.

[71] But Ms Hubbard failed to pay. In order to enforce the award, Cool Ideas approached the High Court requesting that the award be made an order of court.[59] In opposing the application, Ms Hubbard contended that enforcing the award would effectively be enforcing a criminal act because, when she and Cool Ideas concluded the building contract, Cool Ideas was prohibited from carrying on the business of a home builder or receiving any consideration in terms of an agreement with a housing consumer like her.

[72] Ms Hubbard's defence was pleaded in these terms:

> "[I]t was discovered . . . that [Cool Ideas], whom I contracted to construct my home, was not registered as a home builder in terms of the [Housing Protection Act].
>
> *The effect of the above*, so I am advised, *is that [Cool Ideas] is not entitled to carry on the business of a home builder, or to receive any consideration in terms of any agreement with a person, defined as a housing consumer* in terms of the [Housing Protection Act], in respect of the sale or construction of a home.
>
> . . .
>
> The result of the above is, so I am advised, that [Cool Ideas] was not entitled to claim any payment from me, let alone an amount totalling R1 228 522.09 (one million two hundred and twenty eight thousand five hundred and twenty two rand and nine cents) which consists of an amount of R1 064 746 (one million and sixty four thousand seven hundred and forty six rand) for 'work done' and the remainder consisting of interest charged upon such an amount.
>
> . . .
>
> I confirm, as I have alluded to hereinbefore, that the award of the arbitrator effectively seeks to order the performance of a prohibited or criminal act, in that it purports to order me to make payment to an entity who carries on the business of a home builder, as defined in the [Housing Protection Act], in relation to an agreement in respect of the construction/sale of a home, while such an entity is not registered in

[59] This application was instituted in terms of section 31 of the Arbitration Act.

> terms of the [Housing Protection Act] as required by such an Act." (Emphasis added.)

[73] It is apparent from Ms Hubbard's plea that she challenged the validity of the award on the basis that the building contract she had entered into with Cool Ideas was, itself, invalid because Cool Ideas carried on the business of a home builder and demanded to be paid consideration under the contract whilst it was not registered in terms of the Housing Protection Act. Thus the building contract was impugned on the ground that two prohibitions in section 10(1) of the Housing Protection Act were violated.

[74] The High Court rejected the defence raised by Ms Hubbard and made the arbitration award an order of court. However, the Supreme Court of Appeal overturned the High Court's order and replaced it with an order dismissing the application with costs.

Order of court

[75] As mentioned, the main issue here is whether the arbitration award should be made an order of court. Making it an order of court is a prelude to enforcing it in the manner that a judgment of a civil court is enforced. Section 31 of the Arbitration Act regulates the process of making an arbitration award an order of court. It provides:

> "(1) An award may, on application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[76] But converting an award into a court order does not follow as a matter of course. A court is entitled to refuse to make an award an order of court if the award is defective. Section 33 of the Arbitration Act sets out the defects which would justify the refusal. Section 33(1) provides:

"Where—

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[77] It is apparent from section 33(1) that an award which has been improperly obtained cannot be made an order of court. Impropriety may arise from a number of circumstances, including illegality. If an award is tainted by illegality, it may not be made an order of court and may not be enforced in our courts. It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act. An act that has been performed in violation of a statutory prohibition may, generally, have no legal consequences. In *Schierhout*, Innes CJ observed:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."[60]

[78] Here, Ms Hubbard resisted the request to make the award an order of court on the basis that it was tainted by illegality. She contended that the building contract, in terms of which the arbitrator was appointed and the arbitration process was undertaken, was itself void because, at the time of its conclusion, Cool Ideas was not registered. It is common cause that Cool Ideas was not registered at the time that the building contract was concluded.

[79] In her plea, Ms Hubbard submitted that two prohibitions in section 10(1) of the Housing Protection Act were breached when the building contract was concluded. The first prohibition is to the effect that no person shall carry on the business of a home builder. The second is to the effect that no person shall receive consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home.

Issues

[80] Owing to the defence advanced by Ms Hubbard, the following issues arise:

(a) whether in concluding the building agreement with her, Cool Ideas violated section 10(1) of the Housing Protection Act;

(b) if so, whether the breach nullified the agreement;

[60] *Schierhout* above n 48 at 109.

(c) if the contract remained valid, whether, despite the breach, Cool Ideas was entitled to payment for the work done on Ms Hubbard's house; and

(d) if it was entitled to payment, whether the arbitration award ought to be made an order of court.

Illegality

[81] The illegality which is the bedrock of Ms Hubbard's defence depends mainly on the interpretation of section 10(1) of the Housing Protection Act. I agree with the main judgment that the purpose of the Housing Protection Act, including section 10, is to protect housing consumers like Ms Hubbard. It achieves this purpose through a scheme that requires every home builder, such as Cool Ideas, to be registered in terms of the Act before it can carry on the business of a home builder. In addition, prior registration is necessary for a home builder before receipt of any consideration in terms of a building contract. And a home builder who subcontracts another home builder to carry out the construction of a home must be registered before the subcontract is concluded.[61]

[61] Section 10 of the Housing Protection Act, in relevant part, provides:

> "(6) The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between—
>
> (a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and
>
> (b) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a).
>
> (7) A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a)."

[82] Section 10(1) provides:

> "No person shall—
>
> (a) carry on the business of a home builder; or
>
> (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,
>
> unless that person is a registered home builder."

[83] A careful reading of the subsection reveals that it stipulates two prohibitions. First, it forbids any person from carrying on the business of a home builder unless that person is a registered home builder. The use of the word "unless" in the context of the section makes plain that registration as a home builder must precede carrying on the business and receipt of consideration. The phrase "carry on the business of a home builder" requires a little more elaboration. It is not in dispute that Cool Ideas is a home builder envisaged in the Housing Protection Act. Nor can it be gainsaid that Ms Hubbard is a housing consumer in terms of the same Act.

[84] The Housing Protection Act defines "business of a home builder" as—

(a) constructing or undertaking to construct a home or causing a home to be constructed for any person;

(b) constructing a home for the purposes of sale, leasing, renting out or otherwise disposing of such home;

(c) selling or otherwise disposing of a home contemplated in paragraph (a) or (b) as a principal; or

(d) conducting any other activity that may be prescribed by the Minister for the purposes of this definition.[62]

[85] It is clear from this wide definition that, when Cool Ideas entered into a building contract and undertook to construct a house for Ms Hubbard, Cool Ideas carried on the business of a home builder. Even when it later subcontracted Velvori Construction to build the home, Cool Ideas was still carrying on the business of a home builder.

[86] The facts of the case also show that Cool Ideas received payment for the construction of Ms Hubbard's house and what it claimed at the arbitration was the balance of the contract price. At the time Cool Ideas received part of the payment, it was not registered. It was registered after the arbitration award was issued.

[87] Therefore, both prohibitions on which Ms Hubbard relied for her defence were violated. The first violation occurred when the building contract was concluded. The second violation of the first prohibition happened at the time when Cool Ideas subcontracted Velvori Construction. The infringement of the second prohibition arose when Cool Ideas received payment for work done on Ms Hubbard's home. However, in respect of the balance that is the subject matter of the arbitration award, receipt of the money has not occurred and Cool Ideas has now been registered.

[62] Section 1(i) of the Housing Protection Act.

[88] In terms of section 21 of the Housing Protection Act, these breaches constitute criminal offences.[63] Each contravention carries a penalty of a fine not exceeding R25 000 or imprisonment for a period not more than one year.

[89] The answer to the question whether the arbitration award should be made an order of court depends on whether, despite non-compliance with section 10(1), Cool Ideas should derive benefit from the building contract. This in turn requires us to examine the effect of acting contrary to the prohibitions in section 10(1) when the contract was concluded. Put differently, whether the validity of the contract was not affected by the non-compliance.

Validity of the building contract

[90] The general principle of our law is that an act performed contrary to a statutory prohibition is invalid and has no legal effect. In explaining the principle in *Schierhout,* Innes CJ said:

> "[W]hat is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act."[64]

[63] Section 21(1) provides:

> "Any person who—
>
> (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
>
> (b) contravenes section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or (2) or 19(5),
>
> and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge."

[64] *Schierhout* above n 48 at 109.

[91] However, the question whether non-compliance with a statutory prohibition would nullify an act is determined with reference to the language of the statute concerned.[65] But it is important to note that where a statutory provision under consideration amounts to a prohibition such as the ones contained in section 10(1) of the Housing Protection Act, an act performed contrary to it would be invalid, unless it is clear from the statute that, in the light of its scope and object, invalidity was not intended. In other words, it is the prohibition which "operates to nullify the act" performed contrary to it.

[92] In *Lupacchini*,[66] the Supreme Court of Appeal rejected a view of academic writers to the effect that a trustee who is still to receive authorisation from the Master has capacity to sue or to be sued on behalf of the trust, despite the provision that such trustee "shall act in that capacity only if authorised thereto in writing by the Master." The Supreme Court of Appeal held that legal proceedings which were instituted by a trustee before authorisation were invalid. The Court reasoned:

> "I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would

[65] *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) and *Messenger of the Magistrates' Court, Durban v Pillay* 1952 (3) SA 678 (A).

[66] *Lupacchini NO and Another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) (*Lupacchini*).

> seem to me that the case is even stronger for finding legal proceedings to be a nullity."[67]

[93] The authorities referred to suggest that the building contract concluded by Cool Ideas and Ms Hubbard, in contravention of section 10(1)(a) of the Housing Protection Act, was invalid. But the Supreme Court of Appeal here held that the contract remained valid. That Court stated:

> "Sections 10(1) and (2) do not in terms invalidate the agreement between the home builder and the housing consumer. Quite the contrary – I think it is clear that, consistent with the overall purpose of the Act, the validity of that agreement is unaffected by an act of the home builder in breach of those sections. The prohibition in those sections is not directed at the validity of particular agreements but at the person who carries on the business of a home builder without a registration. They thus do no more than disentitle a home builder from receiving any consideration. That being so a home builder who claims consideration in conflict with those sections might expose himself or herself to criminal sanction (section 21) and will be prevented from enforcing his or her claim."[68]

[94] The first flaw in the reasoning advanced for the finding that the building contract is not affected by the breach is that the prohibition is directed at the home builder and not the agreement. While this is true, it does not shed light on whether non-compliance nullifies the contract. Indeed, in *Lupacchini* the prohibition was directed at the trustee and not the act he or she performed. Yet, the Court held that the act was invalid owing to the trustee acting contrary to the prohibition.

[67] Id at para 22.

[68] Supreme Court of Appeal judgment above n 10 at para 11.

[95] The second flaw in the reasoning of the Supreme Court of Appeal in the present case lies in the fact that it approached the matter on an unduly narrow footing. The Court erroneously confined itself to the prohibition in section 10(1)(b) and reasoned that this prohibition does no more than disentitle Cool Ideas from receiving consideration. In this regard, the Supreme Court of Appeal was mistaken. It is apparent from Ms Hubbard's plea, quoted in the judgment of the Supreme Court of Appeal, that she relied on the prohibitions in both section 10(1)(a) and (b).[69] The prohibition in section 10(1)(a) directly affects the contract because it prohibited Cool Ideas from undertaking to build a house for Ms Hubbard.

[96] It was this narrow approach that influenced the Supreme Court of Appeal to conclude that an unregistered home builder who claims consideration contrary to section 10 exposes himself or herself to criminal sanction and would be prevented from enforcing his or her rights. I find nothing in the text of section 10(1), or other sections of the Act, that indicates that the underlying contract should remain unaffected. It will be recalled that the present contract embodies the undertaking by Cool Ideas to build a home for Ms Hubbard. It was the same undertaking that constituted a contravention of section 10(1)(a) and amounted to a criminal offence in terms of section 21.

[97] As the main judgment observes, section 10 must be read as a whole. More importantly, section 10(1)(b) cannot be interpreted separately. It must be construed

[69] Id at para 6.

together with section 10(1)(a) because they are integral parts of one provision. They share features. Both lay down prohibitions which forbid unregistered home builders from performing certain acts. The key feature in both sections is the registration of a home builder.

[98] A contract concluded in contravention of the prohibition in section 10(1)(a) cannot be regarded as valid. The fact that the unregistered home builder may not enforce his or her rights is irrelevant. An illegal contract cannot confer rights on the home consumer privy to it. Allowing the home consumer to enforce his or her rights under such a contract would amount to giving legal effect to a prohibited act. In *Pottie*, Fagan JA pointed out that—

> "[t]he usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."[70]

[99] In our democratic order, it is the duty of courts to apply and enforce legislation like the Housing Protection Act.[71] If the validity of legislation is not impugned, there can be no justification for not enforcing it, let alone giving legal effect to prohibited conduct.

[70] *Pottie v Kotze* 1954 (3) SA 719 (A) at 726H-727A.

[71] Section 165(2) of the Constitution provides:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[100] In *Taljaard*,[72] the Supreme Court of Appeal held that a contract of mandate concluded with an estate agent who had no fidelity fund certificate was valid because section 34A of the Estate Agency Affairs Act[73] does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with section 26 of that Act. Bearing in mind that section 34A was introduced in 1998 in response to the High Court judgment in *Noragent* which held that non-compliance with section 26 did not invalidate the contract of mandate,[74] the Supreme Court of Appeal in *Taljaard* held that, if the Legislature intended the contravention to invalidate the contract, it could expressly have said so in the amendment.

[101] The finding in *Taljaard* was based on two reasons. First, the provision itself does not invalidate the contract. Second, if invalidity were contemplated and in view of *Noragent*, the amendment would have expressly provided for that. In *Taljaard*, the Supreme Court of Appeal did not explain why that Court adopted an approach that was at variance with its earlier decisions. A court is bound to follow its earlier decisions unless it is convinced that they are clearly wrong. As illustrated earlier, that Court in 1926 laid down the principle that "a thing done contrary to the direct prohibition of the law is void and of no effect."[75] This principle was affirmed in later decisions of that Court in *Pottie*,[76] and recently in *Lupacchini*,[77] which was written by the same Judge who wrote *Taljaard*.

[72] *Taljaard v TL Botha Properties* [2008] ZASCA 38; 2008 (6) SA 207 (SCA).

[73] 112 of 1976.

[74] *Noragent (Edms) Bpk v De Wet* 1985 (1) SA 267 (T) at 271I-272D.

[75] *Schierhout* above n 48.

[76] Above n 70.

[102] The invalidity of an act performed contrary to a statutory provision does not flow from the express terms of the prohibition but from the fact that the impugned act was performed contrary to a prohibition in a statute. When the Legislature wants to put an end to a particular conduct, it prohibits it. As was observed in *Pottie*, a court cannot give legal sanction to an act prohibited by the Legislature. Therefore, in *Taljaard*, the Supreme Court of Appeal erred in holding that the contract of mandate concluded contrary to the prohibition in section 34A was valid. The principle that what is done in breach of a statutory prohibition is invalid may be departed from only if it is clear from the language of the relevant legislation that invalidity was not envisaged. It is not necessary for the prohibition to say non-compliance with it would lead to invalidity.[78]

[103] In *Metro Western Cape*, the Appellate Division reaffirmed the principle in these terms:

> "It is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act. . . . If therefore on a true construction of section 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void *ab initio* and a complete nullity under which neither party can acquire rights whether there is intention to break the law or not."[79]

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[77] Above n 66.

[78] *Standard Bank v Estate Van Rhyn* 1925 AD 266.

[79] *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) (*Metro Western Cape*) at 188A-B.

[104] Unlike in *Metro Western Cape* where the underlying contracts were regarded as valid because they did not regulate the business between the trader and his customer, here the building contract governed the prohibited business of a home builder. The prohibitions in section 10(1) are the tools chosen by the Legislature to protect housing consumers. To hold that the building contract is valid would seriously undermine this purpose. Furthermore, to hold the contract valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties. While Ms Hubbard may notionally enforce her rights under the contract, Cool Ideas may not. This may lead to the deprivation of property under section 25 of the Constitution, alluded to by Froneman J in his judgment. I can find nothing in the language of the Housing Protection Act that suggests this sort of injustice was intended.

[105] The principle that a thing done contrary to the direct prohibition of the law is void admits of one exception. This exception applies where it is clear from the language of the law in which the prohibition is contained that invalidity of the act performed contrary to the prohibition was not envisaged.[80] Consistent with this principle, the main judgment holds that section 13 of the Housing Protection Act reveals that non-compliance with the prohibition in section 10(1)(b) was not intended to invalidate the building agreement between the home builder and the housing consumer.[81]

[80] Id at 188F-G and *Pottie* above n 70 at 727H.

[81] Main judgment at [48].

[106] I disagree. Section 13 does not address the consequences of acting contrary to the prohibitions in section 10(1). Instead, section 13 introduces implied terms into building contracts and prescribes the requirements of a valid building contract.[82] These requirements are set out in section 13(1). They are:

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[82] Section 13(1) and (2) provides:

> "(1) A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder—
>
> (a) shall be in writing and signed by the parties;
>
> (b) shall set out all material terms, including the financial obligations of the housing consumer; and
>
> (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body.
>
> (2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—
>
> (a) the home, depending on whether it has been constructed or is to be constructed—
>
> (i) is or shall be constructed in a workmanlike manner;
>
> (ii) is or shall be fit for habitation; and
>
> (iii) is or shall be constructed in accordance with—
>
> (aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and
>
> (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);
>
> (b) the home builder shall—
>
> (i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;
>
> (ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation; and

(a) the building contract must be in writing and signed by the parties;

(b) it must set out all material terms, including the financial obligations of the housing consumer; and

(c) the specifications pertaining to the material to be used in the construction and the plans approved by a local authority must be annexed to the contract.

[107] Importantly, section 13(3) tells us the consequences of not complying with these requirements. It provides:

> "The failure to comply with a provision of subsection (1)(a) and (c) shall not render an agreement referred to in that subsection invalid."

[108] This section makes it plain that non-compliance with requirements (a) and (c) does not invalidate the agreement. On the approach of the main judgment, section 13(3) is superfluous because the scheme of the Housing Protection Act indicates that non-compliance with the Act does not invalidate the building contract. An interpretation that says the contract is invalid owing to non-compliance would be at odds with the legislative scheme.[83]

(iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date."

[83] Main judgment at [47].

[109] Notably, in saving the contract from invalidity, section 13(3) makes no reference to requirement (b). This suggests that a contract which does not set out all material terms, including the financial obligations of the consumer, is invalid. This is implicit from section 13(3) which deliberately excludes requirement (b). The express terms of section 13 are at odds with the legislative scheme determined by the main judgment. It is apparent from section 13 that the Housing Protection Act envisaged that non-compliance with some of its provisions would render the building contract invalid.

[110] The main judgment holds that the extract quoted in [72] does not support the assertion that Ms Hubbard pleaded both prohibitions in section 10(1) as the bases for contending that Cool Ideas was not entitled to claim payment from her. In the first place, that extract is taken from paragraph 6 of the judgment of the Supreme Court of Appeal which records expressly that the extract is taken from the affidavit of Ms Hubbard, filed in the High Court in opposing the arbitration award being made an order of court.

[111] Secondly, the plain reading of the extract shows that Ms Hubbard states that Cool Ideas was not registered as a home builder. And in the italicised words, she contends that the effect of non-registration was that Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person, defined as a housing consumer in terms of the Housing Protection Act. As a result of this, she concludes that Cool Ideas was not

entitled to claim any payments from her. It is difficult to appreciate how it can be said that the extract does not rely on both prohibitions in section 10(1)(a) and (b) when Ms Hubbard's affidavit uses the words of section 10(1)(a) and (b). The fact that, in the affidavit filed by her in this Court, she says that she does not dispute the validity of the building contract is irrelevant.

[112] Even if what she says in her affidavit in this Court were to be treated as a concession, it would change nothing. This is because a concession wrongly made by one of the parties is not binding on a court, if it relates to a point of law.[84]

[113] Furthermore, the main judgment holds that the parties concluded a separate and new arbitration agreement on 3 April 2009.[85] I cannot agree. The question whether Cool Ideas and Ms Hubbard have concluded a separate agreement entails a factual enquiry. That has not been established. On the contrary, it is apparent from the judgment of the Supreme Court of Appeal that in referring their disputes to arbitration, the parties acted in terms of clause 14 of the building agreement.

[114] The arbitration agreement was not self-standing. Instead, it was an integral part of the building contract. Clause 14.1 expressly says that disputes arising from the building agreement would be referred to arbitration. It does not say that the parties would enter into a further agreement but stipulates that disputes arising from the

[84] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[85] Main judgment at [45].

building agreement, during its currency and after its termination, would be referred to arbitration.

[115] Although the word "may" is used in the clause, it does not signify that the parties were not bound by the terms of the clause. As part of a contract intended to be binding, clause 14 obliged the parties to act in accordance with its terms. Once there were disputes which the parties could not resolve, clause 14 precluded them from approaching a court. Instead, the clause obliged them to take such disputes to arbitration. Acting in terms of the clause, Cool Ideas and Ms Hubbard referred their disputes to arbitration. That much is clear from the judgment of the Supreme Court of Appeal.

[116] To facilitate arbitration, clause 14.2 obliged the parties to request that an arbitrator be appointed, not by them, but by the person identified in the clause. Clause 14.2 stipulates that the arbitrator would be appointed by the president of the Master Builders Association, where there is one, or by the president of the Building Industries Federation (SA). His or her decision would be final and binding on both parties. Therefore, there was absolutely no need to conclude a separate arbitration agreement.

[117] In the circumstances, I hold that the building contract that was concluded in contravention of section 10(1)(a) is invalid.

Effect of the invalid contract on the arbitration award

[118] The process of taking the dispute to arbitration was rooted in the building contract. When the parties appointed the arbitrator and submitted their disputes to him, they acted in terms of the arbitration clause in the contract. The arbitrator too derived his power to determine those disputes from the building contract. Therefore, the invalidity of that contract vitiates the entire arbitration process. Consequently, the arbitration award was invalid because it was made in terms of an invalid contract.

[119] It is not necessary to address the other submissions advanced by Cool Ideas because they were premised on the mistaken assumption that the building contract was valid.

[120] It is for these reasons that I support the order proposed in the main judgment.

FRONEMAN J (Cameron J, Dambuza AJ and Van der Westhuizen J concurring):

Introduction

[121] I have had the privilege of reading the judgments of my Colleagues Majiedt AJ (main judgment) and Jafta J (concurring judgment). I cannot agree with their conclusion that the appeal must be dismissed. I would allow the appeal.

[122] My central difference with the main judgment lies in the constitutional issue that needs to be determined. The main judgment reaches the constitutional aspect

relating to the enforcement of private arbitration awards by courts only towards the end, and then only in the narrow form of whether a refusal to make the arbitral award an order of court violates section 34 of the Constitution.[86] It also finds equity considerations not to be applicable.[87]

[123] In *Lufuno Mphaphuli*, this Court held that section 34 does not apply directly to private arbitrations.[88] I thus agree with the main judgment that the applicant's right of access to courts has not been infringed.[89]

[124] But that is not all that *Lufuno Mphaphuli* decided. It also dealt with the relevance of the Constitution to the terms and enforcement of arbitration agreements.[90] It held that in determining whether a provision of an arbitration agreement is contrary to public policy the spirit, purport and objects of the Bill of Rights will be of importance,[91] and it emphasised the importance of fairness in the arbitration process.[92] Importantly too, *Lufuno Mphaphuli* dealt with the relevance of the Constitution to the judicial scrutiny of arbitration awards.[93] It held that "the values of our Constitution will not necessarily best be served by interpreting section 33 [of the Arbitration Act]

[86] See [53]-[62] of the main judgment.

[87] At [52].

[88] *Lufuno Mphaphuli* above n 9 at para 218.

[89] See [62] of the main judgment.

[90] *Lufuno Mphaphuli* above n 9 at paras 219-23.

[91] Id at para 220.

[92] Id at para 221.

[93] Id at paras 224-36.

in a manner that enhances the power of courts to set aside private arbitration awards".[94]

[125] When parties enter into private arbitration agreements they make value choices about how they want to exercise their rights under the Constitution[95] and the extent of interference or control they wish courts to have over the private process.[96] These choices are material and relevant in determining what public policy in the enforcement of a particular private arbitration award should be. The Arbitration Act also recognises these choices and accepts their legitimacy in seeking to give effect to arbitration awards.

[126] Public policy in the interpretation, application and enforcement of contracts embraces issues of fairness.[97] Fairness "is one of the core values of our constitutional order".[98] When the enforcement of arbitration awards on the basis of public policy is at stake, fairness lies at the heart of the enquiry, not at its periphery.

[127] The primary issue at stake is whether a private arbitration award may be enforced contrary to a statutory provision. The main judgment says, No, not in this case, and fairness plays little or no role in determining whether it may. I disagree.

[94] Id at para 235. Although the reference is to section 33 of the Arbitration Act 42 of 1965 it is clear that O'Regan ADCJ regarded with approval the "pleasing symmetry" of the same standards for refusing to make an award an order of court as for setting aside the award. See paras 227 and 232.

[95] Id at para 216.

[96] Id at para 219.

[97] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 73.

[98] *Lufuno Mphaphuli* above n 9 at para 221.

Lufuno Mphaphuli tells us that public policy in accordance with the spirit, purport and objects of the Bill of Rights, fairness in the arbitration process, and the personal choices of the parties play a material and relevant part in determining the issue. When due weight is given to these considerations, nothing stands in the way of enforcement of the award here, even on an acceptance of the correctness of the main judgment's interpretation of the Housing Consumers Protection Measures Act[99] (Housing Protection Act or the Act).

[128] I am in any event not convinced that this interpretation is correct. The inevitable result of the reasoning of the main judgment is that Cool Ideas will be deprived of its right to payment for work fairly and properly done. That will amount to deprivation of property under section 25 of the Constitution. The provisions of the Housing Protection Act should be interpreted in a manner that avoids that result. It can properly and reasonably be interpreted in that way.

[129] The concurring judgment of Jafta J avoids engagement with the central issue of enforcement of a private arbitration award in the face of a statutory provision by finding that the building contract, which includes the arbitration clause, is invalid and can, for that reason, not be enforced at all. This nevertheless has the effect that a court can never enforce an arbitral award if that would be contrary to a statutory provision. For the reasons already summarised,[100] I do not agree. In addition, this was not the basis upon which the parties approached the Court. Had this approach been raised, the

[99] 95 of 1998.

[100] See above [127].

question of severability of the arbitration clause from the rest of the building contract would have been at the forefront of the enquiry.[101] To the extent, however, that the concurring judgment finds that to hold the building contact valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties,[102] I agree. Our disagreement is in what must be done to avoid that injustice and unequal treatment. I consider the injustice and unequal treatment to be a compelling reason for enforcing the arbitration award.

[130] In the first part of the reasoning that follows I accept, as a starting point, the correctness of the interpretation of the Housing Protection Act in the main judgment. The next step in determining whether enforcement will be against public policy, is to weigh that interpretation against the parties' choice of private arbitration and the fairness to them individually in its effect. Viewed from this perspective public policy is not undermined by the enforcement of the arbitration award. For convenience I refer to this part as the arbitration approach.

[131] In the second part I assess whether section 10(1)(b) of the Housing Protection Act should not, in any event, be interpreted in a manner that is less restrictive of Cool Ideas' right to property.[103] That can, I hope to demonstrate, properly and reasonably be done. I will refer to this part as the interpretation approach.

[101] Compare *Lufuno Mphaphuli* above n 9 at para 220 and *North East Finance (Pty) Ltd v Standard Bank of South Africa* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at paras 18-23.

[102] See [104] of the concurring judgment.

[103] Section 25 of the Constitution.

[132] Would the outcome, on either perspective, deprive Ms Hubbard of any of the protections that she should enjoy under the Housing Protection Act? The answer is No.

[133] It is time to substantiate these assertions. I will do so in the following order. First some brief reference to the facts needs to be made in order to give proper context to the question of fairness between the parties and the potential prejudice to Ms Hubbard if the arbitration award is enforced. I will then move to the discussion of the arbitration approach and the interpretation approach before concluding.

Fairness or prejudice to Ms Hubbard?

[134] When building started on Ms Hubbard's home it was being done by a registered builder, Velvori. The only reason why Cool Ideas did not itself register earlier was because it understood from a letter by the National Home Builders Registration Council (Council) that it was not necessary to do so. Ms Hubbard herself invoked the arbitration clause in the building contract and thereby triggered the arbitration proceedings. She did so in order to claim money back from Cool Ideas. Instead, the arbitrator found that she actually owed Cool Ideas more money. The award of the arbitrator amounted to an award for Cool Ideas to be reimbursed for the balance of the contract price, for items it had bought for Ms Hubbard. She does not allege that the arbitration process was unfair, nor does she allege that the actual findings of the arbitrator in relation to the building disputes were unfair or wrong. When she learnt that Cool Ideas had not registered as a home builder, she sought to avoid payment of

what she owed. Registration occurred before judgment was granted in the High Court. What Ms Hubbard sought in those proceedings was not the Act's protection to attain proper building or correction of building works by Cool Ideas, but to escape payment of what she had been fairly found to owe to Cool Ideas.

The arbitration approach

[135] *Lufuno Mphaphuli* was the first and, until now, the only case where this Court has dealt with the Constitution's applicability to private arbitrations. The judgment expressly endorsed "the value of arbitration as a speedy and cost-effective process".[104] It saw its task as follows:

> "The Court has had to consider the relationship between private arbitration and the Constitution, the proper scope of section 34 of the Constitution and the approach to the interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this Court and which, given the need to provide guidance in this regard, it is in the interests of justice for this Court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide."[105]

[136] The Court further enumerated the virtues of private arbitration in its flexibility, cost-effectiveness, privacy and speed. In determining the proper constitutional approach to the arbitration process, the Court bore in mind that litigation before

[104] *Lufuno Mphaphuli* above n 9 at para 223.

[105] Id at paras 237-8.

ordinary courts "can be a rigid, costly and time-consuming process".[106] This led it to conclude that "it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes."[107] It also found, generally, that "courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."[108]

[137] In this judgment, I accept the logical and necessary corollary of the approach in *Lufuno Mphaphuli*. I hold that where parties choose private arbitration as the means of resolving disputes between them, courts should respect and encourage that choice. In practical terms, here, that means that the Court should, for powerful reasons of fairness, license and enforce the outcome of Ms Hubbard's private arbitration with Cool Ideas.

[138] In *Lufuno Mphaphuli* the Court viewed its discussion and application of the principles regulating the interaction between the Constitution and private arbitration awards as properly within its jurisdictional remit. Due regard must be given to the precedential force of the decision. It is for this reason that I disagree with the finding in the main judgment that the issues in *Lufuno Mphaphuli* have little bearing on the central issue in this case and that it is distinguishable on the facts and the law.[109]

[106] Id at para 197.

[107] Id.

[108] Id at para 235.

[109] See [58]-[59] of the main judgment.

[139] *Lufuno Mphaphuli* laid down the following principles about the applicability of the Constitution to private arbitration awards:

(a) Section 34 of the Constitution[110] does not apply directly to private arbitrations, primarily because they do not require public hearings.[111]

(b) Indirect application of section 34 was not finally considered but it was stated that "mindful of the role courts have in giving effect to arbitration agreements . . . section 34 may have some relevance to the interpretation of legislation or the development of the common law."[112]

(c) Arbitration agreements that contain provisions that are contrary to public policy in the light of the values of the Constitution will be null and void to that extent. In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.[113]

(d) In interpreting an arbitration agreement it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend to be fair. The arbitration agreement "should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it

[110] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[111] *Lufuno Mphaphuli* above n 9 at paras 213-4 and 216-8.

[112] Id at para 215.

[113] Id at para 220.

may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores."[114]

(e) Insofar as the interpretation of section 33(1) of the Arbitration Act, which permits an arbitration award to be set aside, is concerned—

> "the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view . . . the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."[115]

[140] The majority judgment of the Supreme Court of Appeal[116] and the main judgment proceed from the basis that the building contract and the arbitration agreement between the parties are valid, but that Cool Ideas may nevertheless not claim or enforce payment for any work done, be it in any ordinary court or by way of arbitration. That result is, on any standard, prejudicial and unfair to Cool Ideas.

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[114] Id at para 221.

[115] Id at para 235.

[116] Supreme Court of Appeal judgment above n 10. The judgment is based on an acceptance of the validity of the building contract, which includes an arbitration clause. It expressly rejected as irrelevant arguments presented to it relying on the equities of the case and that due deference should be given to arbitration awards.

[141] From *Lufuno Mphaphuli* we know that the determination of public policy in deciding whether an arbitration award should be enforced should be done in accordance with the spirit, purport and objects of the Bill of Rights. We also know that it requires courts to ensure fairness in the arbitration process, and that the personal choices of the parties in opting for arbitration must be given proper regard.

[142] The loss of the right to claim performance under the contract amounts, in terms of this Court's decision in *Opperman*, to the deprivation of property under section 25 of the Constitution.[117] If the building contract was held to be invalid, Cool Ideas may, in terms of the common law, have an enrichment claim: the *condictio ob turpem vel iniustam causam* (enrichment arising from a transfer made for an illegal or immoral purpose).[118] By clothing the contract with validity, this result is avoided, but at some cost.[119] Even if one accepts, as the main judgment does, that the deprivation is not arbitrary in terms of statutory and constitutional interpretation,[120] it does not mean that this consideration automatically determines the issue as far as the enforcement of the arbitration award is concerned. The choice of arbitration as a dispute-resolution

[117] *Opperman* above n 30 at para 63.

[118] See *Jajbhay v Cassim* 1939 AD 537 at 545 and 547-8. See also *First National Bank of Southern Africa Ltd v Perry NO and Others* [2001] ZASCA 37; 2001 (3) SA 960 (SCA) at paras 21-5.

[119] I was unable to find any case where an admittedly valid private contract or agreement (in terms of the applicable legislation) was found to be unenforceable by reason of the effect of the same legislation. The application of the principle in *Wynberg* above n 48 has been largely in the field of public law. See *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) at para 9; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) at paras 22-3; and *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A) at 632G. See also *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 480A-D where the Court distinguished the facts before it from those in *Wynberg* and held the principle in that case could not be applied.

[120] See [148]-[168] below on the approach to interpretation.

mechanism indicates the contrary, namely that the parties elected to protect their respective rights to property under the Constitution through that process. If one determines public policy in accordance with the spirit, purport and objects of the Bill of Rights then the potential deprivation of Cool Ideas' property must count as a reason for not finding the enforcement of the award to be contrary to public policy, rather than the opposite.

[143] On the premise that fairness plays no role in determining public policy when deciding whether private arbitration awards should be enforced by courts, both the majority judgment in the Supreme Court of Appeal and the main judgment fail to give further consideration to other factors that may be material and relevant when stricter control of private arbitration awards is envisaged. To reiterate: public policy in the interpretation, application and enforcement of contracts generally invokes the notion of fairness.[121] The fairness of the terms of an arbitration agreement is an important factor in considering their enforcement.[122]

[144] Material and relevant factors in this regard include that: the parties chose private arbitration instead of civil proceedings; Ms Hubbard initiated arbitration proceedings; the building was done by Velvori, which was registered from the start as a builder; the arbitration process was fair and not challenged as making wrong or unfair findings; the amount ordered by the arbitration award, payable to Cool Ideas, mainly related to compensation for additional personal choice items ordered by

[121] *Barkhuizen* above n 97. See also [126].

[122] See [124] and [139](d) above.

Ms Hubbard which were not included in the original contract price; Cool Ideas acted in good faith at all times by enquiring whether it should register; it did register before judgment when told it was necessary; and last, but not least, Ms Hubbard, not Cool Ideas, is the recalcitrant debtor.

[145] It must also be remembered that one of the arguments for the interpretation that the Housing Protection Act did not render the building contract and the arbitration agreement invalid was to ensure that the warranties in section 13(2) of the Act would not be lost to a building consumer. On the facts here, enforcement of the arbitration award would not have deprived Ms Hubbard of that protection. In addition, the threat of criminal prosecution for late registration still hangs over Cool Ideas. Enforcement of the arbitration award will not, on an acceptance of the main judgment's interpretation of the Housing Protection Act, undermine the protection afforded by the Act to building consumers and the criminal sanction for non-compliance will remain. The only effect non-enforcement will have is to allow Ms Hubbard to escape payment of what has been fairly found to be owed to Cool Ideas. That is an impermissible use of the provisions of the Act.[123]

[146] The conclusion I reach is that there was no unfairness in the arbitration process, nor in its outcome. There is nothing substantive, in the sense of prejudice to Ms Hubbard, that would justify a court in finding that public policy should override

[123] Compare *Oilwell (Pty) Ltd v Protec International Ltd and Others* [2011] ZASCA 29; 2011 (4) SA 394 (SCA) and *Barclays National Bank Ltd v Thompson* [1985] ZASCA 50; [1985] 2 All SA 355 (A).

the personal choice made by the parties to enforce their agreement by way of private arbitration.

[147] This is sufficient reason for the appeal to succeed. But even if this approach is not accepted, there is another basis for the same outcome.

Interpretation approach

[148] As noted, the loss of the right to claim performance under the contract may amount, in terms of this Court's decision in *Opperman*, to the deprivation of property under section 25 of the Constitution.[124] But that deprivation, says the main judgment, is not arbitrary. Section 10(1)(b) of the Housing Protection Act is aimed at achieving a legitimate and important statutory purpose and there is a rational, proportional connection between the statutory prohibition and its purpose.[125] I disagree.

[149] An interpretation that the building contract is valid, but that its enforcement by one of the parties, Cool Ideas, is not, deprives that party of any redress at all for the work it has done. Under the common law it may have a claim for enrichment if the building contract was declared invalid for illegality.[126] Counsel for Ms Hubbard sought to ameliorate this unjust and unequal result by suggesting that the common law could be developed to allow an enrichment claim, but fairly and properly conceded that as the law now stands there is none available to Cool Ideas.

[124] *Opperman* above n 30.

[125] See [44] of the main judgment.

[126] See above [142] and above n 118.

[150] There are good reasons why it is necessary to favour an approach that may be less intrusive on Cool Ideas' rights. The first is that we are concerned with the fairness of depriving Cool Ideas of the power to enforce an arbitration award that has not been attacked as being a result of an unfair process or any substantively unfair findings. Second, and perhaps more important, is the accepted principle that the interpretation that best protects or enhances a fundamental right should, where reasonably possible, be preferred.[127] Is that kind of interpretation of the provisions of the Housing Protection Act reasonably possible? The answer is Yes.

[151] There can be no doubt that the Housing Protection Act is intended to protect housing consumers. As pointed out in the main judgment, it employs various measures to do so. But what, in the end, is the performance it seeks to enable housing consumers to obtain? The best answer to that is to be found in the warranties that the Act seeks to be enforceable by the housing consumer against the home builder in terms of section 13(2):

> "The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—
>
> (a) the home, depending on whether it has been constructed or is to be constructed—
>
> (i) is or shall be constructed in a workmanlike manner;

[127] *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-3; and *S v Zuma* above n 18 at paras 15-6.

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with—

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);

(b) the home builder shall—

(i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;

(ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation date; and

(iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date."

[152] The registration of home builders – either those having the capacity to build or those who need to enter into agreements with other home builders to do so[128] – and the various other requirements laid down in the Act are all geared to ensure the

[128] Section 10(6) and (7) of the Housing Protection Act.

enforcement of proper performance in the building of their houses by housing consumers against home builders. That is the substantive, overall purpose of the Act.

[153] There are many ways of achieving this purpose, and of striking the correct balance between the interests of housing consumers and those who have performed construction work for them. The Housing Protection Act can be read to protect consumers without barring Cool Ideas' claim for its performance.

[154] The starting point is that section 10(1)(a) and 10(2), read with section 21, indubitably make it a criminal offence for a home builder to have constructed a home while unregistered. This provides home builders with a very strong incentive, backed by the criminal law, to register *before* undertaking any building work.

[155] The central conundrum in this case arises from the finding that the contract (including the arbitration agreement) is valid. How can it be that Cool Ideas' contract with Ms Hubbard is valid, but its claim is unenforceable?[129] Could it be that section 10(1)(b) has a specific and narrow purpose only? That it was the Legislature's targeted intervention to render unenforceable certain of the contract's terms?

[156] Here, the presence of the other two very broadly defined prohibitions in section 10(1)(a) and 10(2) is significant. They do not make the contract invalid. Hence this third prohibition in section 10(1)(b) was necessary. The provisions read:

[129] Where it is not a gambling contract or other agreement offensive to public policy.

> "(1) No person shall—
>
> (a) carry on the business of a home builder; or
>
> (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,
>
> unless that person is a registered home builder.
>
> (2) No home builder shall construct a home unless that home builder is a registered home builder."

[157] So seen, the prohibition in section 10(1)(b) should be understood in its own, narrowly expressed terms, rather than broadened by analogy with the two prohibitions flanking it. We should not, in other words, conclude that section 10(1)(b) embodies a similar, sweeping prohibition to section 10(1)(a) and 10(2). It is doing something separate, and narrower.

[158] Arising from this, an approach to the provision becomes possible in which it is clear that, while the first and the third prohibitions are absolute in relation to the activities proscribed (carrying on the business of a home builder and construction of homes), the prohibition on receiving consideration applies only *at the time of receipt*. In other words, you have to be registered to receive consideration, but you can register late.

[159] Weighing in favour of permitting late registration is, first, the simple fact that section 10(1)(b) uses the word "receive". And it does not interpose any qualification to the registration requirement. For example, it does not say "unless the person is a registered home builder *at the time of undertaking the construction*". Here it differs

from the provisions of the Attorneys Act[130] and the Estate Agency Affairs Act,[131] which require possession of a fidelity fund certificate at the time of practising, for attorneys, and at the time of performance, for estate agents, to claim payment.

[160] Also in favour of this approach is the entire registration system the Housing Protection Act constructs. The Act gives the Minister the usual general power to make regulations.[132] But, in addition, section 7(2)(b) specifically obliges the Minister to prescribe by regulation "the terms and conditions for the registration and renewal of registration of home builders". Indeed, section 10(4) states that registration of a home builder "shall be subject to the terms and conditions prescribed by the Minister under section 7(2)".

[161] These provisions give particular point to the detail of the General Regulations.[133] Together with other provisions of the Act, they create a powerful supervisory body that is not only nominally present, but actively supervises the activities of home builders,[134] and actively protects housing consumers through implied warranties[135] and enrolment of housing projects.[136]

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[130] 53 of 1979. See section 41.

[131] 112 of 1976. See section 34A.

[132] Section 27 of the Housing Protection Act.

[133] See Item 11 of the General Regulations regarding Housing Consumer Protection Measures, GN R1406 *Government Gazette* 20658, promulgated on 1 December 1999 (General Regulations).

[134] Section 5 of the Housing Protection Act.

[135] Section 13(2).

[136] Sections 14 and 14A.

[162] The Act itself says that the Council must register only home builders with the "appropriate financial, technical, construction and management capacity . . . to prevent housing consumers . . . from being exposed to unacceptable risks."[137] Closely allied to this, the Council can also impose conditions on registration and require a suretyship, guarantee, indemnity or other security in order to satisfy itself that consumers are adequately protected.[138] And the General Regulations set out more detailed conditions that the Council may impose before registering a home builder.[139]

[163] This expressly authorised system is fully consonant with the idea that late registration for the purposes of affording statutory sanction to receipt of consideration from a home-construction contract is feasible.

[164] On this approach, the Council, powerfully vested with authority under the legislation, will vet fly-by-night builders, denying them registration – but will permit good-faith builders like Cool Ideas, which omitted to register itself, but acted largely, if not exclusively, through a subcontractor that was registered.

[165] The upshot is that only carefully vetted builders with the necessary expertise and capacity to meet their financial obligations will ever be able to receive payment. Housing consumers are thus adequately protected.

[137] Section 10(3)(c).

[138] Section 10(4) and (5).

[139] See Item 11of the General Regulations above n 133.

[166] Can it be that a home builder, despite its skill and good faith, is deprived of any claim for payment, no matter how enormous its outlay, in perpetuity – without any way to remedy the mistake, even if it is carefully vetted and registered, subject to a range of conditions and suretyships imposed by the Council to ensure that its customers are adequately protected? Surely not.

[167] It is thus reasonable to interpret the provisions of the Housing Protection Act in a manner that is fair, does not deprive Cool Ideas of its property and does not necessitate the enhancement of the power of courts to interfere in private arbitration awards. Will this construction be detrimental to Ms Hubbard? That question has already been answered.[140] It will not, because she has enjoyed all the substantive protections under the Act.

[168] This interpretation is in accordance with existing authority. The broad formulation in *Schierhout*[141] that a thing done contrary to a statutory prohibition is always a nullity, has been qualified and flexibly applied in many later cases.[142] An illustration of the flexibility is to be found in *Pottie*.[143] There, as here, the conclusion of a contract in contravention of statutory requirements was criminalised without an express provision that the contract itself was invalid. In holding that this did not render the contract invalid Fagan JA stated:

[140] See above [132] and [145]-[146].

[141] *Schierhout* above n 48 at 109-10.

[142] See *Metro Western Cape* above n 79 at 188F-H; *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) at 913H-914C; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-830C; and *Estate Van Rhyn* above n 78 at 274.

[143] *Pottie* above n 70.

> "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent." [144]

And in relation to rendering contracts invalid as a further penalty:

> "A further compulsory penalty of invalidity would . . . have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if . . . enforced . . . the Legislature could have had no reason to view with disfavour. To say that we are compelled to imply such consequences . . . seems to me to make us the slaves of maxims of interpretation which should serve as guides and not be allowed to tyrannise over us as masters." [145]

If this is good law in relation to the possibility of holding agreements valid in the face of statutory prohibition and criminal sanction, so much more it is for holding valid the enforcement of a valid arbitration agreement.[146]

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[144] Id at 726H-727A.

[145] Id at 727E-G.

[146] This reasoning also finds support in jurisprudence from other countries that have dealt with similar issues. In *Loving & Evans v Black* 204 P.2d 23 (Cal 1949), a case involving almost identical facts, the California Supreme Court refused to enforce an arbitration award that was based on a contract between a homeowner and an unlicensed building contractor. The dissenting judge's criticism of the majority holding (at 30) was as persuasive then as it is now:

> "The majority opinion has attempted to resolve the problem as though it might involve an unlawful contract or a contract contrary to public morals and therefore void. It may be assumed that a law declaring such contracts illegal may not be circumvented by submitting controversies thereunder to arbitration and obtaining court confirmation. But the contract here is not of that nature. There is nothing basically unlawful or contrary to public morals in a contract to construct or repair a building. . . . The statute does not declare such a contract to be unlawful. The declaration of unlawfulness is confined to engaging in the business or acting in the capacity of a building contractor without having secured a license. A person pursuing the activities of a building contractor without the required license is guilty of a misdemeanour. And such person may not maintain an action in any court of the state for the collection of compensation for building contractor services. These are the [only] consequences attached to violation." (References omitted.)

Conclusion

[169] For these reasons I would have granted leave and allowed the appeal, with costs.

For the Applicant:	Advocate P Louw SC and Advocate H Cowley instructed by Chetty de Villiers & Mafokoane Inc.
For the First Respondent:	Advocate W van der Linde SC and Advocate X Stylianou instructed by D.J. Greyling Inc.

KOS and others v Minister of Home Affairs and others

WESTERN CAPE DIVISION, CAPE TOWN
AG BINNS-WARD J
Date of Judgment: 6 SEPTEMBER 2017 Case Number: 2298/2017
Sourced by: ADV C WEBSTER SC AND G KAY Summarised by: DPC HARRIS

Family law and Persons – Marriage – Alteration of gender of spouse in civil marriage – Difficulties experienced by transgendered persons in marriages solemnised in terms of the Marriage Act 25 of 1961, in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 – Department of Home Affairs wrong in maintaining that applications by the transgender spouses under the Alteration Act could not be granted while their marriages remained registered as having been solemnised in terms of the Marriage Act.

Editor's Summary

The first to sixth applicants were three married couples whose marriages were solemnised in terms of the Marriage Act 25 of 1961. The first, third and fifth applicants were transgender spouses in each of the marriages, having been born biologically male but undergone surgical and/or medical treatment to alter their sexual characteristics to female after they married. The latter step was taken because they experienced gender dysphoria in that that they were aware of being female trapped in a male body. The difficulties which transgendered persons in marriages solemnised in terms of the Marriage Act 25 of 1961 were experiencing in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 ("the Alteration Act") led to the present litigation.

The transgender spouses applied in terms of section 2(1) of the Alteration Act for the alteration of their sex descriptions on their respective birth registers. None of the parties to the marriages considered the fact that the registration of the altered sex status of the transgender parties would result in the public records showing that their marriages had become same-sex marriages to be relevant to their marriage status. However, the Department of Home Affairs maintained that the applications by the transgender spouses under the Alteration Act could not be granted while their marriages remained registered as having been solemnised in terms of the Marriage Act.

The primary relief sought by the applicants included various types of declaratory relief affirming the subsistence of their marriages; declaring that the second respondent was required by law to alter a person's sex description in terms of the Alteration Act irrespective of that person's marital status; and declaring that the Department's refusal to process the applications of the first and third applicants in terms of Alteration Act because they were married in terms of the Marriage Act was unconstitutional and unlawful, and that its deregistration of the marriage between the fifth and sixth applicants was also unlawful and unconstitutional. They also sought interdicts directing the second

respondent to grant the applications by the first and third applicants under the Alteration Act and to correct the population register to reflect that the fifth and sixth applicant were married to each other.

As secondary relief, sought in the alternative to the primary relief, and contingently upon the court upholding the Department's understanding of the statutory scheme, the applicants sought a declaration that the Alteration Act and/or the Marriage Act and/or the Civil Union Act 17 of 2006 were inconsistent with the Constitution and invalid to the extent that any or all of them fail to allow the alteration of a person's sex description and sex status while that person was in a marriage that was solemnised under the Marriage Act.

Held – The Alteration Act makes provision for the formal acknowledgment, recordal and legal consequences of such transitions. It allows for the alteration, upon application to the Director-General of the Department of Home Affairs (cited as the second respondent in these proceedings), of a person's sex description on the birth register and the provision to the person concerned of an altered birth certificate. It also provides that a person whose sex description has been altered is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration. The legal consequences of the recognition of a sex/gender-change in terms of the Alteration Act are therefore wholly prospective from the date of the recordal, and the Act does not have any retrospective effect.

Marriage brings about mutual rights and obligations that have been recognised to be contractual in legal character, albeit *sui generis* and entailing public law consequences. The effect of section 3(3) of the Alteration Act is that the recordal of a postnuptial sex/gender change in respect of either or both the spouses has no effect on their mutual marital rights and obligations. The formal recording of a person's gender or sex description is a matter of material legal and practical significance, impacting on the population register and the person's identity card.

The respondents did not identify a single provision in any of the legislation to which they referred that expressly forbade the processing and positive determination of the transgender spouses' applications under the Alteration Act. Also strikingly absent from the respondents' arguments was any acknowledgment of the expressly enshrined constitutional principle that statutes must be interpreted in a manner consistent with the promotion of the spirit, purport and object of the Bill of Rights. They did concede that there is nothing in the Alteration Act itself that expressly or impliedly indicates that the applicant's marital status has any bearing on the ability or entitlement of a person who has transitioned to obtain administrative relief under the provisions of the statute. The Alteration Act did not contain anything to support the respondents' interpretation of the statutory framework. The problem with the implementation of the Alteration Act that the respondents sought to identify seemed to arise from their understanding of the Marriage Act and the Civil Union Act. The notion propounded by the respondents was that there was scope for a conversion from one type of duly solemnised marriage to another in the case of transgender persons. The Court found that to be based on a false premise. Both the Marriage Act and the Civil Union Act treat marriage as a union of *two persons*, to the exclusion, while it lasts, of all others. There is thus

no parallel system of civil marriage, as contended by the respondents – only a parallel system for the solemnisation of marriages.

The applicants were held to be entitled in the circumstances to the primary relief for which they applied.

It was declared that the Department of Home Affairs' dealing with the applications by the first, third and fifth applicants under the Alteration Act was inconsistent with the Constitution and unlawful in that it infringed the said applicants' rights to administrative justice, and to equality and human dignity. It was also was inconsistent with the State's obligations in terms of section 7(2) of the Constitution. It was further declared that the second respondent was authorised and obliged to determine applications submitted in terms of the Alteration Act by any person whose sexual characteristics had been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed, for the alteration of the sex description on such person's birth register irrespective of the person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership was solemnised under the Marriage Act or the Civil Union Act.

Notes

For Marriage see:

- *LAWSA* Second Edition (Vol 16, paras 1–269)

Cases referred to in judgment

South Africa

Cape Town City v South African National Roads Authority and others [2015] 2 All SA 517 (2015 (3) SA 386 (SCA), [2015] ZASCA 58) (SCA) – **Referred to** 471

Fourie and another v Minister of Home Affairs and others [2005] 1 All SA 273 (2005 (3) SA 429) (SCA) – **Referred to** 478

Hoffmann v South African Airways 2000 (11) BCLR 1211 (2001 (1) SA 1) (CC) – **Referred to** 489

Minister of Home Affairs and another v Fourie and others; *Lesbian and Gay Equality Project and others v Minister of Home Affairs and others* 2006 (3) BCLR 355 (2006 (1) SA 524, [2005] ZACC 19) (CC) – **Discussed** 475

National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others 2000 (1) BCLR 39 (2000 (2) SA 1) (CC) – **Referred to** 490

European Court of Human Rights

Cossey v The United Kingdom [1990] ECHR 21, (1991) 13 EHRR 622 – **Referred to** 477

India

National Legal Services Authority v Union of India and others AIR 2014 SC 1863 – **Referred to** 472

United Kingdom

Bellinger v Bellinger [2003] 2 All ER 593 (HL), [2003] UKHL 21, [2003] 2 AC 467 – **Referred to** 472

Corbett v Corbett [1970] 2 All ER 33 (PDA) – **Referred to** 477

a **Judgment**

BINNS-WARD J:

Introduction

b [1] This case came to court because of the difficulties transgendered persons in marriages that were solemnised in terms of the Marriage Act 25 of 1961 are experiencing in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 ("the Alteration Act").

c [2] The first to sixth applicants are three married couples. Their marriages were duly solemnised in terms of the Marriage Act. The first, third and fifth applicants (to whom I shall refer individually as "KOS", "GNC", and "WJV", respectively,[1] or collectively as "the transgender spouses") were registered at birth as males. That happened because they were born d as biologically male. The second, fourth and sixth applicants, with whom KOS, GNC and WJV are respectively wed, are female. After they had married, each of the transgender spouses underwent surgical and/or medical treatment to alter their sexual characteristics[2] from those of a male to those of a female. They did this because from an early age they had

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1 At the commencement of the hearing in open court I made an order, as sought in terms of para [20] of the notice of motion:

f "*Permitting the Applicants to:*

1. Use the First to Sixth Applicants' initials instead of their full names on all court documents filed that will be available to the public.
2. File and provide to the respondents a confidential affidavit that contains the First to Sixth Applicants' full names and unredacted versions of the annexures . . . that will not be made publically available."

The respondents did not oppose the making of the order. I granted it because I g considered that it would be just and equitable in the circumstances. It serves to protect the affected applicants' rights to human dignity and privacy, whilst not unduly limiting the operation of the freedom of expression rights under s 16 of the Bill of Rights. However, it was inappropriate for the applicants to have moved for the relief only when the application was called in open court. The public is entitled to uncensored access to any documents filed at court in pending litigious matters unless a court for good reason directs otherwise; see *Cape Town City v South African National Roads Authority and others* h 2015 (3) SA 386 (SCA), [2015] ZASCA 58 [also reported at [2015] 2 All SA 517 (SCA) – Ed]. I consider that in the circumstances the applicants should have applied *ex parte* in preliminary proceedings, possibly through the chamber book, for permission to file redacted papers upon the institution of the current application. It would have been appropriate to grant them such relief, subject to the right of any third party which considered itself prejudiced thereby to approach the court, on notice to the applicants, i for the amendment or rescission of the order.

2 The term "*sexual characteristics*" is taken from the Alteration Act, in which it is defined as meaning "*primary or secondary sexual characteristics or gender characteristics*". According to the Act's definition provisions "*Primary sexual characteristics*" denotes "*the form of the genitalia at birth*"; "*secondary sexual characteristics*" means "*those which develop throughout life and which are dependant* (*sic*) *upon the hormonal base of the individual person*" and "*gender characteristics*" are "*the ways in which a person expresses his or her social identity as a member of a particular sex by* j *using style of dressing, the wearing of prostheses or other means*".

experienced tormenting gender dysphoria.[3] Their self-awareness was that of being female trapped in a male body. Transitioning[4] was the means to liberate them from their gender dysphoria and express their self identification.[5]

[3] The Alteration Act makes provision for the formal acknowledgment, recordal and legal consequences of such transitions. It allows for the alteration, upon application to the Director-General of the Department of Home Affairs (who has been cited as the second respondent in these proceedings), of a person's sex description on the birth register and the provision to the person concerned of an altered birth certificate.[6] It also provides that a person whose sex description has been altered is deemed for all purposes to be a person of the sex description so altered "*as from the date of the recording of such alteration*".[7] Section 3(3) provides that rights and obligations that have accrued to or been acquired by such a person before the alteration of his or her sex description are not adversely affected by the alteration. The legal consequences of the recognition of a sex/gender-change in terms of the Alteration Act are therefore wholly prospective from the date of the recordal; the Act does not have any retrospective effect.

[4] By virtue of its foundation in the agreement between the intending spouses to enter into it, marriage brings about mutual rights and obligations that have been recognised to be contractual in legal character, albeit *sui generis* and entailing public law consequences.[8] The effect of section 3(3) of the Alteration Act is that the recordal of a postnuptial sex/gender change in respect of either or both the spouses has no effect on their mutual marital rights and obligations. Those endure as long as the

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3 Dysphoria is a term used in psychiatry. It is defined in the *Concise Oxford English Dictionary* (10ed) (revised) (2002), as "*Psychiatry* a state of unease or general dissatisfaction".

4 To "*transition*" in the relevant context means to "*adopt permanently the outward or physical characteristics of the gender one identifies with, as opposed to those associated with one's birth sex*". See the *Oxford Dictionary of English* (Online version 2.2.1, Copyright © 2005–2016 Apple Inc.).

5 In *National Legal Services Authority v Union of India and others* AIR 2014 SC 1863, at para [76], the Supreme Court of India (*per* KS Radhakrishnan J) acknowledged that "*Gender identity . . . forms the core of one's personal self, based on self identification, not on surgical or medical procedure*". In *Bellinger v Bellinger* [2003] 2 All ER 593 (HL), [2003] UKHL 21, [2003] 2 AC 467 at para [5], Lord Nicholls of Birkenhead, describing various "*indicia of human sex or gender*", identified "*self-perception*" as one of them, and remarked "*Some medical research has suggested that this factor is not exclusively psychological. Rather, it is associated with biological differentiation within the brain. The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative*".

6 S 3(1) of the Alteration Act read with s 27A of the Births and Deaths Registration Act 51 of 1992.

7 S 3(2) of the Alteration Act.

8 See the discussion in June D Sinclair (assisted by Jacqueline Heaton), *The Law of Marriage*, (Juta, 1996) Vol 1, at pp 311–312; and the description in the *Equality Project* judgment, at para [63], of marriage under the common law, before its recent development, as constituting "*a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words 'I do' bring the most intense private and voluntary commitment into the most public, law-governed and State-regulated domain*".

marriage does. It also has no effect on the transgendered person's rights against, and obligations to third parties.

[5] The effect of an alteration of the record of a person's gender or sex description on their birth register pursuant to the grant of an application in terms of the Alteration Act is that his or her sex descriptor is also altered on the population register. This follows in terms of the provisions of section 5 of the Births and Deaths Registration Act 51 of 1992.[9] The population register is compiled and maintained by the Department of Home Affairs in terms of the Identification Act 68 of 1997.

[6] In terms of section 8 of the Identification Act, the population register must record a comprehensive range of information concerning each and every South African citizen and permanent resident. The information to be recorded includes particulars of such persons' names, dates of birth, gender[10] and identity numbers. It also includes the particulars (if applicable) of each such person's marriage contained in the relevant marriage register or other documents relating to the contracting of the marriage, "*and such other particulars concerning his or her marital status as may be furnished to the director-general*".[11]

[7] The identity number that is allocated to every person on the population register comprises a set of figures. In addition to a serial, index and control number, it consists of a reproduction, in figure codes, of (a) his or her date of birth, (b) gender; and (c) South African citizenship status.[12] It does not reflect the person's marital status.

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9 S 5 provides insofar as relevant:

"(1) The Director-General shall be the custodian of all –

(a) documents relating to births and deaths required to be furnished under this Act or any other law; and

(b) . . .

(2) Particulars obtained from the documents referred to in subsection (1)(a) shall be included in the population register and such inclusion is the registration of the births and deaths concerned."

10 The word "*gender*" is used in the Identification Act to the same effect as the expression "*sex description*" is in the Alteration Act. Sex/gender classification in terms of the Identification Act currently operates on a binary model. Everyone is either male or female. Thamar Klein points out that, by contrast:

> "Australia, India, Nepal, New Zealand, and Pakistan, for example, all offer an additional legal sex/gender identification option, besides those of female and male, to citizens who identify themselves as otherwise. Australia and New Zealand offer 'X' besides 'M' and 'F' as sex/gender identification on passports, India has included 'transgender' in the government citizen ID number system, and Pakistan uses the term 'unix' on the national identity cards of transgendered individuals, whereas Nepal has incorporated the category 'other' for official identity documents. In all cases, intersexed as well as gender-variant people may apply for these options." (T Klein, "*Who Decides Whose Gender? Medico-legal classifications of sex and gender and their impact on transgendered South Africans' family rights*", (2012) 14(2) Ethnoscripts 12-34 (Universität Hamburg), at pp 22–23.)

While judgment in this matter was in the course of preparation it was announced in the news media that Canada also intends issuing "X"-designated gender neutral passports and other identity documents to citizens who identify as being neither male nor female.

11 S 8(e) of the Identification Act.

12 S 7 of the Identification Act.

[8] The alteration of a person's sex description in terms of the Alteration Act also has other knock-on consequences. Every person on the population register over the age of 16 is required to have an identity card (commonly called an "ID book"). If for any reason the card does not correctly reflect the holder's particulars, he or she must apply for a replacement identity card.[13] It follows that anyone who has transitioned is obliged to apply for a new identity document, which necessarily will reflect a reassigned identity number incorporating an altered gender-related figure code. In order to be able to comply with that statutory obligation, he or she would be required first to obtain a formal recordal of the change in terms of the Alteration Act. Making application under the Alteration Act in such cases will therefore be a matter of obligation, rather than one of choice.

[9] There must be a "recent photograph" on the population register of every person over the age of 16. The photograph must be provided or replaced every time such person applies for an identity card or a replacement identity card.[14] The identity card will therefore also include a photograph of the holder; in most cases reflecting the person's appearance as recognisably male or female. Section 17(1) of the Identification Act provides: "*An authorised officer as defined in subsection (3) may at any time request any person reasonably presumed to have attained the age of 16 years to prove his or her identity to that officer by the production of his or her identity card as defined in subsection (4)*". If anyone is called upon by an "authorised officer"[15] to prove who he or she is, they are required to produce an "identity card". A driver's licence or a passport, being documents "*issued by the State and on which the name and a photograph of the holder appear*", would serve as an identity card for the purposes of proving one's identity.[16]

[10] It will readily be deduced from what I have described thus far that the formal recording of a person's gender or sex description is a matter of material legal and practical significance. The many and various difficulties that could present for a person whose gender characteristics differ from those recorded on his or her identity card are not hard to imagine. The evidence bears this out.

[11] The transgender spouses applied in terms of section 2(1) of the Alteration Act for the alteration of their sex descriptions on their respective birth registers. The applications had the blessing and support of the transgender spouses' marriage partners. The first to sixth applicants are content in their respective marital relationships and currently have no wish or intention to end them.

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13 S 19 read with Chapters 4 and 5 of the Identification Act.

14 See ss 9 and 15(2) of the Identification Act.

15 S 17(3) of the Identification Act provides that an "*authorised officer*" for the purposes of s 17(1) "means – (a) a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or (b) a person, or a member of a category of persons, designated by the Minister by notice in the *Gazette*, and who for the purpose of this section shall be deemed to be such a peace officer".

16 In terms of s 17(4) of the Identification Act.

[12] It was common ground that, apart from death, divorce is the only manner in which their marriages can be dissolved.[17] A divorce would be obtainable only if it could be proved that there had been an irretrievable breakdown of their marriage relationship, or that one of them was suffering from mental illness or continuous unconsciousness as contemplated in section 5 of the Divorce Act 70 of 1979. They have pointed out, correctly, that as they cherish their marriages there is no legal basis for them to be dissolved.

[13] They consider the fact that the registration of the altered sex status of the transgender parties will result in the public records showing that their marriages have become same-sex marriages to be irrelevant to their marriage status. For reasons to be described presently, the Department of Home Affairs takes a different view. It maintains that the applications by the transgender spouses under the Alteration Act cannot be granted while their marriages remain registered as having been solemnised in terms of the Marriage Act.

[14] In the result, the applications by KOS and GNC in terms of the Alteration Act have effectively been refused; alternatively, the Department has failed to make a decision in respect of them.

[15] In the case of WJV, however, the Department did alter his sex description. But when it did so, it simultaneously deleted the particulars recorded in the population register of the WJV's marriage with the sixth applicant. It did this unasked. It also changed the record of the sixth applicant's surname to her maiden name.

[16] I shall relate the history of each of these applications in some detail later in this judgment.

[17] The Department's position is founded on its understanding of the import of the current statutory regime that provides a parallel system for the solemnisation of marriages. Since 30 November 2006, civil marriages may be solemnised under the provisions of either the Marriage Act or the Civil Union Act 17 of 2006. The enactment of the Civil Union Act was the legislative response to the judgment of the Constitutional Court in *Minister of Home Affairs and another v Fourie and others*; *Lesbian and Gay Equality Project and others v Minister of Home Affairs and others*.[18] That case concerned a challenge against the constitutionality of the Marriage Act and the common law definition of marriage because they unfairly discriminated against gay and lesbian couples by precluding them from marrying.

[18] In the *Equality Project* case, the Court declared the common-law definition of marriage to be inconsistent with the Constitution and invalid to the extent that it did not allow for same-sex couples who wanted to formalise their unions to enjoy the status and the benefits, coupled with the responsibilities, that it accorded to opposite-sex couples who married. The Court also declared that the omission from the marriage formula in section 30(1) of the Marriage Act after the words "*or husband*" of the

17 Annulment, by contrast, implies that there never was a valid marriage.
18 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC), [2005] ZACC 19.

words "*or spouse*" was inconsistent with the Constitution.[19] It declared the Marriage Act to be invalid to the extent of that inconsistency.

[19] The Court suspended the declarations of invalidity for 12 months to enable Parliament to correct the defects. Its order provided that in the event of Parliament failing to correct the defects within the afforded period, section 30(1) of the Marriage Act would thenceforth fall to be read as including the words "*or spouse*" after the words "*or husband*" as they appear in the marriage formula in that provision. Notwithstanding that the Court did not expressly make a declaration to that effect, the import of its judgment was to develop the common law concept of marriage to connote "a union of *two persons*, to the exclusion, while it lasts, of all others". That much was necessarily implied in the finding that the previously expressed definition that marriage was "a union of *one man* with *one woman*, to the exclusion, while it lasts, of all others" was unlawfully discriminatory and infringed the right of gays and lesbians to enter into the sort of publically formalised union that heterosexual couples could by marrying under the Marriage Act.

[20] At the heart of the *Equality Project* case was the right of gays and lesbians to equality with heterosexual persons in respect of the institution of marriage. It perhaps bears emphasis, as an important aside, that sexual orientation or preference – the expression of a person's sexuality – is not an issue in the current proceedings.[20] There is no evidence about the first to sixth applicants' sexuality. Nor was there any need for such. As Lord Nicholls of Birkenhead thought it relevant to point out in *Bellinger*,[21] "*. . . a transsexual person is to be distinguished from a homosexual person. A homosexual is a person who is attracted sexually to persons of the same sex*". Many might think that that is to state the obvious, but the literature on transgenderism describes that there is an all too common tendency to

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19 S 30(1) of the Marriage Act provides:

"In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

'Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as **your lawful wife (or husband)**?',

and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:

'I declare that A.B. and C.D. here present have been lawfully married". (Bold print supplied for emphasis.)

20 The applicants did allege that if the respondents were correct in their construction of the applicable legislation, the resultant discriminatory treatment in distinguishing between persons married under the Marriage Act and those wed under the Civil Union Act would, in effect, give rise to unfair discrimination on the basis of sexual orientation. In view of the conclusion to which I have come it has not been necessary to decide that point. The contention seems in any event to be based on the very sort of conflation of concepts that has been criticised in the academic literature.

21 *Bellinger v Bellinger*, *supra* at fn 5, in para [10].

conflate sex, gender and sexuality, which is misconceived.[22] The tendency is manifested in the reliance by the respondents, in explanation of their approach to the interpretation and administration of the Alteration Act in respect of persons married in terms of the Marriage Act who subsequently transition, on the reported widespread opposition to any amendment of the Marriage Act to permit the formalisation of marriages between homosexual couples. The opposition to gay marriage was, amongst other things, advanced on the basis of ideas that "*sex is . . . an essential determinant of the relationship called marriage*" and that "*the capacity for natural heterosexual intercourse*" is essential for the subsistence of a marriage – I quote from the judgment of Ormrod J in *Corbett v Corbett*,[23] which was also a case concerning marriage and transgenderism. That viewpoint, or opinions aligned to it, seem to reflect what the respondents, in the context of the current case, characterise as relevant "*deep public and private sensibilities*" that allegedly bear on their ability to record the transgender spouses' sex/gender change[24] That such views have long since been legally discredited is evidenced, for example, by the following statement in the judgment of the European Court of Human Rights in *Cossey*'s case[25]:

> "Mr Justice Ormrod's arguments are clearly unacceptable. Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not 'essential' for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual

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22 A short but useful overview on the subject is given in *Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism* (C. Visser and E. Piccara), 2012 SAJHR 506. The authors observe that:

> 'The labels of transsexual, transgenderist, intersexed, transvestite, heterosexual, homosexual, bisexual and pansexual are all labels that are used in an attempt to describe the many permutations of human identity and sexuality. However, the conflation of sex, gender and sexual orientation has tainted our understanding of what these terms actually mean, leading to the perpetuation of misconceptions that have impacted on the legal treatment of transsexual and transgender issues. At the outset, a distinction has to be drawn between those terms that refer to the sexual orientation of an individual; those that have their application in reference to the biological sex of an individual; and those that describe the gender configuration of the individual" (at pp 510–511).

Albertyn and Goldblatt say that the:

> "Constitutional Court tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds. Sex is generally taken to mean the biological differences between men and women, while gender is the term used to describe the socially and culturally constructed differences between men and women." (C. Albertyn and B Goldblatt, "*Equality*", in S. Woolman and M. Bishop (eds.) *Constitutional Law of South Africa* (2ed), at 35–55.)

23 [1970] 2 All ER 33 (PDA) at p 48.

24 For an insight into how "conservative" submissions on the draft bills affected the enactment of the Civil Union Act and the decision not to amend the Marriage Act, see P de Vos and J Barnard, "*Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga*" 2007 (124) SALJ 795.

25 *Cossey v The United Kingdom* [1990] ECHR 21, (1991) 13 EHRR 622 at para. 4.5.2.

> intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities); it is a societal bond, in that married people (as one learned writer put it) 'represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence'; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one." (Footnotes omitted.)

I am unable to find anything in that statement that is inconsistent with the concept of marriage in our modern law.[26]

[21] As mentioned, Parliament responded to the *Equality Project* judgment by enacting the Civil Union Act. It left section 30(1) of the Marriage Act on the statute book unchanged. It may be inferred that the Legislature's approach was that by enacting the Civil Union Act it had corrected the identified constitutional incompatibility in that provision of the Marriage Act.

[22] "Marriage" is not defined in either Act. It is established that the word is used in the Act consistently with its meaning in the common law.[27] Counsel on both sides accepted, correctly in my view, that the word also has that meaning in the Civil Union Act.[28] It follows that it was also not in issue between the parties that the common law has been developed in the manner described earlier.[29]

[23] The parties appeared to be in agreement at the hearing that, by reason of the unchanged wording of section 30(1) of the Marriage Act,[30] only marriages in which the intending parties are of opposite sex can be solemnised under that statute.[31] Equivalent unions under Civil Unions Act, by contrast, may be solemnised irrespective of the sex/gender of the

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26 *Cf.* Sinclair *The Law of Marriage*, *op cit supra* (at fn 8), especially *sv* "*The Marriage Relationship*, *(a) Consortium Omnis Vitae*" at pp 422–424.

27 In *Equality Project*, at para [3], Sachs J noted that "[t]*he common law* [in respect of marriage] *is not self-enforcing, and in order for such a union to be formalised and have legal effect, the provisions of the Marriage Act have to be invoked*".

28 See s 13 of the Civil Union Act quoted in fn 34 below.

29 In para [19] above.

30 See the highlighted words of the provision quoted in fn 19 above.

31 The applicants' Counsel had argued in their heads of argument that same-sex marriage was possible under the Marriage Act through "*an approved marriage formula*". The submission was no doubt based on the opinion to that effect expressed in the majority judgment in *Fourie and another v Minister of Home Affairs and others* 2005 (3) SA 429 (SCA), at paras [35]–[37] [also reported at [2005] 1 All SA 273 (SCA) – Ed]. The subsequent introduction of Civil Union Act called the feasibility of that approach into question. I am not aware whether there has yet been a case raising the interesting question whether an intended marriage in which one of the parties has already transitioned can be solemnised under the Marriage Act. The respondents' answering affidavit posits a positive answer. The second respondent averred "Had a partner to a relationship undergone a sex alteration prior to marriage and had such a marriage resulted in them entering into a heterosexual relationship, such couples (*sic*) would have been entitled to marry their respective partners under the Marriage Act". (Underlining in the original.) The respondents' position in this respect is somewhat ironic in the context of the importance they attach in other respects to the public's 'sensibilities' about any amendment to the Marriage Act.

parties thereto.[32] The parties entering into a formalised union under that Act must elect whether it is to be called a "marriage" or a "civil partnership".[33] Whichever designation is chosen, the character of a union entered into in terms of the Civil Union Act is indistinguishable in its legal effect and consequences from one solemnised under the Marriage Act.[34] The Civil Union Act is therefore available to both opposite- and same-sex couples for the solemnisation of their intended marriages. A man and a woman intending to get married to each other accordingly have a choice about the statute under which they will exchange their vows;[35] a same-sex couple does not. I shall describe the reported reason for this anomaly presently.

[24] Marriage officers who hold their position *ex officio* by virtue of section 2 of the Marriage Act are automatically also "marriage officers" in terms of the Civil Union Act.[36] However, in terms of section 6 of the Civil Union Act a marriage officer *ex officio* may notify the Minister that he or she

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32 Parliament sought to correct the defect identified in s 30(1) of the Marriage Act by providing the following formula in s 11(2) of the Civil Union Act to be used in the solemnisation of unions under the latter Act:
"In solemnising any civil union, *the marriage officer* must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:
'Do you, A.B., declare that as far as you know there is no lawful impediment *to your proposed marriage*/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as *your lawful spouse*/civil partner?',
and thereupon the parties must give each other the right hand and *the marriage officer* concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:
'I declare that A.B. and C.D. here present *have been lawfully joined in a marriage*/civil partnership." (Emphasis supplied for highlighting.)
The formula is plainly based on that in s 30(1) of the Marriage Act quoted in fn 19 above. The only material difference is the use of the words "*your lawful spouse/civil partner*" instead of "*your lawful wife* (*or husband*)".

33 S 11(1) of the Civil Union Act.

34 This follows from s 13 of the Civil Union Act, which provides:
"Legal consequences of civil union
(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to –
(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."

35 Provided that they are both over 18 (see the definition of "*civil union*" in s 1 of the Civil Union Act).

36 Para (a) of the definition of "marriage officer" in the Civil Union Act provides that the term means "a marriage officer *ex officio* or so designated by virtue of section 2 of the Marriage Act". S 2 of the Marriage Act provides:
"(1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.
(2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area."

objects on grounds of conscience, religion and belief to solemnising a civil union between two persons of the same sex, whereupon he or she is not obliged to solemnise such a civil union. Save as aforesaid, a marriage officer under the Civil Union Act "*has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act, to solemnise a civil union*".[37]

[25] Whether or not the dichotomous regime in respect of the solemnisation of marriages is constitutionally compatible is not a question that has to be decided in this case.[38]

[26] In addition to the six applicants identified thus far, a registered non-profit organisation called Gender Dynamix ("GDX") was also party, as the seventh applicant, to the institution of the proceedings. Using a human rights framework, GDX seeks to advance, promote and defend the rights of transgender and "gender non-conforming" persons in South Africa and beyond. The seventh applicant has been working for a decade now on various issues concerning "*the lack and/or improper implementation of the* [Alteration] *Act*". A number of its employees or former employees had contributed to the enactment of the statute.

The history of problems regarding the Alteration Act

[27] The current executive director of the seventh applicant testified that the organisation's experience was that the implementation of the Alteration Act has been attended by a variety of problems. She described that these fall into "three basic categories":

(a) Ignorance by relevant officials of the existence and content of the Act.

(b) The absence of prescribed forms and procedures for the administration of the Act,[39] with the result that some persons experienced what was described as "persecution" when making applications under the Act.

and

(c) The requirement by the Department of Home Affairs that applicants who were in marriages that had been solemnised in terms of the Marriage Act first obtain a divorce before being allowed to have their altered sex/gender recorded under the Alteration Act; alternatively, "*in extreme cases*", the arbitrary deletion or alteration by the Department of the official record of the affected marriages when a sex/gender alteration was recorded. (In one example given by the deponent, a person who submitted an application under the Alteration Act in 2009 had had the record of her marriage, which had been solemnised in 1976 in terms of the Marriage Act, changed, without her foreknowledge, to that of a marriage purportedly solemnised under the Civil Union Act in 2009.)

37 S 4(2) of the Civil Union Act.

38 See fn 24 above.

39 The Alteration Act, unusually, does not contain a provision for the making of regulations to assist in the administration of the statute.

[28] The deponent to the seventh applicant's supporting affidavit related that the reasons offered to applicants by the Department for the last-mentioned category of difficulty have included its understanding of the effect of the dichotomous regime provided by the existence side by side of the Marriage Act and the Civil Union Act and the reported inability of the Department's data capturing system to reflect parties to marriages that had been solemnised under the Marriage Act as being of the same sex. According to the deponent, the Department's perception that a catch-22 situation prevails has resulted in a number of applications just being left undetermined by the Director-General. One of the consequences has been that the ability of applicants to avail of the internal appeal remedies afforded in terms of the Alteration Act has been thwarted.[40]

[29] The Department has not been absolutely consistent, however, about its inability to register an alteration of sex in terms of the Alteration Act when the applicant has been party to a subsisting marriage in terms of the Marriage Act. The example was cited of a person who had applied for relief under the Act in 2011. Having initially been informed that she would first need to obtain a divorce, which she refused to do, the Department was eventually persuaded, after the applicant had obtained legal representation with the assistance of GDX, to amend the gender marker despite the continued subsistence of the marriage. It did so without "converting" the record of the union to one under the Civil Union Act.[41]

[30] The absence of a uniform approach by the Department to these matters is striking.

[31] The seventh applicant has been involved since 2011 in a series of engagements with the Department and the parliamentary portfolio committee for Home Affairs in an endeavour to resolve the difficulties. These have not borne fruit, and in some instances its approaches were not even favoured with acknowledgment. According to its executive director, GDX has assisted the first to sixth applicants to institute and prosecute the current proceedings because the organisation's "*advocacy efforts on the issue have simply been ignored*".

[32] The experiences of the transgender spouses confirm that the Alteration Act is being unsatisfactorily administered. It is appropriate to describe them in greater detail because they have each sought declarations in terms of section 172(1)(a) of the Constitution that the respondents' conduct in respect of their applications under the Alteration Act was inconsistent with the Constitution. The affirmative significance of such declarations, quite apart from any remedial or ancillary relief that might attend them, is axiomatic.

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40 See also the description of difficulties encountered by applicants under the Alteration Act in the paper by T Klein (fn 10 above).

41 It is not apparent on the papers how the reported inadequacies of the Department's data capturing system must have been overcome in this particular instance.

KOS's application in terms of the Alteration Act

[33] KOS was born in 1981. She was raised as a male, but says that she "always knew that [she] was different". She married the second applicant in 2011, a year before she was diagnosed with gender dysphoria. She has been on hormone therapy since 2013 preparatory to gender reassignment surgery.

[34] She submitted her application in terms of the Alteration Act in March 2014 at the Department of Home Affairs' offices in George. Her wife accompanied her. The first official with whom they dealt refused to accept the application, despite KOS having a copy of the Act with her. The official advised KOS that it could not be possible to alter her gender as that "*must be an offence of some kind*". So despondent was KOS at this treatment that it was only at the insistence of her wife that they thereafter arranged to see a different official, who agreed at least to accept the application, whilst nonetheless expressing reservations about its feasibility. (KOS's reception at the Home Affairs office manifests the category of problem described in paragraph 27 (a) and (b) above.)

[35] Despite repeated enquiries KOS and her family were unable to obtain any information or feedback about the progress of the application. An email from KOS's mother to the Minister in February 2015, which catalogued nine fruitless telephone calls to the Department's client services desk during the period November 2014 to February 2015 about the lack of response to the application, was not favoured with reply or acknowledgment.

[36] During the prolonged period that her application was mired in bureaucratic inertia, KOS was all the while gradually coming to look more like a woman than a man as a result of the hormonal treatment that she was receiving. She consequently found herself in embarrassing situations in which she was called upon to explain why her appearance did not correspond with that depicted on her official identity cards. Some people proved sympathetic to her predicament; from others it elicited reactions of suspicion or hostility. This caused her increasingly to withdraw from dealing with the outside world and leave the management of her affairs to her wife.

[37] Eventually, in April 2015, KOS approached the Department's provincial headquarters in Cape Town. She set out the unsatisfactory history of her application and pointed out that the altered birth certificate that she had applied for was essential to enable her "*to be able to resume my life as a registered South African citizen*". She explained that without it she could not obtain her "*new ID book*, *driver's licence*, *passport* [or] *even open . . . a bank account*". An official there took up the first applicant's cause.

[38] It was discovered that the Department's head office in Pretoria, to which the office in George should have directed the application, had no record of it. However, even after a copy of the application was then faxed to the Pretoria on two occasions, a response was still not forthcoming. To their credit, KOS's exasperation about the lack of progress was shared by the officials in Cape Town who were dealing with the matter.

[39] On 23 June 2015, the Department's head office advised that more information in the form of expert reports was required; in particular, a letter from a medical doctor stating that "*the operation was done*". Gender

reassignment surgery is actually not a requirement for relief in terms of the Alteration Act. (The head office request was a further manifestation of the problem described in paragraph 27 (a) above.) KOS nevertheless provided an additional letter from her doctor, but this notwithstanding, another four months passed without progress.

[40] After pressing the official dealing with the matter for a response, KOS was informed by telephone in late October 2015 that it had been ascertained that she was married and that the application could not be processed without proof that she had obtained a divorce (the problem identified in paragraph 27 (c) above). The reason given was that two women could not be married to each other. When KOS challenged the validity of that proposition, she was told that the problem related to the Department's computer system, which would not allow KOS's identity number to be changed while she remained registered as having been married under the Marriage Act. (It will be recalled that a person's marital status is not reflected on their identity number.[42]) It was suggested that she and the second applicant should go through with divorce proceedings and then remarry under the Civil Union Act.

[41] KOS and the second applicant thereafter took legal advice concerning divorce proceedings and were advised, correctly, that absent an irretrievable breakdown in their marital relationship, no grounds existed for them to seek an order under the Divorce Act for the dissolution of their marriage.

[42] The upshot is that KOS's application has effectively been refused; alternatively, the Director-General has failed to make the decision that he was required to in terms of the Alteration Act.

GNC's application in terms of the Alteration Act

[43] GNC was born in 1953. She experienced gender dysphoria from her early years, but for a long time resisted accepting her female self. She did this by consciously adopting especially masculine roles, such as voluntarily enlisting in a combat unit during her compulsory army service and later becoming a geologist, which she perceived to be a profession preponderantly associated with men.

[44] GNC married the fourth applicant in 1988, long before the enactment of the Civil Union Act. They have a daughter, who was born in 1992.

[45] For many years GNC internalised her gender dysphoria and suffered considerable distress by having to live with what she called her "secret". She disclosed her situation to her wife only in 2014. The fourth applicant has been understanding of GNC's situation and supported her decision to transition.

[46] GNC has undergone gender reassignment surgery. She has also succeeded in changing her forenames and obtaining an identity document that reflects her appearance as a female, but incongruously continues to indicate her sex/gender as male. When she applied for an altered birth certificate she was informed, in July 2016, by the same official who dealt

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42 See para [7] above.

with KOS's application that the Department's computer system "*simply* [would] *not allow an amendment to* [her] *gender as* [she] *was married in terms of the Marriage Act*". GNC was also advised to obtain a divorce and to remarry under the Civil Union Act. Understandably, she sees "*no need to get a divorce to satisfy a computer system*". In the circumstances, GNC's application has also effectively been refused.

[47] Like KOS, GNC has encountered difficulties and embarrassment in her day to day dealings with the outside world. This has been caused by the discrepancy between her appearance and the sex/gender descriptor on her identity documents.

WJV's application in terms of the Alteration Act

[48] WJV was born in 1971. She experienced gender dysphoria from an early age. When she told her father that she was in fact not a boy, but a girl, she was given a severe beating and subsequently compelled to participate in what her father regarded as masculinising activities. She came close to physically transitioning in the early 1990's but was persuaded by her psychologist that medical intervention might not be necessary. She was drafted into the army before she could make a decision. She did not fit in well in the military and her experience there was an unhappy one.

[49] WJV met the sixth applicant after her discharge from the army. They were married on 13 September 1997. WJV had told her wife about her gender dysphoria before the marriage.

[50] WJV commenced the process of physically transitioning in 2012. She approached the offices of the Department of Home Affairs at Roodepoort in November 2013 with a view to having her registered names and sex descriptor changed. The official with whom she dealt there advised that it would be better to tackle those objectives using a two-stage process; that is by first having her names changed, and then, when that had been done, applying for her sex description to be altered. The official advised that trying to achieve both objectives together would "*confuse the system*" and be likely to cause "*a slowing and/or stalling of the application*".

[51] Not wishing to prejudice her applications, WJV went along with the advice and applied first for a change of forenames. In March 2014, she received notice that her forenames had been officially changed in terms of section 24 of the Births and Deaths Registration Act 51 of 1992, and she was issued with a replacement identity document.

[52] WJV submitted her application under the Alteration Act on 7 June 2014. She was able to track the progress of the application through the official channels. The application was cleared in respect of fingerprints on 24 June 2014. By 15 July 2014 the system reflected that the application had been "processed", and then showed that the "rectification department" had received it on 21 July. From that stage, however, the hitherto reasonably efficient treatment of the application ceased.

[53] The lack of any further progress caused WJV to enlist the assistance of the Legal Resources Centre ("LRC") in December 2014. The LRC wrote repeatedly to the Department, including direct approaches to the Director-General and the Minister. The papers suggest that, save for one

reply from the Department's client services centre, the correspondence from the LRC was not even acknowledged.

[54] Eventually, in October 2015, WJV was invited to come to the Department's office in Roodepoort as her documents were ready. She was advised that her wife should accompany her, as it would be necessary for the sixth applicant to apply for a replacement identity document. On arrival at the office, WJV was handed a letter confirming that her gender had been changed. The sixth applicant was informed that she was required to obtain a replacement identity card. It was explained to WJV and her wife that as a consequence of the registration of WJV's sex/gender change, the Department had had to delete its record of their marriage, and that the sixth applicant's surname had therefore reverted to her maiden name. WJV and the sixth applicant learned that the Department's "system" now reflected that they had never married. They were advised that they were free to marry under the Civil Union Act, and told that the Department would be willing to facilitate the solemnisation of a marriage between them under that Act.

[55] WJV also testified to various difficulties that she had had with her shopping and banking accounts because of the disparity between her registered and apparent identities. Her work requires her to travel to neighbouring countries, which she says "are known to be hostile to LGBTI communities". It has been a constant concern to her that the incongruence between her identity documents and her physical presentation might lead to difficulties on these trips, as is the prospect of being stopped by the local law enforcement authorities and having to explain her situation to strangers who might not accept her account and arrest her.

The relief sought in these proceedings

[56] The applicants applied in their notice of motion for varied and wide-ranging relief. It is sufficient at this point to describe it in the broad. By way of primary relief they sought various types of declaratory relief affirming the subsistence of their marriages; declaring that the second respondent "*is required by law to alter a person's sex description in terms of the Alteration* [Act] . . . *irrespective of that person's marital status*" and declaring that the Department's refusal to process the applications of KOS and GNC in terms of Alteration Act because they were married in terms of the Marriage Act was unconstitutional and unlawful, and that its deregistration of the marriage between WJV and the sixth applicant was also unlawful and unconstitutional.[43] They also sought interdicts directing the second respondent to grant the applications by KOS and GNC under the Alteration Act and to correct the population register to reflect that WJV and the sixth applicant are married to each other.

[57] Contingently upon the court taking the view that the primary relief, or at least part of it, fell properly to be sought in proceedings under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the applicants sought condonation, in terms of section 9 of that Act, for having instituted the proceedings outside the time limit prescribed in

43 The last-mentioned head of relief is that which I categorised earlier (at para [32]) as having been sought in terms of s 172(1)(a) of the Constitution.

section 7(1) of the Act and, in terms of section 7(2)(c), exempting them from exhausting the internal remedies under the Alteration Act.

[58] By way of secondary relief, sought in the alternative to the aforementioned primary relief, and contingently upon the court upholding the Department's understanding of the statutory scheme, the applicants sought a declaration that the Alteration Act and/or the Marriage Act and/or the Civil Union Act is/are inconsistent with the Constitution and invalid to the extent that any or all of them fail to allow the alteration of a person's sex description and sex status while that person is in a marriage that was solemnised under the Marriage Act. Various forms of other relief ancillary to any such declaration were also sought.

[59] The applicants have sought certain of the relief not only in their own interest, but also, in terms of section 38 of the Constitution, in the interest of all other couples who find themselves in a similar situation.

The respondents' case

[60] The respondents opposed the application. The Director-General of the Department of Home Affairs deposed to an answering affidavit on behalf of all three respondents[44]. He averred that "*the issues presented in this application are novel and have not been previously canvassed by the Department prior to them having been raised by GDX in its engagement with the Department*". He proceeded "[t]*his matter squarely raises an intersectional debate of issues related to same-sex relationships*, *marriage and sex alteration*".

[61] The respondents contend that there is a gap in the existing legislation that needs to be filled if the applicants' complaints are to be effectively addressed. They aver that the effect of the statutory framework currently in place is the following (I quote from paragraph 13 of the answering affidavit):

1. Once a partner to a marriage undergoes a sex alteration (thereby converting the relationship into a same-sex one), such a relationship does not constitute a marriage under the Marriage Act.
2. However, the law provides no mechanism by which to convert such a marriage concluded under the Marriage Act into a marriage under the Civil Union Act or indeed to provide grounds upon which such a couple may divorce (it being accepted that the grounds for divorce under the Divorce Act do not apply on the facts of [the current] matters.
3. The result is that such a couple remains married under the Marriage Act, but that their sex alteration cannot be registered as contemplated under the Alteration Act.
4. This state of affairs results in persons who are in marriages concluded under the Marriage Act (and who were at the time of concluding such marriages in heterosexual relationships) being deprived of (*sic*) registering a sex alteration under the Alteration Act.

[62] The respondents accept that there is nothing in the Alteration Act, read on its own, to support the notion that an applicant's marital status has any bearing on his or her entitlement to obtain an altered birth certificate

44 The first respondent is the Minister of Home Affairs and the third respondent is the Deputy Director-General, Department of Home Affairs: Civic Services.

under that Act. They contend, however, "*that the issues presented in this matter cannot be viewed in isolation solely through the lens of the Alteration Act*". "*Equally important*", they say "*are the implications of an alteration under the Alteration Act for the Marriage Act*". They argue that the current matter involves "*a question of* [?marital] *status*". The respondents say it is also "*a matter that touches on deep public and private sensibilities which* [they] *aver Parliament is well-suited to finding the best ways to vindicate*".

[63] The respondents assert that they "do not accept the correctness of an argument seemingly advanced by the applicants that even though the Marriage Act does not allow for the *conclusion* of a same-sex marriage, it does allow for and apply to a marriage that was concluded as heterosexual and *subsequently became* same-sex". They point out that after the judgment in the *Equality Project* case the Department "gave careful consideration to the question whether the Marriage Act should be amended to make it applicable to same-sex marriages. There was extensive and wide ranging objection, *inter alia*, from the religious sector to follow such a course; the Civil Union Act was accordingly opted for", (Underlining in the original.) They contend that in the result there is a "parallel regime of the law governing marriage".

[64] The essence of the respondents' contentions is that the first to sixth applicants are the victims of a legislative conundrum. They accept that on their approach the resultant situation would impel a finding that some (unspecified) law or conduct involved was inconsistent with the Constitution, and that a declaration in terms of section 172(1)(a) of the Constitution would be indicated. The Director-General averred that:

> "the respondents have no objection to an order declaring that the Civil Union Act is unconstitutional for its failure to recognise as a valid marriage (either in its own right or by converting a marriage concluded under the Marriage Act), the marriage of two persons who were married as a heterosexual couple under the Marriage Act, and where, subsequent to such marriage, one person to that marriage registers a sex alteration on the Birth Register pursuant to the alteration Act".

Elsewhere in the answering affidavit the Director-General postulates that the conundrum might also be addressed by amendments to Alteration Act,[45] or the Marriage Act.[46]

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45 The suggestion was that the Alteration Act could be amended "*so as to provide that a condition or pre-requisite to an application for a sex alteration by a married person is consent by such person* (*and their marriage partner*) *to convert their marriage from one under the Marriage Act to one under the Civil Union Act*". The case does not call for any determination in this regard, but I would venture that any such amendment would be unlikely to withstand constitutional scrutiny for a number of reasons. It would also be founded on a false premise. Relief under the Alteration Act affords recognition of a sex alteration, not permission to undertake one.

46 The postulated amendment to the Marriage Act would comprise of "*a deeming provision . . . (with or without the consent of the other marriage partner) that a marriage concluded under the Marriage Act between a heterosexual couple is deemed to be a marriage under the Civil Union Act in instances where one party to a marriage concluded under the Marriage Act has undergone a sex alteration under the Alteration Act*". The postulate is misconceived. First, a person does not undergo a sex alteration under the Alteration Act, he or she merely obtains an altered birth certificate in consequence of a sex/gender alteration that has already been undergone. Second, a postnuptial deeming of a marriage solemnised under one Act as one concluded under another Act would be vacuous if it would have no practical effect whatsoever on the marriage partners' subsisting rights and obligations *vis à vis* each other, or third parties.

[65] The respondents averred that while they "*accept that the vindication of rights or indeed the addressing of legislative lacuna[e] are not dependent on public opinion*, . . . *the value of a public consultative process cannot be underestimated*." They stressed that the Department was "*mindful of the widespread and extensive public opposition to an amendment of the Marriage Act*" which had ". . . *largely informed Parliament's decision to adopt the Civil Union Act* (*as opposed to amending the Marriage Act*), *in order to give effect to the Order of the Constitutional Court in* [the *Equality Project* case]".

[66] The Director-General sought to explain the advice given by departmental officials to four of the applicants that they should obtain a divorce and remarry under the Civil Union Act as having been premised on the notion that "*under the current legislative framework a person in a same-sex relationship cannot conclude or remain in a marriage under the Marriage Act*". (My underlining.) He summed up this explanation with the statement "*I accept that is indeed correct as a matter of law*".

[67] The Director-General's response to the deletion by the Department of the record of WJV's marriage was, however, entirely inconsistent with his notion that a person in a same-sex relationship "*cannot remain in a marriage under the Marriage Act*". He said that the registration of the alteration of WJV's sex/gender in terms of the Alteration Act and the attendant deletion of the registration of his and the sixth applicant's marriage had been "a mistake". He reiterated his understanding that the:

> "legislative framework . . . does not simultaneously allow for a person married under the Marriage Act who has undergone a sex alteration to have their sex alteration registered on the system while simultaneously allowing such a person to remain married under the Marriage Act; this is because the result of the sex alteration would be that that person would be in a same sex relationship, which is not permitted under the Marriage Act."

Discussion

[68] I have described the Director-General's reasoning as "inconsistent" because he tendered to restore the registration of the marriage of WJV and the sixth respondent on the system, subject to the simultaneous reversal of the recordal of WJV's sex/gender change under the Alteration Act. In other words, notwithstanding his averment that a couple that have become a same-sex couple as a result of one of them transitioning cannot "*remain married under the Marriage Act*", he is nevertheless willing to restore the registration of WJV and the sixth applicant's marriage. And he clearly does not have [in] mind deeming it a marriage under the Civil Union Act. What he is apparently content to tolerate is an inaccurate population register and a continuing breach by WJV of the obligation under the Identification Act to obtain a replacement identity card by reason of her altered circumstances.

[69] This highlights, I think, the confusion that appears to exist in the minds of the respondents and officialdom in the Department concerning the import and effect of the relevant legislation. I regret to say that their approach appears to have been coloured by the persisting influence of the religious

and social prejudice against the recognition of same-sex unions[47] that, according to their evidence, was accommodated by the decision not to amend the Marriage Act but to bring in the Civil Union Act alongside it instead. They have not identified a single provision in any of the legislation to which they refer that expressly forbids the processing and positive determination of the transgender spouses' applications under the Alteration Act. All that they have been able to point to are the socio-religious objections that reportedly influenced the Legislature's decision to introduce the Civil Union Act and leave the Marriage Act unamended. They do not explain why those considerations should, or properly could, weigh to distort the plain meaning of the enactments as they appear in the statute book.

[70] What is also strikingly absent from the respondents' answer is any acknowledgment of the expressly enshrined constitutional principle that statutes must be interpreted in a manner consistent with the promotion of the spirit, purport and object of the Bill of Rights. Although section 39(2) of the Constitution places the interpretative duty on adjudicative bodies such as courts and tribunals, the provision necessarily implies that organs of State charged with administering legislation are expected to do so consistently with the meaning which the courts are called upon to give it. Organs of State fulfil that obligation by complying with section 7(2) of the Constitution, which obliges the State "*to respect*, *protect*, *promote and fulfil the rights in the Bill of Rights*". The manner in which the applications by the transgender spouses were treated manifests a regrettable lack of compliance by the Department with its constitutional obligations in a number of respects.

[71] Furthermore, had there indeed been a serious concern that there was a gap in the legislation that required to be addressed in order to meet what the respondents admit has been the unconstitutional treatment of the first to sixth applicants (and others like them whose rights have been advocated by the seventh applicant), one would have hoped that the Department would by now be able to show that it had conscientiously engaged with the issues. Section 237 of the Constitution enjoins that all constitutional obligations must be performed diligently and without delay. It is regrettable, having regard to history, that at this late stage the Department has not formulated concrete proposals in respect of the supplementary provisions it contends are needed, and that it reports that it should be afforded a period of 24 months from the date of any order the

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47 In *Fourie* (SCA) *supra*, at para [20], Cameron JA referred to "*the acknowledged fact that most South Africans still think of marriage as a heterosexual institution*, *and that many may view its extension to gays and lesbians with apprehension and disfavour*". I have little doubt that the same can be said about attitudes towards same-sex marriages that come about incidentally because of the sex/gender change of one of the originally opposite-sex partners in existing unions. Prejudice, however, can never justify unfair discrimination; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para [37] and see also *Equality Project* at paras [112]–[113].

court may make in terms of section 172(1)(a) of the Constitution to remedy the situation.[48]

Proper construction of the pertinent legislation

[72] I turn now to consider whether the respondents' argument that there is a lacuna in the legislation can be sustained upon a proper construction of the extant laws.

[73] As mentioned, the respondents concede that there is nothing in the Alteration Act itself that expressly or impliedly indicates that the applicant's marital status has any bearing on the ability or entitlement of a person who has transitioned to obtain administrative relief under the provisions of the statute. The object of the Act is reflected in its long title, which is "[An Act]: *To provide for the alteration of the sex description of certain individuals in certain circumstances*; *and to amend the Births and Deaths Registration Act, 1992, as a consequence*; *and to provide for matters incidental thereto*". The sole criterion for obtaining an altered birth certificate under the Act is proof, in the form prescribed by section 2(2), to the reasonable satisfaction of the Director-General, that the applicant has altered his or her sex/gender. The Alteration Act therefore does not contain anything to support the respondents' interpretation of the statutory framework.

[74] I have already described the administrative consequences of an altered birth registration in terms of the Alteration Act.[49] The consequences are plainly directed towards facilitating the maintenance of an accurate and meaningfully informative population register. As I have highlighted, the failure by a person who has transitioned to obtain a replacement identity card is a criminal offence under the Identification Act. Such a person can obtain a replacement card only after going through the process provided in terms of the Alteration Act. The purpose of the Identification Act, as reflected in its long title is "[t]*o provide for the compilation and maintenance of a population register in respect of the population of the Republic*; *for the issue of identity cards and certain certificates to persons whose particulars are included in the population register*; *and for matters connected therewith*". The evident purpose of the population register is to provide generally for a database to be used to assist in matters of public administration. The content of the population register is not publically available and it may be accessed only with the specific consent of the Director-General.[50] This confirms the primarily governmental purpose of the register. Similarly, the particulars recorded

48 A prevailing reluctance to embrace and advance equality in the areas of sex and gender, especially when issues concerning homosexuality might be involved, is suggested by the fact that the significant advances made towards the realisation of constitutional rights and protections in this area since the dawn of the constitutional era have in the main been achieved through activist litigation, and not, as s 7(2) of the Constitution would contemplate, proactive executive and legislative action. See the long list of cases, many of them involving the Department, referred to in paras [12]–[14] and the footnotes thereto in *Fourie* (SCA), *supra*. The examples of legislatively initiated amelioration referred to by Ackermann J in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para [37], have, by comparison, been relatively limited in their ambit.

49 At paras [5]–[9] above.

50 S 6 of the Identification Act.

in the population register may be amended only with the consent of the Director-General.[51]

[75] The public working of the register is manifested by its system of identity cards. The purpose of identity cards is to combat fraud in both the public and private sectors, and to assist in law administration and enforcement. A person's marital status does not impact on the formulation of his or her allocated identity number in terms of section 7 of the Act. On the contrary, the indication of any personal particulars apart from the person's date of birth, gender and citizenship status is expressly precluded from inclusion in their identity number.[52] Many of life's ordinary undertakings such as travel, legally driving a motor vehicle, or opening a banking account require every South African resident to carry one or more of the various types of identity card recognised in terms of the Identification Act. As the practical experience of the transgender spouses testifies, identity cards do not serve those purposes well if they do not accurately reflect the actual identity of the cardholder as he/or she would present in ordinary circumstances to the outside world. It will not help if anyone whose sex/gender characteristics have been altered from male to female is forced to keep a card showing their original sex/gender with a photograph depicting them as a person of the opposite sex to that which they actually appear to be. Having regard to the objects of the Identification Act, no conceivable purpose could be served by maintaining an inaccurate record of the particulars of any individual. On the contrary, to do so would thwart the effective operation of the Act and impede the exercise of personal rights and freedoms.

[76] I have already referred to the provisions of section 8(e) of the Identification Act.[53] In the case of the first to sixth applicants, it has the effect that the particulars of their respective marriages on the relevant marriage registers must be recorded on the population register. That will be so even if the marriages are subsequently terminated. The second respondent is obliged to supplement the information so recorded on the population register with any "*such other particulars concerning* [a person's] *marital status as may be furnished to the Director-General*". Information concerning the termination of a marriage would be an obvious example of "*such other particulars*". The particulars of a divorce order would fall to be added to the information on the register concerning the person's marital status. The respondents concede that the first to sixth applicants' marriages, remain valid notwithstanding the actual change of sex/gender of one of the parties thereto, and that they can be terminated only by death or divorce. It is not apparent to me why information concerning an alteration of sex/gender – something that does not affect the subsistence or legal effect of a recorded marriage – would constitute particulars falling to be recorded under section 8(e) of the Identification Act. All that would be required is an amendment of the particulars recorded in respect of the person's gender in terms of section 8(b).

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51 S 6 of the Identification Act.

52 S 7(2) of the Identification Act, and in particular the following words therein "*and no other particulars whatsoever*".

53 In para [6] above.

[77] When regard is had to the close and direct inter-relationship between the workings of the Alteration Act and the Identification Act – both of which are administered by the Ministry of Home Affairs – it is perplexing that the respondents omitted to deal with this most directly practical aspect of the legislation in their answering papers. Indeed, they made no mention of the Identification Act in their answering papers whatsoever, or of the effect on its administration of the "lacuna" they would seek to identify in the relevant statutory framework.[54] It is obvious that the practical inter-relationship between the Alteration Act and the Identification Act for the purposes of government administration is immediate and real. The nature of its alleged "intersectional" relationship with the Marriage Act or the Civil Union Act on the other hand has proved difficult for the respondents to pinpoint, unsurprisingly.

[78] The problem with the implementation of the Alteration Act that the respondents have sought to identify seems to arise from their understanding of the Marriage Act and the Civil Union Act.

[79] The object of the Marriage Act appears from its long title. It is "[t]*o consolidate and amend the laws relating to the solemnization of marriages and matters incidental thereto*". (Underlining supplied for emphasis). It is unnecessary to analyse the content of the Act in detail. The "matters incidental" to the solemnisation of marriages with which it deals are the appointment and authority of marriage officers; the formalities that must be observed before a marriage can be solemnised, and what must be done by the marriage officer if objections are raised to a proposed marriage; the circumstances in which a marriage between two minors without parental or guardian consent may be dissolved; the prohibition of the marriage of boys under 18 and girls under 15 without ministerial permission; permitting the marriage of certain persons connected by affinity by virtue of previous marriages; and providing when and where marriages may be solemnised and for the presence thereat of at least two competent witnesses.

[80] The difficulties that the respondent rely on appear to lie in sections 29A and 30(1) of the Marriage Act.

[81] Section 30(1) of the Act provides for the marriage formula to be used in the solemnisation ceremony. As discussed earlier,[55] this is the provision that was centrally under consideration in the *Equality Project* case, which, because it has been left unamended by the Legislature, continues to have the effect of precluding same-sex couples from having their partnerships solemnised under the Marriage Act. "*Solemnisation*" is a noun derived from the verb form "*solemnise*", which means "*duly perform* (*a ceremony, especially that of marriage*) › *mark with a formal ceremony*".[56] That is what section 30(1) is concerned with. It does not bear on the consequences of any marriage solemnised in terms of its provisions. Indeed, as mentioned earlier, the Act does not contain any provision concerning *the consequences*

54 The only mention of the population register was at para [99] of the respondents' answering affidavit, where the deponent stated "*I do not accept that an alteration of a person's sex description in the Population Register would not affect the validity of a marriage.*"

55 At paras [18]–[19], and fn 19.

56 *Concise Oxford English Dictionary* (10ed), revised (OUP, 2002).

of a marriage solemnised under its auspices. On the contrary, it is common ground that those are determined by the common law and are indistinguishable from those of a marriage or civil partnership solemnised under the Civil Union Act.

[82] The Marriage Act, moreover, does not contain anything prohibiting a party to a marriage duly solemnised in terms of the formula prescribed in section 30(1) from undergoing a sex-change or obtaining an altered birth certificate in terms of the Alteration Act. Any provision that had such an effect would, for a number of reasons, be of very doubtful constitutional validity. It would probably be found to offend against the basic rights of everyone to equality because it would be likely to unfairly discriminate against affected parties on one or more of the grounds set out in section 9(3) of the Bill of Rights and also to unjustifiably infringe the right that everyone has to bodily and psychological integrity, including the right to security in and control over their body (section 12(2)(b) of the Bill of Rights). There being no express provision in the Marriage Act having the effect contended for by the respondents, why should one be imputed? For the reasons canvassed earlier, it would be against constitutional principle to interpret or apply the express provisions of the Marriage Act in a manner that would undermine, rather than promote the spirit, purport and objects of the Bill of Rights. For all these reasons, I am unable to find a cognisable basis in the facts of this case for interconnecting section 30(1) of the Marriage Act with the implementation of the Alteration Act.

[83] Section 29A of the Marriage Act prescribes the registration of a marriage solemnised under the Act: It provides:

> "Registration of marriages
>
> (1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.
>
> (2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986 (Act 72 of 1986).[57]"

The only legal and practical effect of registration in terms of section 29A is to create an official record of the *solemnisation* of the marriage in terms of the Act as an historical fact. I have already discussed the consequential significance of the registration for the workings of the Identification Act. Registration is a matter of record keeping; it has no more bearing than section 30 does on the legal consequences of the marriage.

[84] The respondents' Counsel drew attention to the fact that the marriage certificate and other official forms provided for in terms of the regulations made under the Marriage Act identify the parties as "husband" and "wife", and raised this as presenting a practical difficulty should either of the parties subsequently change their sex/gender. If there is a difficulty, I

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57 The obligation imposed on marriage officers in terms of s 29A(2) with reference to the repealed Identification Act, 1986, would fall to be construed, in terms of s 12(1) of the Interpretation Act 33 of 1957, as applicable with appropriate modification with reference to the current Identification Act, 1997.

fail to see why the Minister should not be able to address it by exercising her regulatory powers in terms of section 38(1)(a) of the Act to make provision for an appropriate form to cater for any required amendments to the official records or registers. There is nothing in the Act that prohibits the amendment of records to take account of subsequent name and/or sex/gender details of persons whose marriages were duly solemnised under the statute. The Minister cannot rely on any shortcomings in the regulatory record-keeping mechanisms of the Marriage Act to deny transgendered persons their substantive rights under the Alteration Act, or to frustrate the substantive requirements of the Identification Act. Apart from any other considerations, to do so would be to act inconsistently with her obligations in respect of the provision of effective and coherent government.[58]

[85] Turning to the Civil Union Act. Its objects are expressed in the long title, which is repeated in section 2 of the statute, *s.v.* "*Objective of Act*", namely, "(*a*) *to regulate the solemnisation and registration of civil unions*, *by way of either a marriage or a civil partnership*; *and* (*b*) *to provide for the legal consequences of the solemnisation and registration of civil unions*". Apart from its provision of a gender neutral marriage formula, there are no pertinent differences between the prescribed formalities in respect of the solemnisation of marriages under the Civil Union Act and those under the Marriage Act. Unlike the Marriage Act, the Civil Union Act deals with the legal consequences of the unions that are solemnised under its auspices. As mentioned, it does so by providing that the legal consequences are the same "*with such changes as may be required by the context*" as those of a marriage solemnised in terms of the Marriage Act.[59] As discussed, both Acts treat marriage as "a union of *two persons*, to the exclusion, while it lasts, of all others". There is thus no parallel system of civil marriage, as contended by the respondents; there is only a parallel system for the solemnisation of marriages. The notion propounded by the respondents that there is scope for a "conversion" from one type of duly solemnised marriage to another has accordingly been advanced on a false premise.

[86] Furthermore, the development of our common law of marriage and the associated enactment of legislation enabling the formalisation of same-sex marriage has meant that the difficult socio-political issues identified by the House of Lords as standing in the way of its ability to come to the assistance of Mrs Bellinger,[60] and requiring the attention of Parliament, do not preclude a positive outcome of the application for the applicants in this case.[61]

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58 S 41(1)(c) of the Constitution.

59 See s 13 of the Civil Union Act, which has been set out in fn 34 above.

60 See *Bellinger v Bellinger* fn 5 above.

61 The law has also moved on in the United Kingdom since *Bellinger*. There has been far-reaching statutory reform. See, for example, the Gender Recognition Act 2004 (c. 7) and The Marriage (Same Sex Couples) Act 2013 (c. 30).

Conclusion

[87] The applicants are entitled in the circumstances to the primary relief for which they have applied. The failure of the Director-General to decide the applications of KOS and GNC under the Alteration Act, alternatively, his effective refusal of their applications amounted to "administrative action" within the meaning of PAJA, and therefore fell, in terms of the principle of subsidiarity, to be challenged in terms of the provisions of that statute. The proceedings were instituted outside the time limit prescribed in terms of section 7 of PAJA and can be entertained only if an extension of time is granted in terms of section 9 of the Act. As mentioned, the applicants have applied for such an extension. The respondents, quite properly in the circumstances, have not opposed the application for an extension of time. The application raises important issues that bear materially on the lives of a section of South African society and on matters of public administration. It would therefore be in the interests of justice that the required extension should be granted. The context also makes it appropriate, to the extent necessary, to exempt the first to sixth applicants from having to exhaust the internal remedies under the Alteration Act.

[88] It is not clear to me that the Department's deletion of the record of the marriage between WJV and the attendant unilateral change of the sixth applicant's surname back to her maiden name is "administrative action". The action was not taken in terms of any law. It was clearly unlawful and falls to be set aside for being in breach of the doctrine of legality. Lest I should be thought to be wrong in this approach, however, I shall contingently, to the extent that may then be necessary, also grant relief in terms of section 9 of PAJA in respect of the challenge mounted against those actions.

[89] The applicants sought an order declaring that the second respondent "*does not have the power to delete a marriage from the Population Register, or to alter a spouse's surname because one spouse has successfully applied for an alteration of their sex descriptor in terms of the* [Alteration Act]". I am not persuaded that making such an order would be appropriate. The respondents have conceded that the second respondent has no such power and have explained that what happened in connection with WJV's application under the Alteration Act was "a mistake". Similarly, I do not think it to be necessary or appropriate to make an order declaring that the first to sixth applicants' respective marriages are valid marriages in terms of the Marriage Act. It was common cause on the papers that the marriages were valid. The statement by the second respondent that such marriages could not continue to exist if one of the spouses altered his or sex was uttered in the context of his confused and contradictory attempts to explain the Department's understanding of the "intersectional" effect of the Alteration Act, the Marriage Act and the Civil Union Act. I consider that the declaratory orders that will be made will adequately address those aspects.

Orders

[90] The following relief is granted:

1. It is declared, in terms of section 172(1)(a) of the Constitution, that the manner in which the Department of Home Affairs dealt with the

applications by the first, third and fifth applicants under the Alteration of Sex Description and Sex Status Act 49 of 2003 ("the Alteration Act") was conduct inconsistent with the Constitution and unlawful in that it:

(a) infringed the said applicants' right to administrative justice;

(b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and

(c) was inconsistent with the State's obligations in terms of section 7(2) of the Constitution.

2. It is further declared that the second respondent is authorised and obliged to determine applications submitted in terms of the Alteration Act by any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed, for the alteration of the sex description on such person's birth register irrespective of the person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership (if any) was solemnised under the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006.

3. An order is made in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") extending the period within which the first to sixth applicants were permitted to commence proceedings for the judicial review of the second respondent's determination of, alternatively failure to determine, the respective applications submitted by the first, third and fifth applicants in terms of the Alteration Act to the date upon which the current application was instituted.

4. Insofar as might be necessary, an order is made in terms of section 7(2)(c) of PAJA exempting the first, third and fifth applicants from exhausting the internal remedies provided under the Alteration Act.

5. The second respondent's rejection of, alternatively failure to decide, the applications by the first and third respondents in terms of the Alteration Act is reviewed and set aside; and the second respondent is hereby directed to reconsider and, within 30 days of the date of this order, determine those applications in accordance with the provisions of the Alteration Act construed in the light of this judgment.

6. It is declared that the deletion by the Department of Home Affairs of the particulars in the population register compiled and maintained by the Department in terms of the Identification Act 68 of 1997 in respect of the marriage between the fifth and sixth applicants in terms of the Marriage Act, 1961, was unlawful; and the second respondent is hereby directed to, within 30 days of the date of this order, unconditionally, and without derogation from his approval of the fifth applicant's application in terms of the Alteration Act, reinstate on the register the record of the particulars of the solemnisation of the said marriage in terms of the Marriage Act.

a 7. The first respondent is directed to pay the applicants' costs of suit, including the costs of two Counsel.

For the applicant:
N Bawa SC, *M Bishop* and *E Webber* instructed by the *Legal Resources Centre*, Cape Town and Johannesburg

For the respondent:
K Pillay and *T Mayosi* instructed by the *State Attorney*, Cape Town

CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 319/17

In the matter between:

MATSHABELLE MARY RAHUBE	Applicant
and	
HENDSRINE RAHUBE	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HOUSING AND LAND AFFAIRS, NORTH WEST	Second Respondent
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent
REGISTRAR OF DEEDS, VRYBURG	Fifth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, GAUTENG	Seventh Respondent

Neutral citation: *Rahube v Rahube and Others* [2018] ZACC 42

Coram: Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

Judgment: Goliath AJ (unanimous)

Heard on: 17 May 2018

Decided on: 30 October 2018

Summary: Upgrading of Land Tenure Rights Act 112 of 1991 — constitutionality of section 2(1) — declaration of constitutional invalidity — violation of women's rights — right to equality — section 9(1)

Section 172(1)(b) of the Constitution — just and equitable relief — order limiting retrospective effect

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 26 September 2017 in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is confirmed subject to the variations set out in paragraph 2.

2. The order of the High Court is varied to read:

   "(a) Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 *GG* 373 of 16 November 1962 (Proclamation R293) into holders of rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution.

(b) The order in (a) above is made retrospective to 27 April 1994.

(c) In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and the upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith.

(d) The order in 2(a) above is suspended for a period of 18 months to allow Parliament the opportunity to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991.

(e) The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane in any manner whatsoever, until such time as Parliament has complied with the order in 2(a) above.

(f) The third respondent is ordered to pay the costs of the applicant, including the costs of two counsel."

3. The third respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

GOLIATH AJ:

Introduction

[1] *Batho botlhe ba tsetswe ba gololosegile le go lekalekana ka seriti le ditshwanelo.*[1] All human beings are born free and equal in dignity and rights. Whether in Setswana or in English, this extract from article one of the Universal Declaration of Human Rights is powerful because until 24 years ago it was not true for the majority of South Africans.

[2] During apartheid, the African woman was a particularly vulnerable figure in society and she suffered three-fold discrimination based on her race, her class and her gender. Reflecting upon the present, we must ask ourselves whether the African woman truly benefits from the full protection of the Constitution.[2] Moreover, we must establish whether enough has been done to eradicate the discrimination and inequality that so many women face daily. Laws and policies must seek to do more than merely regulate formalistically. The Legislature is enjoined to ensure that laws and policies promote the participation of women in social, economic and political spheres while also advancing the spirit, purport and objects of the Constitution. This is a case where a woman seeks to vindicate her right to access to housing – a right which is intrinsically linked to her dignity – by challenging a piece of legislation, which she contends perpetuates apartheid legislation that precluded her, and countless

[1] This is a translation of an extract from article 1 of the Universal Declaration of Human Rights from English into Setswana. Universal Declaration of Human Rights, 10 December 1948.

[2] Constitution of the Republic of South Africa, 1996.

African women like her, from holding land tenure rights, simply because of her race and gender.

[3] This case involves this Court exercising its section 167(5) powers,[3] to confirm the order of the High Court of South Africa, Gauteng Division, Pretoria[4] (High Court), that declared section 2(1) of the Upgrading of Land Tenure Rights Act[5] (Upgrading Act) constitutionally invalid, to the extent that it automatically converts holders of land tenure rights into owners of property, without providing other occupants or affected parties an opportunity to make submissions. We are required to deal with three questions. First, whether the High Court order should be confirmed. Second, if the order is confirmed, what remedy would be most just and equitable. Last, how this Court should handle the issue of costs.

Parties

[4] The applicant, Ms Matshabelle Mary Rahube, brings the application in her own interest in terms of section 38(a) of the Constitution, as well as in terms of

[3] Section 167(5) of the Constitution reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[4] *Rahube v Rahube* 2018 (1) SA 638 (GP) (High Court judgment).

[5] 112 of 1991. Section 2(1) of the Upgrading Act reads:

> "Any land tenure right mentioned in Schedule 1 and which was granted in respect of—
>
> (a) any erf or any other piece of land in a formalised township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;
>
> (b) any erf or any other piece of land in a formalised township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;
>
> (c) any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership,
>
> and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion."

section 38(c) of the Constitution, in the interests of other women who have been deprived of title to their homes by operation of apartheid laws and section 2(1) of the Upgrading Act. The applicant also brings this application in the public interest in terms of section 38(d) of the Constitution.[6]

[5] The first respondent is Mr Hendsrine Rahube, the applicant's brother. The second, third and seventh respondents (state respondents) are the state parties responsible for administering land reform and did not participate in the proceedings before us until this Court issued directions requesting them to make written submissions. These submissions were filed and support the legal arguments advanced by the applicant.

Background

[6] The applicant and the first respondent are siblings who, with other members of their family, moved into a property located at Stand 2328 Block B, Mabopane, North West Province (property) in the 1970s. At the time, the applicant, her grandmother, uncle, three brothers (including the first respondent) and two children all lived at the property. It is common cause that the grandmother was the "owner" of the property until she passed away in 1978. There is no documentary proof of her ownership. It may have been that the grandmother was simply the de facto owner, but the correctness of referring to her as the "owner" is neither here nor there given that the legal regime, as discussed below, made it clear that African women could not obtain formal rights in land because of gender discrimination.

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[6] Section 38 of the Constitution reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> . . .
>
> (c) anyone acting as a member of, or in the interests of, a group or a class of persons;
>
> (d) anyone acting in the public interest."

[7] The applicant moved out of the property in 1973 to live with her husband. She moved back to the property in 1977 after her marriage dissolved and has lived there ever since with her children and grandchildren. The applicant's brothers moved out of the property between the 1980s and 1990s and her uncle moved out in 2000.

[8] In 1987, the first respondent was nominated by the family to be the holder of a certificate of occupation (certificate) with respect to the property. In 1988, by virtue of his earlier nomination, the first respondent was issued a deed of grant. The deed of grant was issued in terms of Proclamation R293[7] (Proclamation), which was promulgated in terms of the Native Administration Act,[8] that was later renamed the Black Administration Act.[9]

[9] The Upgrading Act was enacted in 1991 but took effect in the former Republic of Bophuthatswana territory, which now forms part of the North West Province, on 28 September 1998 when the Land Affairs General Amendment Act[10] was signed into law. The Upgrading Act automatically converted rights in property, such as deeds of grant, to ownership rights. This meant that the first respondent, as the holder of the deed of grant, automatically became the owner of the property in terms of section 2(1), irrespective of whether he was residing at or using the property.

Litigation History

Magistrate's Court

[10] In August 2009, the first respondent instituted eviction proceedings against the applicant and other occupants of the property in the Garankuwa Magistrate's Court.

[7] Regulations for the Administration and Control of Townships in Black Areas, GN R293 *GG* 373, 16 November 1962.

[8] 38 of 1927.

[9] Africans were initially referred to in statutes as "Natives". This term was later changed to "Bantu", and eventually to "Blacks". The short titles of the statutes reflect the name used to refer to Africans at the time the statute was promulgated.

[10] 61 of 1998.

The applicant alleges that it was during this period that she became aware that the deed of grant registered in the first respondent's name had been converted into a full right to ownership in terms of section 2(1) of the Upgrading Act.

[11] The applicant raised the constitutional invalidity of section 2(1) in opposition to the eviction proceedings. Consequently, the proceedings were suspended pending the outcome of an application in the High Court challenging the constitutionality of section 2(1) of the Upgrading Act.

High Court

[12] The application to the High Court was opposed by the first and third respondents. The second and seventh respondents indicated that they would abide by the decision of the court.

[13] The applicant made a number of claims, including that she was the owner of the property in terms of the Restitution of Land Rights Act.[11] The High Court did not order any relief except for that relating to the constitutional invalidity of section 2(1) of the Upgrading Act.[12] This was because other relief, such as an order declaring the applicant the owner of the property, may still be available to the applicant and other family members after the finalisation of the constitutionality challenge.

[14] The High Court upheld the applicant's constitutional challenge to section 2(1) of the Upgrading Act insofar as it provides for the automatic conversion of land tenure rights into ownership without any procedures to hear and consider competing claims.[13] The High Court reasoned that people who were not holders of certificates or deeds of grant were prevented from acquiring ownership of properties in which they had a substantial interest. This exclusion was inherently gendered because, in terms of the

[11] 22 of 1994.

[12] High Court judgment above n 4 at paras 18 and 96.

[13] Id at para 96.

Proclamation, women could not be the head of a family, and thus, could not have a certificate or deed of grant registered in their name.[14]

[15] The High Court remarked that the Proclamation is characterised by language which is racist and sexist.[15] The Upgrading Act thus recognised and converted rights that had been acquired through a discriminatory legislative scheme. This injustice was compounded by the fact that upgrading was automatic and no review mechanism was created by the Act. The state respondents argued that section 24D of the Upgrading Act provided for an appeal procedure.[16] The High Court found that this section was lacking and did not save section 2(1) of the Upgrading Act from constitutional invalidity.[17]

[16] The High Court therefore held that section 2(1) of the Upgrading Act is inconsistent with sections 9[18] and 34[19] of the Constitution as it fails to protect, notify

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[14] Id at paras 26-7.

[15] Id at para 50.

[16] Section 24D(10)(a) reads:

> "Any person aggrieved by an entry made by a person designated under subsection (1) or (2) in a register of land rights, may within 30 days after he or she became aware of the entry, but not more than a year after the entry was made, appeal in writing against such entry to the Minister."

[17] High Court judgment above n 4 at para 54.

[18] Section 9 of the Constitution reads:

> "(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."

[19] Section 34 of the Constitution reads:

and consult with the occupants of a property who do not have a certificate or a deed of grant registered in their name.[20]

[17] The High Court ordered that the declaration of invalidity should apply retrospectively to 27 April 1994. Although in its reasoning the High Court limited the application of this declaration in cases where the property in question has been sold to a third party and where the property has been inherited by a third party in terms of the laws of succession, this limitation was not included in the order.[21] The declaration was suspended for 18 months to allow Parliament time to cure the defect. In the interim, the first respondent was precluded from transferring or otherwise encumbering the property. The Court ordered that the third respondent was to pay the applicant's costs, including the costs of two counsel.

Confirmation

[18] This Court is requested to confirm the order declaring section 2(1) of the Upgrading Act to be constitutionally invalid. In terms of section 167(5) of the Constitution, orders of the High Court and the Supreme Court of Appeal that declare Acts of Parliament constitutionally invalid have no force unless confirmed by this Court. Before confirming such an order, this Court must be satisfied that the impugned provision of the Act is indeed inconsistent with the Constitution.

[19] The applicant argued that this Court should confirm the order of invalidity because the impugned provision of the Upgrading Act violates her right to equality, on the basis of gender and sex,[22] contained in section 9 of the Constitution, her right to

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> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[20] High Court judgment above n 4 at para 62.

[21] Id at para 81.

[22] For the purposes of this judgment references to the word "sex" refer to the biological characteristics that define humans as female, male or intersex. This is usually assigned at birth and differentiation between people is made on the basis of external genitalia, chromosomes, hormones and the reproductive system. References to "gender" are references to an identity that can change over time, and that differs from one culture or society to

property contained in section 25 of the Constitution and her section 33 right to just administrative action. The reliance on section 33 is a departure from the High Court's findings which were based on section 34 of the Constitution. The first respondent opposed the confirmation proceedings but levelled arguments that, for the most part, spoke to the factual issue of ownership of the contested property rather than the constitutional invalidity of section 2(1) of the Upgrading Act.

Interpretation of the Proclamation

[20] The Proclamation was put into force in Bophuthatswana in 1962. It is alleged that the Proclamation only made provision for men to be heads of the family. As a result, the first respondent obtained a deed of grant that was later converted into a right of ownership over the property. During the hearing it was unclear whether the

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another. Gender is both a social construct and a personal identity. In social terms gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies regardless of their sex. For these definitions see Valdes "Deconstructing the Conflation of 'Sex', 'Gender' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83 *California Law Review* 1 at 20 read with fn 46 and 22 read with fn 51. See also Rubin "Notes on the Political Economy of Sex" in Reiter *Toward an Anthropology of Women* (Monthly Review Press, New York 1975) at 159 for an examination of the way that society transforms biological sex into products of human activity.

The distinction between these terms is recognised by our Constitution. "Gender" and "sex" are treated as two separate and distinct grounds in section 9 of the Constitution. In *Woolworths (Pty) Ltd v Whitehead* [2000] ZALAC 4, (2000) 21 ILJ 571 (LAC) at paras 73 and 110, differentiation on the basis of pregnancy was deemed to amount to differentiation on the basis of sex, rather than gender. This is because child-bearing relates to the biological make-up of the female sex. In the minority judgment of *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at paras 64-5, it was held that legislation that criminalised provision of sex work is unconstitutional because it discriminates on the basis of gender. There was no distinction made between sex workers who are biologically male or female and so this is not about sex-based discrimination. Rather the criminalisation overwhelmingly affects women because societal norms and patriarchal practices mean that women are more often than not the sellers of sex and not the buyers.

The recognition of the distinction between sex and gender is relatively recent. This judgment recognises that the basis for the impugned legislation was discrimination based on a conflation of both biology and the sociological view of women. Usually attribution of gender roles flows from biological classifications of male or female. The exclusion of women from being the head of the family is based on the social perception of what women can do and how they should behave. This is a sociological phenomenon, not a biological one. For these reasons, this judgment examines the provision using both the grounds of sex and gender in the Constitution but reference will be made predominantly to gender because the overwhelming effect of the impugned provision is to reinforce social rather than biological characteristics attributed to women.

factual situation in areas governed by the Proclamation (TBVC states)[23] was that African women were excluded from holding formal interests in property. This raised a question whether the Upgrading Act has had a genuine discriminatory impact on women. After the hearing, the Court deemed it necessary to direct the parties to file further written submissions on the effects that the Proclamation had on women.

[21] In their submissions, the applicant and the state respondents agreed that women had indeed been excluded from holding the position of head of the family that was a prerequisite for formal titles in land. The first respondent baldly alleges that this was not the case and that the applicant had held the titles to other properties during her marriage. There is no evidence of this. However, the applicant before us claims that she was legally unable to register her interests in the property because only men could be the head of the family. To test this submission, it is necessary to interpret the Proclamation contextually and then establish whether the Upgrading Act, which relies on the position created by the Proclamation, unfairly discriminates against African women.

Historical context

[22] The historical context within which a particular provision operated, or in response to which it was enacted, has been used as an interpretative tool by this Court on a number of occasions.[24] In *Brink*, this Court recognised that the interpretation of section 8 of the Interim Constitution[25] – now the section 9 right to equality – involved a historical enquiry. This Court held:

[23] "TBVC states" is the common way of referring to Transkei, Bophuthatswana, Venda and Ciskei, which were areas reserved for African people during apartheid and were awarded veiled independence in terms of the Promotion of Bantu Self-Governance Act 45 of 1959 and the Black Homelands Citizenship Act 26 of 1970.

[24] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 44; *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31; *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 126; *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 39 and 322-3.

[25] Constitution of the Republic of South Africa Act 200 of 1993.

> "As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. . . . The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[26]

[23] African women under apartheid were systemically disenfranchised in a number of ways. It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely-held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property, and legal affairs.

[24] This Court has recognised the cloaked but ubiquitous nature of patriarchy in the past. In *Volks* it held:

> "This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality. The need to take account of this context is as important in the area of gender as it is in connection with race, and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an

[26] *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40.

> unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry."[27] (Footnotes omitted.)

[25] O'Regan J remarked in *Brink* that:

> "Although in our society discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in 'which there is equality between men and women' as well as equality between 'people of all races'."[28]

[26] Under apartheid, the effects of patriarchy were compounded by legislation that codified the position of African women as subservient to their husbands and male relatives. This context has been acknowledged by this Court on many occasions.

[27] In *Gumede*, Moseneke DCJ relying on the expert evidence of Professor Nhlapo,[29] stated that:

> "Legislating these misconstructions of African life had the effect of placing women 'outside the law'. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a

[27] *Volks v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) at para 163.

[28] *Brink* above n 26 at para 44.

[29] Professor Thandabantu Nhlapo is an Emeritus Professor at the University of Cape Town. He was the Chair of the Commission on Traditional Leadership Disputes and Claims, and the Chair of the Project Committee on Customary Law which assisted in the drafting of legislation such as the Recognition of Customary Marriages Act 120 of 1998.

> separate residence), had a profound and deleterious effect on the lives of African women."[30]

[28] Later in that judgment, Moseneke DCJ also relied on the evidence of Dr Claassens,[31] which had been compiled by reviewing authorities and ethnographic material, to demonstrate the manner in which property rights held by African people were distorted in favour of men under apartheid. This evidence advised that—

> "[t]here is a range of historical and ethnographic accounts that indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family, and that women, including single women, could be and were allocated land in their own right. Furthermore there are accounts of women inheriting land in their own right. However, Native Commissioners applying racially based laws such as the Black Land Areas Regulations and betterment regulations issued in terms of the South African Development Trust and Land Act repeatedly intervened in land allocation processes to prohibit land being allocated to women."[32] (Footnotes omitted.)

In both *Gumede*[33] and the later case of *Ramuhovhi* this Court noted that the matrimonial property systems that were applied to women in the TBVC states dispossessed them of property rights in favour of the male head of the family.[34] This illustrates two things: a legislative inclination in favour of male property rights holders, and an acknowledgment by this Court that, generally at least, only men were considered to be the head of the family.

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[30] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 17.

[31] Dr Aninka Claassens is the Director of the Land and Accountability Research Centre at the University of Cape Town. Her overarching research focus is on the nature and content of customary law in the South African constitutional dispensation and she has researched extensively the ability of women, particularly unmarried women, to access land in communal areas.

[32] *Gumede* above n 30 at para 18.

[33] Id at paras 17-8.

[34] *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC) at para 62 read with fn 50.

Textual reading of the Proclamation

[29] Read in light of the context above, the Proclamation definitely had discriminatory effects on African women. The Proclamation defines "family" in the following way:

> "'Family' in relation to a person, means—
>
> (a) the wife (including a partner in a customary union) and all unmarried children of such person;
>
> (b) all widowed daughters of such person and their unmarried children residing with the said person;
>
> (c) any parent or grandparent of such person, or of the wife of such person, who by reason of old age, infirmity or other disability is dependent on such person; and
>
> (d) any other person, who in the opinion of the manager is bona fide dependent on such person."

[30] This definition is crafted in gendered terms in that no provision is made for a husband, brother or non-dependent man to be a member of a family, and describes the family only in relation to the head of the family. The Proclamation does not define "head of the family" however, all references to the "head" are made using masculine pronouns. Section 8(1) of Chapter 2 of the Proclamation states:

> "Any person who is the head of a family and is desirous of taking up *his* residence in the township and of leasing and occupying for residential purposes, together with the members of *his* family, a dwelling erected by or belonging to the Trust, shall apply for a certificate in respect of such dwelling and of the site on which such dwelling stands." (Emphasis added.)

[31] Similarly, section 9(1) of Chapter 2 of the Proclamation provides:

> "Any person who is the head of a family and desires to purchase from the Trust a site in the township on which *he* is to erect *his* own dwelling, or on which a dwelling has been erected by or belonging to the Trust, for occupation by *him* and members of *his*

> family for residential purposes, shall apply for a deed of grant in respect of such site."
> (Emphasis added.)

[32] On a plain reading of these sections of the Proclamation, it is obvious that it envisages a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control. It may be argued that the masculine pronouns used in the section should have been read as referring to both men and women.[35] This is not, however, a tenable suggestion.

[33] When the Proclamation is read in the context of the multiple discriminatory statutes that aimed to limit the autonomy of women at the time, it seems unlikely that the Legislature intended that the masculine pronouns should be read to be gender-neutral. Moreover, an examination of the treatment of statutes by the courts illustrates that Judges, in times gone by, even interpreted the seemingly neutral word "persons" to exclude women from its purview.[36] Beyond this context, it is unlikely that male relatives and township officials, operating within a system of patriarchy, which prioritised male interests in spheres such as property, would interpret the Proclamation in favour of African women.

[34] When faced with a challenge to the constitutional validity of a provision in an Act, the Court examining the challenge should ascertain whether it is reasonably possible to interpret the section in a manner that conforms with the Constitution.[37] In this case that would involve reading the Proclamation to have gender-neutral provisions so that section 2(1) of the Upgrading Act, which is based on the Proclamation, is saved from constitutional invalidity. This is not reasonably possible.

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[35] Section 6(a) of the Interpretation Act 33 of 1957 states:

> "In every law, unless the contrary intention appears—
>
> (a) words importing the masculine gender include females."

[36] See *Rex v Detody* 1926 AD 198 at 211 and *Incorporated Law Society v Wookey* 1912 AD 623.

[37] *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA) at para 11.

This interpretation would be unduly strained[38] because it is simply not plausible that the Proclamation was applied in a gender-neutral way during apartheid. To read it as gender-neutral now would not cure the discrimination that occurred previously and, since the Upgrading Act is based on the position as it was during apartheid, would not render the Act constitutionally compliant.

Upgrading Act as a violation of section 9 of the Constitution

[35] The applicant relies on the violation of three distinct rights in her constitutional challenge: equality contained in section 9, property in terms of section 25 and just administrative action in terms of section 33. Because of this there are a few approaches that could be taken in evaluating her claim. We choose to focus the discussion of the invalidity of section 2(1) of the Upgrading Act on its violation of section 9. Section 9 in our Constitution not only entitles everyone to equal protection before, and benefit of, the law[39] but also stipulates that the state may take legislative and other measures to protect and advance the rights of disadvantaged persons.[40] Vitally, it further prohibits both direct and indirect unfair discrimination against people on the basis of, inter alia, their gender and sex.[41] Equality, as a cornerstone of the Constitution, best encapsulates the applicant's major concern with the impugned section. Equality also underlies the reliance on the other rights in sections 25 and 33 of the Constitution.

Section 9(1)

[36] Following the test established in *Harksen*, it must first be held that differentiation between groups has occurred without any rational connection to a

[38] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[39] Section 9(1) of the Constitution.

[40] Section 9(2) of the Constitution.

[41] Section 9(3) of the Constitution.

legitimate governmental purpose.[42] In this case, the Upgrading Act differentiates between people who were the holders of land tenure rights under apartheid and those who were not, but occupied the property. The practical effect is a differentiation between African men, who could be the head of a family and thus the holder of a certificate or deed of grant, and African women who could not. The state respondents, in their written submissions pursuant to directions from this Court asking for their view on the constitutionality of the impugned provision, agree that section 2(1) of the Upgrading Act is a violation of section 9 of the Constitution, and cannot have a legitimate governmental purpose.

[37] A provision in a statute that differentiates between groups of people but does so without a legitimate governmental purpose will be irrational and unconstitutional due to its inconsistency with section 9(1). This Court has held:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[43] (Footnotes omitted.)

[38] That section 2(1) of the Upgrading Act was not enacted with a legitimate governmental purpose, is underscored by the fact that it also contradicts the overall purpose for which the Upgrading Act was enacted. This Court has held that the purpose of the Upgrading Act was "to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to

[42] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43.

[43] *Prinsloo* above n 24 at para 25.

Africans".[44] The Upgrading Act was part of a scheme of legislation that was enacted to redress the injustices caused by the colonial and apartheid regimes. Land reform was one of the key focus areas of this scheme because the systemic deprivation of the African majority's rights in land and property was a main feature of the apartheid system.

[39] The Upgrading Act relies on the legal position created by the Proclamation in order to establish which rights warrant upgrading. In *DVB Behuising*, this Court stated with regard to the Proclamation:

> "One is dealing here with legislation that is admittedly racist and sexist and that constituted a key element in the edifice of apartheid. In characterising the proclamation we cannot ignore its history, what it was intended to achieve, and what it actually did achieve."[45]

[40] Similarly, in *Moseneke*, this Court stated:

> "Subordinate legislation made under [the Black Administration Act] has been referred to as part of a demeaning and racist system, as obnoxious and as not befitting a democratic society based on human dignity, equality and freedom."[46] (Footnotes omitted.)

[41] The Proclamation is subordinate legislation of the kind described above which created land insecurity and made it difficult for people to protect their land, whether from confiscation or from invasion.[47] The Proclamation gave some limited, subservient rights to certain African people, but because of the wording, African women were not included in that group. This position, as the cases above reveal, would certainly be in conflict with the values of the Constitution, like human dignity,

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[44] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) (*DVB Behuising*) at para 8.

[45] Id at para 40.

[46] *Moseneke v The Master* [2000] ZACC 27; 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 20.

[47] *DVB Behuising* above n 44 at para 92.

equality and freedom, if it was still in force today. Surely a piece of existing legislation that was designed to counteract the effects of the Proclamation but fails will be similarly inconsistent.

[42] In *Mabaso* this Court was asked to deal with whether the continued differentiation between attorneys enrolled in South Africa and those enrolled in the former TBVC states was justified.[48] The Court found:

> "Ten years into our new constitutional order, citizens are entitled to have any unfairly discriminatory differentiation between the different legislative schemes removed from the statute books. Where it remains on the statute books, victims of the unfair discrimination are entitled to seek and obtain relief."[49]

[43] The Upgrading Act relies, in section 2(1), on the legal position created by an unjust Act. This highlights the distinct lack of a legitimate governmental purpose in the section. Section 2(1) of the Upgrading Act automatically upgraded titles, such as certificates and deeds of grant, into ownership rights. In doing this, it reinforced the position created by the Proclamation. During apartheid African women were not entitled to hold land tenure rights and under the Upgrading Act's dispensation their vulnerability was compounded as they did not have the opportunity to register their interests in a property before the title was automatically upgraded in favour of the male head of the family.

[44] This lack of a legitimate governmental purpose for the provisions of section 2(1) of the Upgrading Act is thus irrational. The section is constitutionally invalid due to its inconsistency with section 9(1) of the Constitution. The section does not pass this lowest threshold of constitutional scrutiny.[50]

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[48] *Mabaso v Law Society, Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 2.

[49] Id at para 42.

[50] See *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

[45] In view of this it is unnecessary to delve much deeper into the alleged violation of other rights, but it will be helpful to explain that this discriminatory irrationality would have been even more difficult to overcome where the threshold constitutional standard is higher than mere rationality.

Section 9(2) and 9(3)

[46] Section 9(2) states that legislative and other measures may be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

[47] The automatic upgrading of land tenure rights amounts to indirect differentiation by the state between men, who could hold these titles and women, who could not. In terms of *Harksen*, because the differentiation takes place on two specified grounds – gender and sex – it will amount to discrimination.[51] Similarly, it will be presumed to be unfair.[52] There has been no evidence to the contrary presented and the presumption of unfairness is further bolstered by the vulnerable position that African women have occupied for generations. Thus, section 9(3) has also been infringed.

[48] The Upgrading Act was a legislative measure taken in terms of section 9(2) of the Constitution to advance the rights of persons disadvantaged by unfair discrimination.

[49] Section 25(5) of the Constitution provides that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". The quest to enable citizens equitably to access land must include attempts to strengthen rights in land that were previously held, such as the informal right that the applicant holds

[51] *Harksen* above n 42 at para 48.

[52] Id.

through her lengthy occupation of the property in question. The Upgrading Act, which took effect in Bophuthatswana in 1998, is a piece of legislation which speaks to the fulfilment of the state's section 25(5) obligation. Parliament failed, however, to act positively to ensure that the gender discrimination perpetuated by the Proclamation did not taint the equitable provision of property. Moreover, it only recognised and strengthened rights that were formally held, neglecting the countless holders of informal rights or interests in property.

[50] Section 25(5) creates a justiciable socio-economic right to gain access to land on an equitable basis. The Upgrading Act amounts to a step taken by Parliament in an attempt to foster the realisation of that right. It is a well-established principle of this Court that when evaluating the measures taken by the state in relation to socio-economic rights, those measures must pass the constitutional standard of reasonableness.[53] In *Khosa*, this Court held that the context of each case is vital in determining the reasonableness of a measure taken. This, the Court established, was best achieved by looking at the purpose for which the measure was pursued.[54]

[51] The mischief that the Act was created to rectify was to provide for recognition and security of rights that had previously been ignored or systemically devalued.[55] A reasonable step to ensure equitable access to land must do something to counteract pre-existing inequitable access. Otherwise, as in this case, it leaves intact inequity. The automatic upgrading of land tenure rights does not achieve this purpose because it excludes African women from the benefit of legal protection. If anything, entrenching an apartheid position would be the exact opposite of what the legislature sought to

[53] See *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 138 and 161; *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at paras 67-8; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 41-4.

[54] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 49.

[55] See [41] and [43].

achieve with the Act rendering it an unreasonable legislative measure in terms of section 9(2).

Review procedures

[52] The applicant alleges that the failure to provide a forum for review of the various putative rights that may exist in a property before upgrading takes place renders section 2(1) constitutionally non-compliant. The High Court upheld this challenge by stating that this failure violated the applicant's right of access to courts in terms of section 34 of the Constitution. It further held:

> "[T]he lack of notice of the conversion, and the absence of a procedure for raising issues with the conversion of land rights into ownership, defies the *audi alteram partem* principle (that all parties be given the opportunity to respond to evidence)."[56]

[53] Before this Court, the applicant abandoned the section 34 challenge and instead based her final constitutional challenge to the Act on section 33 of the Constitution, which enshrines the right to just administrative action.

[54] We are not convinced that section 2(1) of the Upgrading Act violates section 33 of the Constitution. It is clear that the upgrading takes place automatically and therefore by operation of law. Thus, no decision is taken by an administrator and no administrative action has occurred. The legislative functions of Parliament are explicitly excluded from the definition of administrative action by section 1(b)(dd) of the Promotion of Administrative Justice Act[57] (PAJA).

[55] It is not necessary, however, for this Court to determine whether there has been a violation of either section 33 or 34 given that section 2(1) has already been impugned using section 9 of the Constitution. However, an examination of the review

[56] High Court judgment above n 4 at para 59.

[57] 3 of 2000.

mechanisms, or lack thereof, for section 2(1) automatic upgrades also lends itself to the conclusion that the section 9 discrimination perpetuated against women is unfair and not rationally connected to any legitimate governmental purpose.

[56] Unlike other provisions in the Act, section 2(1) does not contain an internal review mechanism. While section 3(1)(a)(i) provides that land tenure rights in Schedule 2 of the Act will not be converted to a right of ownership unless the Minister is satisfied that the interests and rights of putative holders are protected,[58] the applicant in this case is left with only section 24D to protect her rights.

[57] The first respondent alleges that this section safeguards the rights of putative holders and thus, saves the Act from constitutional invalidity. However, section 24D does not adequately protect the applicant's rights or those of women in a similar position. In terms of section 24D(10)(a) any person who is aggrieved by an entry made in a register of land rights (which constitutes the formal recognition of the ownership right) may appeal to the Minister within 30 days of becoming aware of the entry, but not more than one year after the entry was made.[59]

[58] It is not uncommon for pieces of legislation that allow for the review of decisions or procedures to contain time-bar clauses such as this one.[60] Section 24D

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[58] Section 3(1)(a)(i) states:

> "Where the State is the owner of an erf or piece of land situated outside a formalised township, the relevant land tenure right need not be converted into ownership, and a deed of transfer shall not be submitted unless—
>
> (i) the Minister is satisfied, on the basis of a report by a person assigned or appointed by him or her, that the rights or interests of putative holders are being protected."

[59] See above n 16.

[60] See for example section 7(1) of PAJA which states:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for

does not, however, allow for the condonation of the late filing of an appeal. This initial injustice is compounded by the fact that the section does not establish any procedure by which affected parties are notified of the automatic upgrading of the right. Resultantly, parties who have interests in property may only discover years later that the ownership of that property has been registered in the name of the holder of a deed of grant. As is evident in the case before us, these parties cannot then rely on section 24D to protect their rights because they are barred from bringing appeals more than a year after the right was registered.

[59] It is further worth noting that section 24D only makes provision for an appeal after the right has been registered in the applicable registry. In the case before us counsel for the applicant stated that there was no evidence that the right had been registered. However, registration is not a prerequisite upon which the validity of the right to ownership is premised. Instead, in terms of section 2(2) of the Upgrading Act, registration simply gives effect to the right that was automatically created by section 2(1). It seems likely that there may be cases like this one, in which the registration of the right cannot be located in the registry. Here, the "protections" in section 24D would be of little assistance as the appeal procedure is only against an entry made in a register, and not against the automatic upgrading of the initial right.

Just and equitable relief

[60] In terms of section 172(1)(b) of the Constitution, once a declaration of invalidity is made, a Court may make any just and equitable order.[61] This includes

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it or might reasonably have been expected to have become aware of the action and the reasons."

[61] Section 172(1)(b) states:

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

. . .

(b) may make any order that is just and equitable."

making an order limiting the retrospective effect of the order or suspending the declaration of invalidity to allow Parliament to rectify the inconsistency.[62]

Retrospective effect

[61] The High Court held that the order of invalidity should apply retrospectively to the date of the enactment of the Interim Constitution – 27 April 1994. In the High Court the applicant argued that it should instead be declared invalid from the date that the Upgrading Act was enacted in 1991. In this Court, however, the applicant abandons this argument in favour of the High Court's determination. In confirming the order of the High Court, it is important to recognise that the retrospective effect of this order is crucial to the effective protection of women's rights.

[62] A prospective order would not protect the rights of the applicant before us, nor would it provide relief to women in her position. Moreover, this Court cannot condone more than 20 years of discrimination brought about by the legislation by relying only on a prospective order of invalidity. With this principle in mind, one might ask how we can condone the nearly three years of discrimination that persisted between the enactment of the Act and the coming into operation of the Interim Constitution. This is certainly an issue that troubled Kollapen J in the High Court. However, the impugned provisions of the Upgrading Act only became constitutionally inconsistent, and therefore invalid, when the Interim Constitution came into force.[63] It would not, therefore, be just and equitable, nor indeed sensible, to extend the effect of the declaration of invalidity beyond 27 April 1994. The order of retrospectivity made by the High Court should thus be confirmed.

[62] Section 172(1)(b) states that a just and equitable order includes:

> "(i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[63] *Ramuhovhi* above n 34 at para 57.

Limited retrospectivity

[63] This aspect is not without its difficulties. More than 20 years have elapsed since the enactment of the Upgrading Act and in that time the advancement and protection of women's rights have made significant strides. This means that in some instances property ownership which was obtained through the operation of section 2(1) of the Upgrading Act may have ended up under the legal control of African women. This could be for a number of reasons, including because of judicial intervention which prevents gender discrimination in intestate succession as in *Bhe*,[64] or indeed through the financial empowerment of women that has allowed them to purchase property in their own name.

[64] This Court must be cautious not to create new and different injustices in our attempt to remedy the one perpetrated by section 2(1) of the Upgrading Act. This Court is, therefore, empowered under section 172(1) of the Constitution to make an order limiting retrospectivity. In *Ramuhovhi*, this Court held that one of the factors that must be considered when limiting retrospectivity is the disruptive effect that unlimited retrospectivity would have. It further stated:

> "Limiting retrospectivity helps 'avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute'. Currie and De Waal state that the disruptive effects of an order of retrospective invalidity must be balanced against the need to give effective relief to the applicant and similarly placed people."[65]

[65] All the parties before us agree that certain disruptions would occur if the order of retrospectivity is unlimited. The High Court identified two groups of people who should be excluded from the effect of retrospectivity. Those people were third parties who had, in good faith, purchased property which title had been upgraded in terms of

[64] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of The Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[65] *Ramuhovhi* above n 34 at para 57.

section 2(1) and persons who inherited such property in terms of the law of succession.[66] The second category was further restricted so that this limitation only applies to estates that had been finalised. The High Court held that in both of the above categories, a transfer of property would not qualify for the exception if a party had been on notice that the property was the subject of a dispute.[67]

[66] We agree with the High Court's limitations on retrospectivity. In the past 20 years the position of women in society has improved and the alienation of property in sexist ways has largely been declared unconstitutional.[68] Moreover, it is imperative that this Court does not disrupt the South African property scheme by making an order that would impact substantially on the financial interests of buyers, sellers and banks who acted in good faith by relying on a law that they thought was valid.

[67] This may appear to be harsh treatment of women who have already faced the consequences of property in which they have an interest being alienated. However it is the established jurisprudential position of this Court that "as a general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity".[69] This has been applied both to criminal matters and to the finalisation of estates in terms of the law of succession even where the effect of those cases was discriminatory. The Court aims, as far as possible, to avoid injustices being perpetrated both against the victims of an impugned provision, and against parties who acted in good faith in terms of the provision. But it is impossible to craft a perfect remedy. There may be other avenues of redress available to affected women based on the specific facts in each of these finalised

[66] High Court judgment above n 4 at para 80.

[67] Id at para 81.

[68] See *Bhe* above n 64.

[69] *Engelbrecht v Road Accident Fund* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 45; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 93; *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 13; *S v Ntsele* [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 14.

cases. These cannot however arise as a result of this declaration of invalidity. This Court recognised in *De Lange* that it is a lesser evil for a constitutional violation to go without compensation than to impose monetary liability on a person who, knowingly or not, relied on what she thought to be a valid law.[70]

[68] We do, however, believe that the list of exceptions provided by the High Court should be extended. Women who, through a stroke of luck or another unforeseen event, obtained a title in property which was upgraded to an ownership right in terms of the Act should not have these titles nullified by virtue of this declaration. We do not have before us concrete factual evidence of the full effect that the Proclamation, and therefore the Upgrading Act, had on the rights of women. While it is clear from the submissions made by all parties that many women were denied the right to register their interests in property by virtue of their gender, we cannot conclusively say that no woman obtained a title at any point. The ground on which we are declaring section 2(1) invalid is that it does not take reasonable steps to ensure access to property on an equitable basis and that the Upgrading Act perpetuates discrimination against women in contradiction to the Act's stated aims. However, in instances where this injustice has been organically rectified, to allow this to be reversed would be exceptionally dislocated from the social context within which the Act operates.

[69] Therefore, the retrospective declaration of invalidity does not apply to cases where women had their titles upgraded by section 2(1) of the Act, nor does it apply to finalised estates where the property has been inherited by a third party acting in good faith, nor, finally, to cases where the property has been transferred to a third party through a final and valid alienation process.

Suspension of the declaration of invalidity

[70] As the High Court found, the effects of this declaration of invalidity may be far-reaching, with effects on groups beyond those explicitly excluded from the

[70] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 104-5.

retrospective order. Parliament is in a far better position than this Court to conduct the necessary factual enquiry to establish the full extent of redress demanded. Moreover, the unconstitutional effects of section 2(1) of the Upgrading Act cannot be remedied by a simple reading-in exercise. The best way to go about achieving this cannot be determined by this Court. The order suspending the declaration of invalidity for 18 months should be confirmed.

Interim relief

[71] To ensure that the applicant is given effective relief pending Parliament curing the constitutional defect in the Upgrading Act, the High Court ordered that the first respondent be interdicted from passing ownership, selling, or encumbering the property in any manner whatsoever. The High Court also protected persons who might be vulnerable to wrongful evictions or bad faith transactions utilising unconstitutionally conveyed property rights by stating that nothing prevented them from approaching a competent court for interim relief similar to that awarded to the applicant. Both of these pronouncements are sensible and provide adequate protection for the time being. Therefore, the order of interim relief is also confirmed.

Costs

[72] The applicant successfully challenged the constitutionality of section 2(1) of the Upgrading Act in the High Court. As a result, costs were awarded against the third respondent, the Minister for Rural Development and Land Reform, who opposed that application. This was because of the Minister's role as the state authority responsible for the effects of the legislation. The applicant was not successful with her claim against the first respondent because the High Court opted not to pronounce on this dispute. The general rule that costs should follow a successful result was applied and the applicant was ordered to recover all of her costs from the third

respondent while the first respondent paid his own costs.[71] There is no reason why this costs order should be overturned.

[73] It is the norm to award costs in favour of a successful applicant for a confirmation. The third respondent did not participate in these proceedings until responding to this Court's directions issued after the hearing. Their response to these directions was useful and illustrated that the Minister no longer opposed the confirmation of constitutional invalidity. This fact is not, however, sufficient to justify this Court's deviation from the principle relating to successful confirmation proceedings.[72] In terms of *Biowatch*, "[t]he primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice".[73] It is clear that "[t]he state is under an ongoing constitutional obligation to respect, protect, promote and fulfil the rights in the Bill of Rights by ensuring (inter alia) that legislation which violates constitutional rights is amended or replaced".[74] The state failed to enact legislation that allows for the equitable distribution of land and the redress of gendered discrimination that occurred during apartheid. In the circumstances the Minister should pay the costs of the confirmation proceedings. The first respondent should bear his own costs.

Conclusion

[74] During apartheid it was not true that all persons were born free and equal in dignity and rights. The oppression that the system meted out was felt no more acutely than by African women. They were relegated to the status of perpetual minors, often forced to work in the unregulated domestic care sector to look after children who were not their own, and they were prevented from owning property which left them permanently dependent on the male heads of their families to access the basic

[71] High Court judgment above n 4 at para 95.

[72] *Levenstein v Estate of the Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (8) BCLR 921 (CC) at para 79.

[73] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 16.

[74] *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 65.

protection that a home provides. Twenty-four years into democracy, a piece of legislation that reifies the factual position created by a racist and sexist apartheid Act cannot pass constitutional muster. The Upgrading Act, in its attempt to redress one injustice, exacerbated another. When enacting remedial legislation, Parliament must be aware of the historic omnipresence of patriarchy which will otherwise undermine even the noblest of legislative endeavours. In conclusion, section 2(1) of the Upgrading Act is constitutionally invalid insofar as it solidifies the position created by apartheid legislation which excluded African women from the property system and resulted in discrimination on the basis of sex and gender in terms of section 9 of the Constitution.

Order

[75] The following order is made:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 26 September 2017 in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is confirmed subject to the variations set out in paragraph 2.

2. The order of the High Court is varied to read:

   "(a) Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 *GG* 373 of 16 November 1962 (Proclamation R293) into holders rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution.

   (b) The order in (a) above is made retrospective to 27 April 1994.

   (c) In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of

ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and the upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith.

(d) The order in 2(a) above is suspended for a period of 18 months to allow Parliament the opportunity to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991.

(e) The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane in any manner whatsoever, until such time as Parliament has complied with the order in 2(a) above.

(f) The third respondent is ordered to pay the costs of the applicant, including the costs of two counsel."

3. The third respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel.

For the Applicant:	A de Vos SC and M P Moropa instructed by Lawyers for Human Rights
For the First Respondent:	N L Skibi instructed by Legal Aid Board South Africa
For the Second, Third and Seventh Respondents:	L T Sibeko SC, M J Gumbi and X Mofokeng instructed by Leepile Attorneys Incorporated and State Attorney, Pretoria

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 315/18

In the matter between:

JAMES KING N.O.	First Applicant
TRUDENE FORWORD N.O.	Second Applicant
ANNELIE JORDAAN N.O.	Third Applicant
ELNA SLABBER N.O.	Fourth Applicant
KALENE ROUX N.O.	Fifth Applicant
SURINA SERFONTEIN N.O.	Sixth Applicant

and

CORNELIUS ALBERTUS DE JAGER	First Respondent
JOHANNES FREDERICK DE JAGER	Second Respondent
ARNOLDUS JOHANNES DE JAGER	Third Respondent
HENDRICK CHRISTIAAN DE JAGER	Fourth Respondent
JACOBUS HENDRIK SERFONTEIN	Fifth Respondent
DAVID-JOHN FORWORD	Sixth Respondent

CHARL WYNAND ROUX Seventh Respondent

KALVYN ROUX Eighth Respondent

MASTER OF THE HIGH COURT, CAPE TOWN Ninth Respondent

Neutral citation: *King N.O. and Others v De Jager and Others* [2021] ZACC 4

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Judgments: Mhlantla J (minority): [1] to [88]
Jafta J (majority): [89] to [163]
Victor AJ (concurring): [164] to [246]

Heard on: 11 February 2020

Decided on: 19 February 2021

Summary: unfair discriminatory bequest — private wills — freedom of testation — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — section 39(2) of the Constitution

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders granted by the High Court and Supreme Court of Appeal are set aside.

4. It is declared that clause 7 of the will of the late Mr Carel Johannes Cornelius De Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is inconsistent with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and therefore unenforceable.
5. The costs of Mr James King shall be paid from the estate of Mr Kalvyn de Jager.
6. There shall be no order as to costs in respect of other parties.

JUDGMENT

MHLANTLA J (Khampepe J, Madlanga J and Theron J concurring):

Introduction

[1] This matter concerns a will that was executed over a hundred years ago. It is common cause that a clause in a will, which contains a fideicommissum substitution,[1] discriminates against female descendants. At its core, this application concerns a novel issue whether and to what extent a court may encroach on freedom of testation, through the vehicle of public policy, in the context of private wills with unfair discriminatory bequests against unknown descendants on the sole basis of immutable characteristics. This matter calls on this Court to grapple with the perplexing question how to reconcile the fundamental right to equality and the primacy of freedom of testation in the context of

[1] De Waal and Schoeman-Malan *Law of Succession* 5 ed (Juta & Co (Pty) Ltd, Cape Town 2015) at 147-8 defines a fideicommissum as:

> "A legal institution in terms of which a person (the *fideicommittens*) transfers a benefit to a particular beneficiary (the *fiduciary* or *fiduciaries*) subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit goes over to a further beneficiary (the *fideicommissary* or *fideicommissarius*)."

private wills. This question must be answered through the lens of public policy against the backdrop of our constitutional democracy.

[2] The applicants seek leave to appeal the decision of the Supreme Court of Appeal, which dismissed their application for declaratory orders that would grant them the entitlement to certain fideicommissary property.

Background facts

[3] On 28 November 1902, Mr Karel Johannes Cornelius De Jager and Mrs Catherine Dorothea De Jager (the deceased's grandparents) executed a joint will[2] (will) in terms of which they bequeathed various properties, including farming properties, to their six children – four sons and two daughters, subject to a fideicommissum.[3] One of their sons Cornelius, had three sons: Corrie, John and Kalvyn (deceased). The first to third respondents are John's sons. Mr Kalvyn de Jager died testate on 5 May 2015. He had no sons but left five daughters (the second to sixth applicants). His daughters had four sons – the fourth to eighth respondents (deceased's grandsons).

[4] The fideicommissum was governed by clause 7, which provided:

> "With respect to the bequest of grounds/land to their sons and daughters, as referred to under Clauses 1, 2, 3 and 4 of this, their Testament, it is the will and desire of the appearers that such grounds/land will devolve, following the death of their children, to said children's sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other *Fidei Commissaire* heirs from the lineage of the sons of

[2] Last Will and Testament dated 20 November 1902.

[3] The children of the deceased's grandparents were Gabriel, Carel, Cornelius, Arnoldus, Johanna and Georgina.

> the appearers by representation, in continuity, and in the case of the death of a daughter or a daughter's son without leaving a male descendant, her or his share will fall away in the same way and on the same conditions, and go to the other daughters or their sons, by representation, of the deceased's son's brothers or their sons "per stirpes", respectively."[4]

[5] In terms of the will, beyond the first generation, the fideicommissary property would, as far as the second and third generations were concerned, not devolve upon their female descendants. The deceased was the last grandson of the testators in respect of whose estate a fiduciary asset from the original will fell to be dealt with. The substitution of the estate following his death will thus be the last substitution.

[6] When Mr Cornelius de Jager died, his sons (including the deceased) each became fiduciary heirs to a one-third share in the farms subject to clause 7. The eldest son, Corrie, died childless. His one share in the properties devolved in equal shares to his two surviving brothers, John and the deceased. When John died in 2005, his share of the properties devolved upon his three sons. It is clear that until the death of the deceased the terms of the fideicommissum were interpreted in light of clause 7. They limited the fideicommissary beneficiaries to the sons of the testators' children and, thereafter, their sons. The clause was interpreted as not applying to any female descendants of the testators.

[7] Since the deceased had no male descendants, a problem arose after his death in 2015. The first applicant, Mr James King, was appointed as one of the six co-executors in the deceased's estate. The co-executors received three claims against the fideicommissary properties. The first was by the deceased's daughters, who claimed that the terms of the clause were discriminatory because female descendants were excluded from inheriting. Thus, they were entitled to inherit from their father's estate. The second was lodged by the first to third respondents, who relied on the terms of clause 7 and contended that since the deceased had no sons, the fideicommissum devolved on them. The third was lodged by

[4] Last Will and Testament dated 20 November 1902.

the deceased's grandsons, who contended that if their mother's claim of unfair discrimination did not succeed, clause 7 of the will should be interpreted in such a way that the property devolves on them, as the deceased's male descendants (his grandsons).

Litigation history

High Court

[8] As a result of the conflicting claims, the first applicant launched an application in the High Court[5] and sought directions on how to deal with the fideicommissary properties. He supported the contention by the deceased's daughters that certain portions of clause 7 unfairly discriminated against them on the grounds of gender and sex. He thus sought an order declaring the offending portions of the will invalid. He also sought amendments that would have the effect of amending the will to include a provision that would enable the female descendants or daughters to inherit the fideicommissary properties.[6]

[9] The High Court noted that it was common cause between the parties that the terms of clause 7 were discriminatory against the female descendants of the testators.[7] That Court considered the key tension to be whether this discrimination raised an issue of public policy that warranted intervention by a court to strike out or amend the impugned provision of the will. In doing so, the High Court considered several cases dealing with public charitable testamentary trusts and the right to equality in the new constitutional era.[8]

[5] *King N.O. v De Jager* 2017 (6) SA 527 (WCC) (High Court judgment).

[6] Id at para 21.

[7] Id at para 46.

[8] Id at paras 28-38. It went on to discuss *Harper v Crawford* 2018 (1) SA 589 (WCC), a matter involving a testamentary disposition with no public character, where it was held that courts should only interfere with choices made by individuals in a private law context in rare or exceptional cases and where the Court concluded that it had no competency to vary the provisions of that private trust deed.

[10] The High Court held that the will did not have a public character or an indefinite life and its provisions did not discriminate against one or more sectors of society but rather, against certain descendants. Furthermore, it analysed the terms of section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act[9] (Equality Act), and its prohibition of unfair discrimination on the grounds of gender, which is stated to include "the system of preventing women from inheriting family property"[10] and "any practice . . . which impairs the dignity of women and undermines equality between women and men".[11] The High Court considered that this issue did not engage any testamentary "system" or "practice" as contemplated by the Equality Act, and that it would be strained to view it as such, as opposed to a once-off, private testamentary disposition by the testators.[12]

[11] The High Court concluded that in balancing the right to equality and the right to freedom of testation, allowing the former to trump the latter would produce an arbitrary result and would constitute a broad incursion into the fundamental constitutional right to property.[13] The High Court directly applied the Constitution to clause 7 and found that the terms of the fideicommissum infringed on the applicants' right to equality. It went on to consider, without finding that clause 7 was a law of general application, whether the discriminatory provision was a justifiable infringement on the right to equality in terms of section 36 of the Constitution.[14] Upon conducting a justification analysis, it held that the limitation of the second to sixth applicants' right to equality effected by clause 7 of the will was reasonable and justifiable given the importance accorded to freedom of testation. It

[9] 4 of 2000.

[10] Section 8(c) of the Equality Act.

[11] Section 8(d) of the Equality Act.

[12] High Court judgment above n 5 at para 53.

[13] Id at para 69.

[14] Id at paras 71-6.

held that the constitutional challenge to clause 7 should fail and that the impugned clause was also not so unreasonable and offensive so as to be contrary to public policy.[15]

[12] The second issue turned on the interpretation of "male descendants" in clause 7. The High Court held that the proper interpretation of clause 7 was that the testators intended to limit the beneficiaries to the third generation, being their great-grandsons.[16] In the result, the High Court dismissed the claims of the second to sixth applicants and the fourth to eighth respondents with no order as to costs.

Supreme Court of Appeal

[13] The applicants appealed to the Supreme Court of Appeal. Their appeal was heard and dismissed on 13 November 2018. That Court gave no written reasons for its order. In this regard, I endorse the statements of my brother Jafta J, that the failure of the Supreme Court of Appeal to give reasons here is unfortunate.[17]

In this Court

Applicants' submissions

[14] The applicants submit that clause 7 unfairly discriminates against women. They contend that when a provision in a private will unfairly discriminate against female descendants in an out-and-out disinheritance clause,[18] it ought to be struck down by a court on the grounds of public policy. Furthermore, they submit that the High Court erred in its interpretation of the words "male descendants" as being limited to great-grandsons.

[15] Id at paras 71-81.

[16] Id at para 103.

[17] Second judgment at [105].

[18] Concisely defined, out-and-out disinheritance means the absolute exclusion of an individual or individuals from inheriting in terms of a will.

[15] In terms of the discrimination issue, the applicants submit that the High Court incorrectly characterised the right to freedom of testation. Particularly, the extent to which it is protected under the Constitution. They contend that the right to equality should be considered as the right which requires greater protection in the circumstances. The applicants also challenge the distinction reinforced by the High Court between public charitable testamentary trusts and out-and-out disinheritance clauses in private wills. They submit that different consequences should not apply between the two instruments, particularly given that courts do indeed strike down discriminatory provisions in private contracts that are against public policy. The applicants posit that the right to equality reflects current public policy in South Africa, while the right to freedom of testation does not serve a similar purpose.

[16] On the interpretation issue, the applicants contend that the words "male descendants" should be given their ordinary meaning and, therefore, include successive generations, which includes the grandsons of the deceased. This would not defeat the purpose of clause 7. Instead, this would give due regard to the context of the will and would not create a departure from the ordinary meaning of the words.

Respondents' submissions

[17] The first to third respondents oppose the application on the following grounds: (a) the history and circumstances of the will do not render this matter appropriate for adjudication by this Court on the issue of the validity of discriminatory provisions in a private will of this nature; (b) granting relief will result in benefits being awarded arbitrarily to one group of female descendants; and (c) this matter gives rise to the typical situation envisaged by the High Court where testators' last wishes "are second-guessed by a court which might have little inkling as to why"[19] the testators provided as they did.

[19]High Court judgment above n 5 at para 61.

[18] In respect of the discrimination issue, the respondents submit that there is no prospect that this Court will conclude that unfair discrimination on gender within a private will, in the absence of a specific justification for disinheriting potential beneficiaries, cannot be justified under section 36 of the Constitution. The respondents aver that there are critical distinctions between how courts should treat public and private testamentary dispositions.[20] In terms of the interpretation issue, this merely involves the application of trite and unchallenged principles of testamentary dispositions.

Issues

[19] The preliminary issue is whether leave to appeal should be granted. The substantive issues are: (a) the proper interpretation of clause 7; (b) whether clause 7 is unfairly discriminatory against women; and (c) whether it is enforceable. These issues usher in the question whether a discriminatory out-and-out disinheritance provision in a private will can be declared unenforceable based on public policy. The final issue is whether clause 7 itself is contrary to public policy as underpinned by our constitutional values and thus warrants this Court's intervention.

Leave to appeal

[20] The issue whether unfair discriminatory provisions in a private will, which discriminate against females in an out-and-out disinheritance clause, should be considered unenforceable on public policy grounds, engages this Court's jurisdiction as a constitutional matter on two fronts.[21] First, this Court has accepted that what constitutes public policy is determined "by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights".[22] Second, in terms

[20] The respondents claim that the strength of the Supreme Court of Appeal's reasoning in *Harvey N.O. v Crawford N.O.* [2018] ZASCA 147; 2019 (2) SA 153 (SCA) strongly weighs against the applicants' prospects of success.

[21] Section 167(3)(b)(i) of the Constitution.

[22] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 29.

of section 39(2) of the Constitution, this Court has recognised that the development of the common law in line with the values of the Constitution also constitutes a constitutional issue.[23]

[21] The next hurdle is whether it is in the interests of justice to grant leave to appeal. This requires balancing an array of factors including reasonable prospects of success, which is not determinative but is a weighty factor.[24] Other relevant factors include: the importance of the issue;[25] whether a decision by this Court is desirable;[26] and the public interest in the determination of the issue.[27] The question whether courts ought to intervene where there are allegations of unfair discrimination in private testamentary bequests that seek to be enforced in the constitutional dispensation, warrants this Court's attention. This Court has never been called upon to grapple with alleged discriminatory private out-and-out disinheritance testamentary provisions whilst balancing freedom of testation against equality under the umbrella of public policy. This balancing act and the determination of the issue at hand is of interest to the broader public. Therefore, it is in the interests of justice that leave to appeal be granted.

[23] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 17; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at paras 3 and 9; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15(b).

[24] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 36.

[25] *De Reuck v Director of Public Prosecutions* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

[26] Id.

[27] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) 2011 at para 53 and *Radio Pretoria v Chairperson of Independent Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2003 (3) BCLR 231 (CC) at para 22.

Analysis

[22] I now deal with the merits of the appeal. The essential question raised by this matter is whether the impugned fideicommissary provision in a private will that bequeaths the property only to male descendants is contrary to public policy and therefore unenforceable. To answer this question, I will begin by considering the current common law position and examples of testamentary bequests which our law has thus far deemed to be contrary to public policy and unenforceable.

The common law position of testate succession in South Africa

[23] Generally, it is accepted that testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on this freedom.[28] It is well established that there are various restrictions on freedom of testation. These include: (a) effect will not be given to testamentary dispositions which are illegal, contrary to public policy or vague;[29] (b) the maintenance and education of a parent's children constitute a claim against such a parent's deceased estate;[30]and (c) restrictions imposed by legislation.[31]

Pre-constitutional dispensation

[24] During the pre-constitutional dispensation, "South African testators enjoyed almost unlimited testamentary freedom and courts were generally loath to interfere with testamentary bequests that were capable of being carried out".[32]

[28] De Waal and Schoeman-Malan in *Law of Succession* above n 1 at 3.

[29] See for instance *Minister of Education v Syfrets Trust Ltd N.O.* 2006 (4) SA 205 (C) (*Syfrets*) at para 22; and *Aronson v Estate Hart* 1950 (1) SA 539 (A); [1950] 2 All SA 13 (A) at 555-6.

[30] *Ex Parte Insel* 1952 (1) SA 71 (T) at 75; *Glazer v Glazer* 1963 (4) SA 694 at 707; and *Hoffmann v Herdan N.O.*1982 (2) SA 274 at 275.

[31] This includes: The Maintenance of Surviving Spouses Act 27 of 1990; The Trust Property Control Act 57 of 1988; and the Pension Funds Act 24 of 1956.

[32] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" (2012) 27 *Tulane European & Civil Law Forum* at 114.

[25] The common law rule was that testamentary bequests that were considered contrary to public policy were unenforceable. This public policy test was flexible and gave testators considerable latitude to include discriminatory clauses in their bequests.[33] A notable case is *Aronson*, in which the testator provided for a forfeiture of benefits should a beneficiary "marry a person not born in the Jewish faith or forsake the Jewish faith".[34] The forfeiture clause was challenged on various grounds including whether the forfeiture provision was against public policy.[35] The Appellate Division held that it was not contrary to public policy. It reasoned that a marriage of that nature would increase tensions, could lead to irreconcilable differences, and would have an unsettling effect on children. Furthermore, in that case, Greenberg JA went on to state that "I know of no principle in law which would make it contrary to public policy for the testator to attempt (according to his rights) to safeguard his descendants against these perils".[36]

[26] However, in other cases involving private wills, certain conditions attached to bequests were deemed contrary to public policy. For instance, in *Levy*,[37] a testator provided that one of his daughters would only receive benefits if her marriage was dissolved by death or "through any other cause".[38] The Court held that a provision in a will which was calculated to break up an existing marriage was *contra bonos mores* (against public morals) and therefore invalid. In terms of that provision, that Court held "it was difficult to imagine

[33] Id.

[34] *Aronson* above n 29 at 540.

[35] Id at 546. These other grounds outlined were twofold. Firstly, it was void for uncertainty, and, secondly, it amounted to a nude prohibition.

[36] Id. See further the concurrence by Van den Heever JA. This approach was criticised by various academics, see for instance, Hahlo "Jewish Faith and Race Clauses in Wills – A Note on Aronson v Estate Hart 1950 1 SA 539 (A)" (1950) 67 *SALJ* 231 at 239-240 and Corbett et al *The Law of Succession in South Africa* 2 ed (Juta and Company, Cape Town, 2002) at 130-1.

[37] *Levy N.O. v Schwartz, N.O.* 1948 (4) SA 930 (W).

[38] Id at 498.

provisions in a will more repugnant to public policy".[39] The impugned condition was deemed unenforceable and the daughter was able to inherit unconditionally.

[27] In the context of public wills, testators were afforded considerable scope in the realm of charitable trusts to limit certain benefits on various grounds. In *Marks,*[40] the testator created a trust for the payment of bursaries to students at a university but stipulated that the recipient must be a "Jew or Jewess (not a converted)" and the bursary would lapse "if the grantee prove religiously inclined".[41] A challenge on the basis that the condition was vague and contrary to public policy was unsuccessful. The Appellate Division held that there was sufficient certainty and that, regarding the public policy issue, it was not framed in peremptory terms and it was difficult to ascertain the intention of the testator.[42] In doing so, the court in *Marks* reinforced the primacy of freedom of testation in the context of public charitable trusts and consequently, condoned limits on potential beneficiaries on particular grounds.

[28] However, there were outliers, for instance, the High Court's decision in the matter of *William Marsh,* albeit in the context of the Trust Property Control Act, not the common law,[43] where Mr Marsh executed a will in 1899 to create a trust providing for a home for destitute white children. During the 1970's, the Methodist Church began to administer the homes and over time, as a result of changes within the socio-economic landscape, there

[39] Id at 499.

[40] *Marks v Estate Gluckman* 1946 AD 289.

[41] Id at 294.

[42] Id at 310. Tindall JA states that "In my opinion, it cannot be said that the provision in clause 7, giving the administrator this discretion, is contrary to public policy merely because it advises him to cancel the bursary 'if the grantee prove religiously inclined'. There is some difficulty in determining the precise meaning of these words. If they are directed against the use of a bursary for the purpose of qualifying for a religious career, the advice to the administrator is not contrary to public policy. . .".

[43] *Ex Parte President of the Conference of the Methodist Church of Southern Africa: in re William Marsh Will Trust* 1993 (2) SA 697 (C) (*Willam Marsh*) per Berman J and Seligson AJ. At 702 Berman J states that "it is to my mind fortunately unnecessary for the Court to consider the application on the basis of the common law approach".

came to be a dearth of destitute white children.[44] As a result, the Church applied in terms of section 13 of the Trust Property Control Act to delete the word "white".[45] The Court, based on section 13, held that the intention of the testator was frustrated by the racial prohibition and that the racial limitation was contrary to public policy since it would not be in the public interest for children of other races to be excluded from accessing children's homes for the destitute. The Court held that it was in the public interest and in accordance with public policy, that the discriminatory provisions be removed.[46] In light of the discriminatory provision in the will, the court made an order in favour of the applicants to the effect that the term "white" be removed from the phrase "white destitute children". However, it is important to note that these cases were all before the enactment of the Constitution, whereupon the position changed.

Common law position under the constitutional dispensation

[29] Since the advent of the Constitution, testamentary bequests have been challenged on the basis of public policy as infused by constitutional values. In particular, decisions have emerged in which courts have intervened in matters dealing with public charitable trusts.

[30] In *Syfrets*, a will and codicil executed in 1920 created a charitable testamentary trust that was established in the 1960's, under which bursaries to study abroad had been provided for "deserving students with limited or no means".[47] The eligibility of the bursaries was restricted to persons of "European descent" and excluded persons of "Jewish descent" and "females of all nationalities". The High Court was asked to delete the discriminatory criteria (in this case, race, religion, and gender). Applying established common law

[44] Id at 700.

[45] Id.

[46] Id.

[47] *Syfrets* above n 29 at para 1.

principles, the court considered whether the impugned provisions were against public policy. In doing so, it noted that in the constitutional era public policy was rooted in the Constitution and the values it enshrines.[48] The Court, therefore, considered whether the provisions constituted unfair discrimination and if so, whether they were contrary to public policy. The High Court held that the provisions constituted indirect discrimination on the basis of race as well as direct discrimination on the grounds of religion and gender. The Court proceeded to apply the *Harksen*[49] test, and balanced competing constitutional values and principles of public policy.[50] It also noted the public nature of the trust,[51] and concluded that "the testamentary provisions in question constitute unfair discrimination. Accordingly, it concluded that they were contrary to public policy as reflected in the foundational values of non-racialism, non-sexism, and equality".[52] It held that it was therefore empowered to vary the trust and delete the offending provisions.

[31] In *Emma Smith*,[53] a will executed in 1938 created a charitable trust which was designated for the "higher education" of "European girls born of British South African or Dutch South African parents who have been resident in Durban".[54] They had to be "poor" and, but for such assistance, "unable to pursue their studies".[55] The matter hinged on whether the trust could be varied to delete the racially restrictive provision in terms of section 13 of the Trust Property Control Act. The Supreme Court of Appeal focused on whether the impugned trust provisions were in conflict with the public interest. In doing

[48] Id at para 24.

[49] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[50] Id at paras 33 and 39.

[51] Id at para 46.

[52] Id at para 47.

[53] *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) (*Emma Smith*).

[54] Id at para 8. The parties agreed that "'European' is an obsolete reference to white South Africans".

[55] Id.

so, it considered section 9 of the Constitution,[56] the Equality Act and the Higher Education Act.[57] It stated that "in the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster".[58] It noted that the university, in administering the trust, would operate "in the public sphere" and therefore, must act consistently with public policy as well as constitutional values. The Supreme Court of Appeal held:

> "The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as a University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past."[59]

[56] Section 9 of the Constitution reads:

> "(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."

[57] 101 of 1997.

[58] *Emma Smith* above n 53 at para 38. See further para 37 which endorses Cameron et al *Honore's South African Law of Trusts* 5 ed (Juta and Company, Cape Town 2002) 171-2:

> "The Bill of Rights applies to all law including the law relating to charitable trusts. . . the objects of a trust will have to conform with the disavowal of unfair discrimination under the 1996 Constitution and the Equality Act, which envisage equality even in person-to-person relations".

[59] Id at para 42.

[32] Similarly, *BOE Trust*[60] concerned a trust created in a will executed in 2002 in which the testator provided for the trust income to go towards bursaries to assist "white South African students" to study abroad on condition that the recipient "must return to South Africa". The trustees approached the court for an order to delete the word "white" from the trust deed. Although both parties accepted that the condition unfairly discriminated against potential beneficiaries on the basis of race, the High Court held that it was not clearly contrary to public policy. The court went on to state that "it is recognised that discrimination designed to achieve a legitimate government purpose is not unfair".[61] The High Court considered that the testator may have had a legitimate objective – to counter the brain drain,[62] but, there was no firm finding in this regard.[63] The Supreme Court Appeal affirmed the principle of freedom of testation but held that it was "not absolute".[64]

[33] From this analysis, it is evident that discriminatory testamentary bequests in public trusts have been tested against the robust yardstick of public policy. However, our courts to date have only applied this to: (a) testamentary forfeiture clauses (even in the private context, often in the form of resolutive or negative potestative conditions); and (b) public charitable trusts. A public policy challenge to out-and-out disinheritance cases in the private sphere is, therefore, novel. The question that arises is whether these types of provisions are contrary to public policy under our constitutional dispensation. This, in turn, begs the question, whether the common law should be developed to address discriminatory

[60] *BOE Trust Ltd N.O. (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)* [2012] ZASCA 147; 2013 (3) SA 236 (SCA) (*BOE Trust* Supreme Court of Appeal judgment).

[61] *BOE Trust Ltd N.O.* 2009 (6) SA 470 (WCC) (*BOE Trust* High Court judgment) at para 14.

[62] Id at para 15 where it stated:

> "During the post-constitutional years must has been said and written about the increasing trend amongst white graduates of our universities to emigrate, upon the completion of their education, thereby depriving the country of benefit of their skills obtained at the expense of the South African tertiary-education system."

[63] Id at para 17.

[64] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 28.

provisions in out-and-out disinheritance testamentary provisions in private wills. I will consider the first issue for determination namely, the interpretation of clause 7.

The golden rule of interpretation

[34] The point of departure when interpreting wills is "to ascertain the wishes of the testator from the language used in the will".[65] Courts are obliged to give effect to the wishes of the testator unless they are prevented by some law from doing so. The "golden rule" for the interpretation of wills and this inherent limitation is famously described as follows in *Robertson*:

> "The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so."[66]

[35] If one considers clause 7 of the will, the clear interpretation of "male descendants" is to provide for sons only, after the first generation. No armchair or extrinsic evidence was put before this Court to consider otherwise. Therefore, in giving effect to the wishes of the testators from the language used it is clear that as far as the second and third generations are concerned, they intended for the fideicommissary beneficiaries to be male descendants, and thus, for benefits not to devolve upon any of their female descendants.

[36] The next question to consider is whether this Court is barred from giving effect to the testators' intention by any rule or law. The analysis above canvassed some of our

[65] *Robertson v Robertson Executors* 1914 SA 503 (AD) at 507. This dictum was quoted with approval in the context of a *fideicommisssum* by Watermeyer JA in *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 183.

[66] *Robertson* id at 507.

The common law has developed additional rules to guide courts when using the golden rule. These include, the "general scheme of the will," and the dominant clause must be ascertained. "The plain meaning rule" stipulates that ordinary words must attain their ordinary meaning and technical words their technical meaning. See further Corbett, Hofmeyr (eds) and Khan *The Law of Succession in South Africa* 2 ed (Juta and Company, Cape Town 2001) at 454-455.

jurisprudence both before and after the advent of the Constitution. It revealed that whilst freedom of testation is a central principle of testate succession, it is a trite rule of the law of succession that clauses which are contrary to public policy are unenforceable. But, our courts have, up until now, only dealt with this in respect of conditions attached to private bequests or in the cases of public charitable testamentary bequests as opposed to out-and-out disinheritance bequests. Our courts have not been faced with a set of facts such as this to be tested against public policy. Specifically, an out-and-out disinheritance bequest where the testators had no personal relationships or interactions with the lineal descendants,[67] yet excluded these descendants that they had never met (unknown lineal descendants) on the sole basis of their immutable characteristics.[68] This ushers in the pivotal question whether this matter warrants the development of the common law, as infused with our constitutional values.

Direct versus indirect application of the Bill of Rights

[37] Before turning to this point, I wish to dispose of the question whether this Court ought to consider the enforceability of clause 7 on the ground that it amounts to discrimination on the basis of gender and sex[69] in contravention of section 9 of the Constitution (direct application of the Bill of Rights) or whether we should consider

[67] Only blood relations in the descending line.

[68] The potential beneficiaries in question are the lineal descendants of the testator and succeed the testator's own generation and that of their children's generation and so on. "Excluded" in this context connotes an implicit exclusion of one group of potential beneficiaries by proximity to a similarly placed group of potential beneficiaries who have been expressly "included" solely due to immutable characteristics. The status of the applicants before us is as follows: unknown (meaning they had no personal relationships or interactions with the testator, as they were born after the death of the testator) lineal descendants that are excluded as potential beneficiaries on the basis of immutable characteristics.

Immutable characteristics are defined as those enshrined under section 9(3) of the Constitution including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[69] It is critical to mention that our courts have used the grounds of gender and sex interchangeably but it is nonetheless important to note that they are distinct. On one hand, "gender" can be understood as the "socially and culturally constructed differences between men and women" while, in contrast "sex" is described as the "biological differences between men and women". See Woolman and Bishop *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2013) at 2665.

enforceability through the lens of public policy, as infused with constitutional values (an indirect application of the Bill of Rights).

[38] In *Barkhuizen*, Ngcobo J held that the proper approach to constitutional challenges to contractual terms is "whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[70] This was, among other things, due to various concerns with directly applying the provisions in the Bill of Rights to the contract. First, that the impugned clause in *Barkhuizen*, the time-bar clause, did not constitute a law of general application which could limit a right under section 36 of the Constitution.[71] Second, that the time-bar clause did not amount to a "law" or "conduct" which a court could declare invalid under section 172(1)(a) of the Constitution.[72]

[39] Various parallels can be drawn between contractual and testamentary provisions. Clause 7 is a clause in a private will, it is not a law of general application for purposes of section 36, nor does it amount to "law" or "conduct" for the purposes of section 172(1)(a). In *Barkhuizen*, it was also noted that this approach "leaves space for the doctrine of *pacta sunt servanda* to operate".[73] Equally, this approach allows for the principle of freedom of testation to flourish alongside and subject to our constitutional values. For this reason, coupled with the fact that this approach is primarily pleaded by the applicants, I shall, therefore, resort to an indirect horizontal application of the Bill of Rights through the vehicle of public policy.

[40] I have had the benefit of reading the judgments penned by my brother Jafta J (second judgment); and my sister Victor AJ (third judgment). While the second judgment

[70] *Barkhuizen* above n 22 at para 30.

[71] Id at para 24.

[72] Id.

[73] Id at para 30.

determines the matter by directly applying the Constitution and Equality Act, and the third judgment applies the Equality Act directly to clause 7 in accordance with the principle of constitutional subsidiarity, I am resolute that this matter should be determined from a common law viewpoint through the lens of public policy as imbued with our constitutional values.

[41] In both written and oral argument, the applicants predominantly pleaded that the matter should be determined in terms of the common law, and its development.[74] Since time immemorial, courts have considered the common law rule that clauses that are contrary to public policy are unlawful and are unenforceable. Our law reports are teeming with examples of what is against public policy and therefore unenforceable. These matters are not limited to unfair discriminatory issues. It would be remiss of us to take a detour and neglect engaging with this body of jurisprudence and not attempt to bring it in line with a constitutionally infused common law approach. In my view, there is no bar to applying the common law instead of the Equality Act, because the Equality Act gives effect to section 9 and the right to equality and does not purport to codify the common law public policy standard or the limits of freedom of testation.

Duty to develop the common law

[42] Section 39(2) of the Constitution obliges courts to develop the common law to "promote the spirit, purport and objects of the Bill of Rights". This principle is bolstered by section 173 of the Constitution which endows this Court with "the inherent power to . . . develop the common law, taking into account the interests of justice".

[43] In *Carmichele*, this Court considered the nature of the section 39(2) obligation as follows:

[74] The applicants submit that "This Court is compelled to consider whether section 39(2) of the Constitution mandates a change to the common law notion of freedom of testation."

> "It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2).
>
> . . .
>
> The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."[75]

[44] The importance of developing the common law in light of our constitutional values was underscored in *Du Plessis* when Mahomed DP stated:

> "the common law is not to be trapped within limitations of the past . . . it needs to be revisited and revitalised with the spirit of constitutional values. . . defined in chapter 3 of the Constitution and with full regard to the purport and objects of that chapter ".[76]

[45] This Court has accepted that "the normative influence of the Constitution must be felt throughout the common law".[77] It has been said that "the mission of section 39(2) is to carry out the audit and re-invention of the common law".[78]

[75] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 39 and para 54.

[76] *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 CC) at para 86 in the context of the interim Constitution.

[77] *K* above n 23 at para 17. See also *S v Thebus* [2003] ZACC 12; 2003 (2) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28.

[78] Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 at 426.

[46] Section 1 of the Constitution provides for our cherished founding values.[79] Notably, the constitutional normative value system has been sketched as follows:

> "The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society which breaks clearly and decisively from the past and where institutions which operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system."[80]

[47] The duty of the courts to develop the common law, in true fidelity to the ethos of the transformative constitutional project, is well articulated by Cameron J in *Fourie*:[81]

> "Developing the common law involves a simultaneously creative and declaratory function in which the court puts the final touch on a process of incremental legal development that the Constitution has already ordained . . . This process also requires faith in the capacity of all to adapt and to accept new entrants to the moral parity and equal dignity of constitutionalism. Judges are thus entitled to put faith in the sound choices the founding negotiators made on behalf of all South Africans in writing the Constitution. And they are entitled also to trust that South Africans are prepared to accept the evolving implications that those choices entail. The task of applying the values in the Bill of Rights to the common law thus requires us to put faith in both the values themselves and in the people

[79] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[80] *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 at 728. Also, the term of art "an objective normative value system" is imported from German law, see further *Carmichele* above n 75 at para 54.

[81] *Fourie v Minister of Home Affairs* [2004] ZASCA 132; 2005 (3) SA 429 (SCA).

whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all."[82]

[48] This prompts the question: when is section 39(2) triggered? O'Regan J proffered laudable guidance on this in *K*:[83]

"It is necessary to consider the difficult question of what constitutes 'development' of the common law for the purposes of section 39(2). In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

The question we should consider is whether one characterises such cases as development of the common law for the purposes of section 39(2). The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution

[82] Id at paras 23-5.

[83] *K* above n 23.

> are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."[84]

[49] Based on what was said by this Court in *K*, determining whether a novel set of facts falls within the ambit of an existing common law rule is within the domain of section 39(2). Therefore, should we choose to extend the existing common law rule (that clauses contrary to public policy are unenforceable) to private out-and-out disinheritance testamentary provisions, which unfairly discriminate between unknown included and excluded lineal descendants on the sole basis of immutable characteristics, this would be an incremental, yet significant, development of the common law. As I see it, the second judgment applies the broad existing common- law rule as it stands,[85] without acknowledging that, given the novel facts, a development is warranted in light of section 39(2) coupled with what was said by this Court in *K*.

[50] When considering these novel facts, this Court has a constitutional obligation to craft and mould the common law in accordance with the spirit, purport and objects of the Bill of Rights. It is worth noting that in *Mighty Solutions*, this Court cautioned that before a court proceeds to develop the common law it must consider various steps.[86] The purpose

[84] Id at paras 16-7. See also *Carmichele* above n 75 at para 40.

[85] See second judgment at [90].

[86] In *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) at para 39, this Court noted that before a court proceeds to develop the common law it must:

> (a) Determine exactly what the common law position is;
>
> (b) Consider the underlying reasons for it;
>
> (c) Enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development;
>
> (d) Consider precisely how the common law should be amended; and

of this is not to impugn the principle of freedom of testation. Rather, the purpose of applying some of these steps is to allow us to re-evaluate the weight attached to freedom of testation when juxtaposed with other constitutional considerations such as balancing a public policy enquiry.

Principles underlying the current common law position

[51] The common law position has been outlined in detail above. The common law rule in effect aims to respect the wishes of the testator through the principle of freedom of testation.[87] This is inherited from, among others, the English approach of unlimited freedom of testation, notwithstanding the distinct economic and social developments that have taken place in both England and South Africa.[88] Hahlo remarked:

> "The principle of unlimited freedom of disposition by will which South Africa took over from England during the nineteenth century was the product of the individualistic and *laissez faire* attitude which prevailed in English law at that time, but has since given way to a socially minded approach."[89]

[52] It is evident that the primacy of freedom of testation in testate succession, as it currently stands, is based on our law's respect of freedom, to act as one wishes in the private sphere. Our mixed legal system, with all its historical nuances, has clasped onto the importance of the English law view, as it was at the time of its adoption into our law, of autonomy, private property and unfettered freedom to bequeath one's property as one

(e) Take into account the wider consequences of the proposed change on that area of the law.

The respondents contend that the applicants in *King* have not met the factors outlined in *Mighty Solutions*. However, they do not expand on this. Rather, the respondents list 8 reasons why it is not in the interests of justice to deal with the discrimination issue.

[87] Corbett et al above n 36 at 39.

[88] Hahlo "The Case against Freedom of Testation" (1959) *South African Law Journal* 76 (435) at 442.

[89] Id.

wishes, whilst retaining some of the Roman and Roman-Dutch law exceptions to this.[90] The question that then arises is to what extent must this primacy of freedom of testation be balanced against other key constitutional values (including equality and non-sexism) which underpin our constitutional dispensation? Similarly, it is important to question whether there may be certain types of bequests, beyond the current exceptions, that should be unenforceable because they are *contra bonos mores*. Before dealing with these questions, I will briefly highlight the patriarchal manifestations of the law of testation as well as the status of freedom of testation in other jurisdictions.

The patriarchal manifestation of the law of testation

[53] Testate succession, and in particular the principle of freedom of testation, while facially neutral, has traditionally manifested in a patriarchal manner. Roman private law was based on the idea that each family had a male head. Families residing in one household were centred patriarchally with their roots firmly lodged in the notion of the *paterfamilias*.[91] The move towards freedom of testation was seemingly brought about with an expectation that the predominantly male testators would dispose of their property through the reasonable man[92] standard, for which the social expectation at the time was to ensure the well-being of one's family.

[54] In *Bhe*, this Court acknowledged:

> "Roman-Dutch law, like the Roman law upon which it was founded, was neither humanitarian nor egalitarian. In its gender bias, it was similar to other European systems

[90] For example, the common law position in our current law that conditions attached to bequests that seek to break up marriages are *contra bonos mores* appear directly related to the Roman law position that conditions which encouraged an immoral act were against public policy. See Du Toit "The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch Law" (1999) 10(2) *Stellenbosch Law Review* at 240.

[91] Leage and Ziegler *Roman Private Law: Founded on the 'Institutes' of Gaius and Justinian* 2 (Macmillan, 1906) at 1.

[92] I use "man" consciously because that was the "reality" of the time.

> of its time, and its effects on both the South African legal system and South African society have been enormous."[93]

[55] Therefore, it must be accepted that the genesis and development of freedom of testation have undeniable layers of patriarchy, deeply rooted in notions that women cannot own property as well as be commercially active, and thus cannot inherit property. As I will demonstrate below, these underlying social and economic considerations are not static and are inimical to the values of the Constitution.

Comparative analysis

[56] It is useful to consider the role of the principle of freedom of testation in other jurisdictions. In Canada, freedom of testation is a deeply entrenched common law principle. The Supreme Court of Canada has recognised the importance of testamentary autonomy,[94] maintaining that this right may only be limited in certain instances.[95] Most recently, in *Spence v BMO Trust Company*,[96] the Ontario Court of Appeal (ONCA) considered the exclusion by Mr Spence, a Jamaican man, of his daughter and grandson from his will. The testator stated in his will that the reason for the exclusion was that his daughter "has had no communication with him for several years and has shown no interest in him as her father".[97] However, extrinsic evidence indicated that the true reason for the exclusion was that his daughter had had a child with a white man, and her son was

[93] *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at fn 112 cites Zaal "Origins of gender discrimination in SA Law" in Liebenberg (ed) *The Constitution of South African from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Phillip, Cape Town 1995) at 34.

[94] *Tataryn v Tataryn Estate* [1994] 2 SCR 807.

[95] For example, in *Canada Trust Co. v Ontario Human Rights Commission* 1990 CanLII 486 (ONCA) (*Canada Trust*), the Ontario Court of Appeal found certain terms of an educational trust, which included racist and religious qualifications, to be discriminatory. However, at 25 the ONCA held that it is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.

[96] 2016 ONCA 196.

[97] Id at para 10.

accordingly of "mixed-race". While the Ontario Superior Court of Justice set aside the will in its entirety, based on contravention of public policy, the ONCA upheld an appeal. Of significance is that the ONCA held that judicial interference with Mr Spence's testamentary freedom was not warranted. The will was not facially discriminatory and therefore did not offend public policy. However, the ONCA stated that even a facially discriminatory will would have been valid as it reflects a testator's intentional and private disposition of his property, with which the Court was not entitled to interfere.[98]

[57] The applicants in *Spence* relied on the decision in *McCorkill* which confirmed that courts are authorised to examine the validity of a bequest on grounds of public policy.[99] However, the ONCA in *Spence* held that this decision to strike down an absolute (unconditional) bequest was exceptional.[100] It is worth noting that Ontario's Succession Law Reform Act, unlike that of other Canadian provinces, places a strong emphasis on will formality and adherence to the testator's intentions. Additionally, private individuals in Canada are not subject to the Charter of Rights and Freedoms. It is therefore difficult to challenge a will based on suspicion of discrimination in Ontario.[101]

[58] A curious position arises in the United States of America's federal legal system relating to testamentary freedom. Most states recognise that "the right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and it is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by

[98] Id at para 73.

[99] *McCorkill v McCorkill Estate,* 2014 NBQB 148, aff'd 2015 NBCA 50. The testator in *McCorkill* had bequeathed the residue of his state to a neo-Nazi organisation, and the court struck this down on the basis of public policy. Also, in *Fox v Fox Estate,* 1996 CanLII 779 (ONCA), a trustee's actions were prohibited because they represented bad faith, and not because they were discriminatory.

[100] Based on the illegal activities of the organisation that would have been funded by the residue of the testator's estate. The implementation of the testator's intentions would have facilitated the financing of hate crimes.

[101] Spiro "Could the Charter be Extended to Prohibit Discrimination in a Will?" *CanLII Connects* (2019). Available at https://canliiconnects.org/en/commentaries/67792.

statute".[102] The courts of Wisconsin, however, have "dissented sharply from this theory"[103] in several cases, deeming the right to make a will as a "sacred right" and one that is guaranteed by the Constitution".[104] These courts consider it "more sacred than the right to make a contract", and an "inherent power and not a statutory power".[105] However, in *Estate of Ogg*, the Wisconsin Supreme Court noted that this position goes against the majority opinion of the United States' legal authority, where the "right to make a will is in no sense a property right or a so-called natural right".[106]

[59] I now turn to consider civil law jurisdictions.[107] Germany provides for constitutionally protected rights of private ownership and private succession in terms of article 14.1 of the German *Grundgesetz* (Basic Law),[108] which states that "property and the right of inheritance are guaranteed. Their content and limitation shall be determined by the

[102] *Fullam v Brock*, 155 SE 2d 737, 739 (NC 1967).

[103] *Estate of Ogg v First National Bank of Madison*, 54 NW 2d 175 (Wis. 1952) at page 177.

[104] Id at 177-78 wherein *Estate of Ogg* cites the following cases: *Will of Rice* (1912), 150 Wis. 401, 136 NW 956, 137 NW 778; *Upham v. Plankinton* (1913), 152 Wis. 275, 140 NW 5; *Will of Ball* (1913), 153 Wis. 27, 141 NW 8; *Duncan v. Metcalf* (1913), 154 Wis. 39, 141 NW 1002; *Will of Schaefer* (1932), 207 Wis. 404, 241 NW 382.

[105] *Estate of Ogg* above n 103 at 177.

[106] Id.

[107] On 8 April 2020, this Court, as it has previously done, sent a request to the World Conference on Constitutional Justice (Venice Commission) to determine other jurisdictions' constitutional stance on the freedom of testation. In contrast to common law jurisdictions, civil law jurisdictions often explicitly enshrine freedom of testation under their constitutional property right provisions and consequently the right of succession, which is frequently framed as "the right to inherit is guaranteed" or similarly (where the right to inheritance is not expressed in the Constitution, it is enshrined under the jurisdiction's civil code). See also Article 48 of the Constitution of the Republic of Croatia, 22 December 1990; Article 11(1) of the Czech Charter of Fundamental Rights and Freedoms, 16 December 1992; Article 64 of the Constitution of the Republic of Poland, 2 April 1997; Article 60 of the Constitution of the Republic of Armenia, 5 July 1995; Article 29 of the Constitution of the Republic of Azerbaijan, 12 November 1995; Article 46 of the Constitution of the Republic of Moldova ; Article 20 of the Constitution of the Slovak Republic, 1 October 1992.

[108] Germany: Basic Law for the Federal Republic of Germany, 23 May 1949. According to the most recent decision of the German Federal Constitutional Court, that Court characterizes the freedom to make a will as a key element of the guarantee of the right to inheritance. This freedom includes "the right of the testator in [their] lifetime to order a transfer of [their] assets after [their] death … to one or several legal successors, in particular to exclude a statutory heir from participation in the estate and to restrict his or her inheritance to the [monetary] value of the statutory compulsory portion (see BVerfGE 58, 377 (398)). The testator is thereby afforded the possibility to arrange the terms of the succession [themselves] by last will largely in accordance with [their] personal wishes and idea s. In particular, *the testator is constitutionally not forced to treat his or her descendants equally*. See BVerfG, Order of the First Senate of 19 April 2005, 1 BvR 1644/00, para. 63. And BVerfGE 67, 329 (345) - Official Digest (Entscheidungen des Bundesverfassungsgerichts – BVerfGE) 112, 332 (348), ECLI:DE:BVerfG:2005:rs20050419.1bvr164400, available in English on that Court's website at http://www.bverfg.de/e/rs20050419_1bvr164400en.html.

laws".[109] As a result, the *Privaterbrecht* (law of private succession) is expressly enshrined and the state is thus restricted, to an extent, from interfering.[110] The nexus between private ownership and freedom of testation has been recognised by the German Constitutional Court.[111] In doing so, the Court considered freedom of testation as an element of the transferability of ownership. German law thus provides a guarantee of freedom of testation by the express provision for private ownership and private succession.[112] However, the Basic Law in Germany does not have horizontal application and so the equality clause cannot directly restrict freedom of testation.[113] Regardless, "the Legislature must ensure the fundamental content of the constitutional guarantee contained in article 14.1 of the Basic Law, keep in line with all other constitutional provisions, and must, in particular, adhere to the principles of proportionality and equality".[114]

[60] In addition, the role of good morals operates in German law.[115] A testamentary provision would be, objectively, *Sittenwidrig* (contrary to good morals) "if it offends the legal convictions of all reasonable and right-minded people"[116] which is determined by the

[109] Translation by Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?" above n 32. The original stipulates "Das Eigentum und das Erbrecht warden gewährleistet. Inhalt und Schranken warden durch die Gesetze bestimmt".

[110] De Waal "*Bill of Rights Compendium: The Law of Succession and the Bill of Rights*" (Butterworths, Durban 2012) at 3G-4.

[111] Id at 3G-8 citing BverfGE 67, 329 (341). See also BVerfGE 26, 215 (222); BVerfGE 50, 290 (340).

[112] Id at 35-5 citing *Erbrecht* 24. Leipold contends:

> "freedom of testation plays an important part with regard to [the] power of disposition and functions as an essential element of private ownership. The relationship between freedom of testation and private ownership is established by the guarantee of private ownership in article 14(1) of the Basic Law."

[113] De Waal above n 110 at 3G-8.

[114] BVerfG, Order of the First Senate of 19 April 2005 – 1 BvR 1644/00 at para 62.

[115] Dutch law does not recognize a constitutional guarantee of private ownership and private succession, however the concept of *goede zeden* (good morals) plays a role. Although little judicial exploration has been conducted into the impact of rights such as equality, freedom of association and religious beliefs and their impact on freedom of testation. Du Toit above n 32.

[116] Paragraph 138 (1) of the Civil Code.

"opinion of the decent average person".[117] Consequently, any testamentary provision that conflicts with good morals is void.

[61] Similarly, the Dutch Civil Code, in terms of article 4:44, determines that a "testamentary bequest is void if the decisive motive for making the will or bequest is contrary to the public order or good morals, provided such motive is evident from the will itself".[118] More specifically, a condition or testamentary obligation imposed by a will that is contrary to, amongst others, the public order or good morals, is deemed not to have been written.[119] It is noteworthy that testamentary dispositions that conflict with article 4:44 are fairly rare in modern Dutch wills.[120] This is likely attributable to article 21(2) of the Dutch Notaries Act which obliges a notary to refuse to provide their services when, according to reasonable conviction, the service would contravene the law or public order or would amount to the assistance of an act that will have an unlawful purpose or consequence.[121] Notaries will therefore caution testators against including potentially discriminatory provisions in wills.[122] There are, however, established Dutch authorities confirming that prescriptive (conditional) testamentary provisions can constitute an infringement on the fundamental rights of a beneficiary.[123]

[62] Based on this analysis, while some jurisdictions, whether common law or civil, tend to defer to freedom of testation, it is clear that testamentary freedom is never completely

[117] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" above n 32 at 105.

[118] Id at 105.

[119] Id at 106.

[120] Du Toit "Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdictions" above n 32 at 105.

[121] Id at 108.

[122] Id at 108. Civil Law notaries cannot represent any person in the Netherlands, but rather act for the public good. Notaries will therefore caution testators against including potentially discriminatory provisions in wills.

[123] *HR* 21 June 1929 *NJ* 1325 1327-1328. For example, the *Hoge Raad* in the case of Elisabeth invalidated a testamentary forfeiture clause which obliged a beneficiary to baptise her children in a particular denomination, based on a violation of good morals.

unfettered. A noticeable trend is that the public policy yardstick is exercised to different extents and in various contexts to limit deference to testamentary freedom.

Public policy and private wills under the constitutional dispensation

[63] I turn now to consider whether the common law position which prioritises freedom of testation in the context of private wills ought to be extended as set out in *K*, and in line with the spirit, purport and objects of the Bill of Rights, so that courts may test private out-and-out disinheritance provisions against the public policy standard and weigh the principle of freedom of testation against other constitutional considerations.

Constitutional protection of freedom of testation

[64] While not expressly enshrined in the Constitution, freedom of testation garners constitutional protection from a concatenation of rights in the Bill of Rights including the right to property, dignity and privacy.

[65] This Court has accepted that freedom of testation "is fundamental to testate succession".[124] It has been said that freedom of testation implicitly forms part of section 25(1) of the Constitution in that it protects a person's right to dispose of her assets, upon death, as she wishes.[125] In *Syfrets*, it was accepted, albeit obiter, that while no express mention is made of freedom of testation in the Constitution "it forms an integral part of a person's right to property, and must therefore be taken to be protected in terms of section 25".[126] This was revisited in *BOE Trust* in which the Supreme Court of Appeal stated that this view is "well held". It went on to state that were the inverse held to be true, it would entitle the state to effectively "infringe a person's property rights after he or she

[124] *Moosa N.O. v Minister of Justice* [2018] ZACC 19; 2018 (5) SA 13 (CC); 2018 (10) BCLR 1280 (CC) at para 18.

[125] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[126] *Syfrets* above n 29 at para 18.

has passed away, unbounded by the strictures which obtain while that person is still alive".[127] That Court endorsed Du Toit's account of the centrality of freedom of testation and its connection with the right to property.[128]

[66] However, in *Syfrets*, that Court was circumspect on whether testamentary wishes that are contrary to public policy curtail section 25(1). Firstly, deprivation of property engages a considerably high threshold as it constitutes a "substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment".[129] Secondly, "for deprivation to be arbitrary, it must be procedurally unfair or must take place without sufficient reason . . . there can be no question of procedural unfairness . . . given that any order would be granted only after a full hearing by a court".[130] That Court went on to state that "in any event, it is, of course, trite that the principle of freedom of testation has never been absolute and unfettered: various restrictions have been placed on this freedom".[131] In other words, limiting freedom of testation, due to contravention of public policy, is by no means an arbitrary deprivation – it is for good cause. I endorse this view that the unenforceability of testamentary bequests that are contrary to public policy for being impermissibly discriminatory does not constitute an *arbitrary* deprivation for the purposes of section 25(1).

[127] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[128] Id. The Supreme Court Appeal endorsed the view that "freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property."

[129] *Syfrets* above n 29 at para 20.

[130] Id at para 21.

[131] Id at para 22.

[67] The principle of freedom of testation has been held to warrant constitutional refuge through the right to privacy[132] coupled with the right to dignity.[133] In *BOE Trust*, the Supreme Court of Appeal espoused:

> "Not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."[134]

[68] Autonomy and moral agency underscore the importance that freedom of testation affords to the right to privacy.[135] Also, this Court has recognised that the right to privacy and dignity are closely related as "the right to privacy, through the constitutional order, serves to foster human dignity".[136]

[132] Section 14 of the Constitution reads:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[133] Section 10 of the Constitution reads: "everyone has inherent dignity and the right to have their dignity respected and protected".

Our courts have indicated that freedom of testation can be shielded by these rights in *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 27 and *Syfrets* above n 29 at para 41.

[134] *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 27.

[135] De Vos et al *South African Constitutional Law in Context* (Oxford University Press, Cape Town 2015) at 463 note that privacy and dignity are closely related and note further that "where a person's privacy is breached, that person will often not be treated with concern and respect". Steyn "Limiting Freedom of Testation: Evaluating 'Discriminatory' Stipulations in Testamentary Charitable Trusts" (LLM, NWU 2018) at 19.

[136] *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 44 and in *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27 this Court stated—

> "there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."

[69] Therefore, the principle of freedom of testation is at the heart of testate succession and cloaked in constitutional protection by virtue of the rights to property, dignity, and privacy. Freedom of testation thus informs public policy and carries significant weight in any analysis of what public policy, as infused with our constitutional values, dictates.

[70] However, one cannot ignore that there are competing values at play. Our Constitution also envisages and promises a democratic State based on "human dignity, the achievement of equality . . . non-racialism and non-sexism . . . and the supremacy of the Constitution".[137] Furthermore, it protects all persons from direct or indirect unfair discrimination, both in the public and private sphere. It is therefore evident that the common law position – where out-and-out disinheritance clauses in private wills have seemingly been out of reach of the courts' powers to declare them unenforceable on public policy grounds – cannot be maintained. This is because, in a constitutional dispensation based on the supremacy of the Constitution, we are enjoined to recognise both freedom of testation as well as recognise the principle of non-discrimination even in the private sphere. We, therefore, have no choice but to navigate the point at which they interact.

Retrospectivity

[71] Before addressing the question whether public policy, infused with our constitutional values, would find the impugned clause 7 unenforceable, it is critical to dispose of an issue raised by the respondents concerning retrospectivity. The respondents submit that the Constitution cannot reach backwards so as to invalidate actions taken under then valid laws, even if those laws are contrary to fundamental rights. The practical implication of this view is that a litigant can only seek constitutional relief for a violation of human rights by conduct that occurred after the commencement of the Constitution.

[137] Section 1(a)-(c) of the Constitution.

[72] I disagree. Public policy is considered in light of the *boni mores* (good values) of today, as infused with our constitutional values and "it is axiomatic that the public policy of 1902 does not necessarily correspond in all respects with the public policy of today".[138] Since this matter focuses, via the common law, on the question of public policy, this elusive concept[139] is by its very nature ever-evolving – so too the common law is ever-evolving. These types of enquiries involve, by virtue of the doctrine of precedent, a backwards and forwards process of adjudication.[140]

[73] Before the advent of the Constitution, courts in this country had the power to develop the common law through their jurisprudence in light of public policy and adjust it to the ever-changing needs of society.[141] It has been said that "determining the content of public policy was once fraught with difficulties".[142] Now, however, we have instructive guidance since public policy is deeply rooted in our Constitution and its ingrained values.[143] Therefore, applying the public policy of today does not raise the question of the

[138] *Syfrets* above n 29 at paras 25-6 and noted at para 23 "the position in this regard is analogous to the principle in the law of contract regarding contractual provisions which are contrary to public policy and it would appear that identical considerations apply to both fields".

[139] Along with *boni mores*, legal convictions of the community, norms of conduct required by the society and the general standard of reasonableness.

[140] Davis "How Many Positive Legal Philosophers Can Be Made To Dance on the Head of a Pin? A Reply to Professor Fagan" (2012) 129 *SALJ* 59 at 70 said:

> "In order to determine the ambit of the rule, we move backwards to divine the meaning of the past. In this way judges decide a case by considering a past rule, the application of which holds implications for the future. The court may deviate from the past in order to develop the rule for present or future application. In evaluating past decisions as a means by which to confront the future, courts are guided by some normative idea which informs the legal system, past, present and future."

[141] Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" (1987) 104 *SALJ* 52 at 59 and 67 said that:

> "When the court is confronted with a legal problem in the common-law for which there is no precedent or authority and whether the judge has thus to step into the unknown; or when the court is asked to depart from the common law precedent and strike out in a new direction."

[142] *Barkhuizen* above n 22 at para 28.

[143] Id and above n 11. *Syfrets* above n 29 at para 24 states that "since the advent of the constitutional era, however, public policy is now rooted in the Constitution and the fundamental values it enshrines, thus establishing a normative value system".

retrospective application of the Constitution. Rather, it is consistent with the role of courts to develop the common law to bring it in line with the Constitution.

[74] In any event, we are dealing with the enforcement of the testamentary provisions, which occurred in 2015 on the death of Mr Kalvyn de Jager, and not the drafting of the provisions which dates back to the early 1900's. It is perspicuous that public policy is determined or measured as it is at the time that the will, or any provision therein, is enforced, not the point at which it is executed. Thus, the issue of retrospectivity that the respondents are concerned with, must fall to be dismissed as devoid of merit.

[75] Our Constitution affords our society the opportunity and duty to jettison overt and covert patriarchal practices that still remain prevalent. Given our past and present, coupled with our entrenched constitutional values, the common law must be developed to give effect to the spirit, purport and objects of the Bill of Rights. In other words, it must establish a "constitutionally-founded *boni mores* criterion"[144] to tackle out- and-out disinheritance clauses of this nature where they appear in the private sphere. I expand below on discriminatory testamentary bequests on the grounds of gender and sex and whether the clause before us, and those similar to it, ought to be declared unenforceable based on public policy.

Is clause 7 contrary to public policy?

[76] It is common cause that the impugned clause is unfairly discriminatory.[145] The respondents acknowledge that there may be testamentary provisions in the private sphere that are so fundamentally against public policy as to be "abhorrent" and should, therefore, not be enforceable by courts. They submit that discrimination on the basis of gender and

[144] Du Toit "The Constitutionally Bound Dead Hand – The Impact of Constitutional Rights and Principles on Freedom of Testation" (2001) 12 *Stellenbosch Law Review* 222 at 227.

[145] The respondents conceded this point in oral argument before this Court.

sex, without more, is not abhorrent. I disagree. The respondents fail to account for the significance of our entrenched constitutional values, and specifically, the rights to equality and non-sexism.

[77] Equality as an entrenched right and founding value is perspicuously the lodestar of our transformative constitutional project. This Court has said:

> "The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."[146]

[78] Similarly, in *Fraser*,[147] this Court stated that "there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised".[148] Equality as a founding value underpins our constitutional democracy and informs public policy.

[79] The historical analysis above illustrates that the facially neutral principle of freedom of testation as it currently stands reinforces patriarchal and outdated ideas concerning sex, gender, property, ownership, family structures and norms. Our courts are aware of the impact of discriminatory testamentary bequests on women. *In re Heydenrych Testamentary Trust*,[149] in the context of a public charitable trust, the applicants submitted that direct discrimination on the basis of sex and gender should be treated "more

[146] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 22 *(Van Heerden).*

[147] *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[148] Id at para 20.

[149] *In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC).

circumspectly" than direct discrimination on the basis of race.[150] The amicus curiae[151] took issue with the discriminatory provisions on the ground of gender.[152] The Court found that the impugned conditions in that trust constituted unfair discrimination on grounds of gender and race.[153]

[80] Furthermore, in *Bhe*, Ngcobo J correctly anchored our obligations to counter discrimination against women as stemming from core-binding international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[154] coupled with the African (Banjul) Charter on Human and Peoples' Rights.[155]

[81] In order to answer the question whether the unfairly discriminatory clause in issue is unenforceable, this Court has to consider whether it is inimical to public policy, as imbued with the Constitution's values and rights. As noted above, the principle of freedom of testation gives effect to constitutional rights and these must be borne in mind in determining public policy in this context. At the same time, discriminatory clauses infringe upon the founding value of equality and the right to non-discrimination. Determining public policy in this context requires due consideration of all the relevant rights and values.

[82] It cannot be gainsaid that private testamentary bequests (when juxtaposed to public trusts) relate to our most intimate personal relationships and can very well be based on irrational and erratic decisions which are located in the domain of the "most intimate core of privacy". It is, therefore, apposite for the right to privacy to play an active role in

[150] Id at para 2.

[151] Women's Legal Centre intervened.

[152] *In re Heydenrych Testamentary Trust* above n 149 at para 3.

[153] Id at para 20.

[154] *Bhe* above n 93 at para 51.

[155] Articles 1, 2 and 5(a). South Africa signed the Convention on 29 January 1993 and ratified it on 14 January 1996.

determining whether judicial interference can enter the perimeter of private testamentary bequests. This, in turn, buttresses the point that when courts intervene in private testamentary bequests of this nature there ought to be a lower level of judicial scrutiny.

[83] Bequests that entail fideicommissa are already regulated by the law.[156] Fideicommissa tend to run over a long period and impact successive generations and they often concern beneficiaries unknown to the testator. This influences our decision to allow a court to reach a finding that unfair discriminatory clauses in fideicommissa are contrary to public policy and that it may be justified for a court to declare such provisions unenforceable. Private testamentary bequests are in the truly personal realm. However, some of these bequests discriminate against a testator's unknown lineal descendants, with whom the testator never had personal relationships or interactions, solely based on immutable characteristics. In those instances, there is a shift along the continuum, which warrants a greater level of judicial intervention.

[84] With the above in mind, the immutable characteristic at issue here is womanhood; the testators excluded future lineal female descendants unknown to them simply because they are women. As the applicants submit, "in this instance, a testator is not excluding a particular individual or individuals because their idiosyncrasies are disfavoured by the testator. Here the testator excludes future beneficiaries unknown to him simply because they are women, and includes future unknown beneficiaries simply because they are men". There is no relevant armchair or extrinsic evidence to show the contrary. It is the "unknown lineal descendants" element of this bequest, along with other elements discussed above, that weighs in the direction of favouring the right to non-discrimination over absolute freedom of testation in cases like these. It can never accord with public policy for a testator, even in the private sphere, to discriminate against lineal descendants unknown to her or him purely on the ground of gender. No privacy or property right considerations can ever

[156] In terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

trump that; that is simply the sort of discrimination that our present-day public policy cannot countenance. Any sense that this view is violative of dignity or property interests is not worthy of being countenanced by our constitutional order. This being presumptively unfair discrimination,[157] today's public policy simply cannot admit of the constitutional protection of discrimination of that nature.

[85] All this leads me to the conclusion that unfair discrimination against women in the context of private out-and-out disinheritance clauses against unknown lineal descendants is abhorrent and inimical to our constitutional rights and values. This manner of unfair discrimination is contrary to our constitutionally infused conception of public policy. It has gone on long enough and must be stopped.

Remedy

[86] What remains is the question of remedy, and in particular whether this Court should vary or rectify clause 7. In doing so, it must be borne in mind that courts should be circumspect that amending or varying the terms of testamentary provisions is a last resort in view of the importance of freedom of testation to our constitutional dispensation. On these facts, however, it is not appropriate to vary the provision, since it is the final substitution of the fideicommissum,[158] and in any event, a variation would not be fair in light of the prior generations of women who have already been left out.

[87] A just and equitable remedy will be one where a declaration is made that clause 7 is unenforceable from the date of this judgment coupled with a declaration that, for the

[157] In terms of section 9(5), read with section 9(3) of the Constitution, discrimination on the ground of gender is presumed to be unfair.

[158] According to the Immovable Property (Removal or Modifications of Restrictions) Act, a testator cannot prevent the alienation of land by means of a long-term *fideicommissa*. Sections 6, 7 and 8 of the Act provide that long-term provisions are restricted to two *fideicommissaries*.

purposes of the final substitution, the second to sixth applicants are beneficiaries of equal shares of the fideicommissary property.

Conclusion

[88] It follows that the appeal must be upheld. Clause 7 of the will of the late Mr Carel Johannes Cornelius de Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is unconstitutional, invalid and must be declared unenforceable. Had I commanded the majority reasoning, I would have issued a declaratory order that clause 7 is contrary to public policy. To ensure that the applicants are afforded effective relief, I would have also made a declaratory order that the second to sixth applicants are beneficiaries of equal shares of the fideicommissary property.

JAFTA J (Mogoeng CJ, Majiedt J, Mathopo AJ and Victor AJ concurring):

Introduction

[89] I have had the benefit of reading the judgment of my colleague Mhlantla J (first judgment). I agree that the appeal must be upheld and that the impugned clause of the will should be declared unenforceable. I also think that relief should be granted in favour of the applicants. But my reasons differ materially from those furnished by my colleague.

[90] I do not think that the public policy relevant to this matter must be determined by preferring the value of equality over those of freedom and dignity. Nor do I think that it is necessary to develop the common law. As the common law presently stands, unlawful wills and those that are contrary to public policy are not enforceable.[159]

[159] *Harvey* above n 20 at para 65.

[91] Moreover, as the first judgment illustrates, our courts accept that freedom of testation constitutes a right protected by section 25(1) of the Constitution.[160] This compounds the complex issue of determining whether freedom of testation is contrary to public policy. This is because our public policy rests on the values underlying the Constitution. At the very least it appears that there is a clash of some of those values here. The value of equality, on the one hand, collides with the values of freedom and dignity, on the other.

[92] The first judgment seeks to resolve this difficulty by making reference to the origins of freedom of testation. It concludes that freedom of testation is a neutral principle "steeped in patriarchal and outdated ideals concerning sex, gender, property ownership, family structures and norms".[161] Building on an academic article that concludes that freedom of testation perpetuates discrimination against women who were historically excluded from ownership of property, the first judgment holds that unfair discrimination against women in the context of inheritance is "abhorrent and inimical to our constitutional rights and values".[162]

[93] As I see it, this conclusion conflates the conduct of unfair discrimination with freedom of testation. While unfair discrimination is plainly not in line with the value of equality, it does not constitute freedom of testation. The first judgment acknowledges that freedom of testation is "a neutral principle" and as such, it may not be equated to unfair discrimination which is a consequential act of a particular clause in a will. Freedom of testation should not be confused with the terms of a particular will, nor should it be taken as a licence to unfairly discriminate.

[160] *Syfrets* above n 29; *BOE Trust* Supreme Court of Appeal judgment above n 60 at para 26.

[161] First judgment at [79].

[162] Id at [85].

[94] Freedom of testation entails a testator's right to dispose of her estate as she pleases in a will, provided that the disposition is lawful and is not contrary to public policy.[163] Subject to these restrictions she is free to do as she wishes with her property and her wishes must be respected, after her departure from this world. These limitations render freedom of testation flexible. In its current form the principle does not justify testamentary provisions which are illegal or contrary to public policy.

[95] Proceeding from the premise that freedom of testation is a neutral principle, it is difficult to appreciate how at the same time it can be said it has deficiencies of the nature that warrants its development as contemplated in section 39(2) of the Constitution. This Court has emphasised under this section that the common law development is triggered when that law deviates from the spirit, purport and objects of the Bill of Rights.[164]

[96] Since freedom of testation in its present form acknowledges that a will that is contrary to public policy is unenforceable, there is no need to develop it to achieve what is already obtainable. I can think of no deviation of freedom of testation from the objects of the Bill of Rights which warrants development in this matter. With regard to the claim based on public policy, the applicants are entitled to assert that clause 7 is unenforceable for being contrary to the value of equality and for that reason, the clause is contrary to public policy. They do not need the development of the common law in order to succeed in their claim. Nor can the respondents resist the claim on the ground that freedom of testation permits the breach of the equality value.

[163] *Harvey* above n 20 at para 56.

[164] *Carmichele* above n 75 at paras 33-5.

Issue

[97] As I see it, the question that arises for consideration is whether the clause that gives rise to unfair discrimination in the present will may be enforced in light of section 9 of the Constitution. The issue arises here because parties on both sides agree that the impugned clause unfairly discriminates against women. Proceeding from this common cause fact, the applicants ask that, by order of the court, the will be amended by deleting certain words and replacing them with words which are not discriminatory against women.

[98] But before I address the question, I need to clarify one matter. This is the conflation of the public policy claim with the equality claim in the judgment of the High Court and to some extent in the first judgment. These are discrete claims with distinct elements. For example, in an equality claim the complaint is that the right to equality is violated, and not the value of equality. Whereas in a public policy claim the complaint is that certain conduct is contrary to the value of equality. With regard to the latter, the justification analysis under section 36 of the Constitution is inapposite because that section applies to a limitation of rights and not to what is inconsistent with values. Departing from this erroneous premise, the High Court mistakenly defined the issue before it as being whether "the impugned provision of clause 7 of the will, can be justified under the limitation clause in section 36 of the Constitution".[165]

[99] This was plainly in error. Section 36 expressly prescribes that rights in the Bill of Rights may be limited only in terms of law of general application. Clause 7 of the will we are concerned with is not a law, let alone a law of general application. This simply means that clause 7 cannot constitute a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. But this was not the only error committed by the High Court. In the section 36 justification analysis undertaken

[165] High Court judgment above n 5 at para 71.

by that Court, it appears that the Court understood the limitation it was dealing with to have been a limitation of the right to freedom of testation.

[100] The High Court stated:

> "In applying the limitation test it is significant that two of the three values mentioned in section 36, human dignity and freedom, are engaged when exercising one's right to freedom of testation. The right to equality or to equal treatment, although fundamental, is a broadly stated right and must, in appropriate instances, give way to competing rights.
>
> As far as the importance of the limitation is concerned, no material has been placed before the court to indicate whether similar discriminatory provisions in private wills are a commonplace problem which justifies such a potentially far-reaching limitation. The envisaged limitation, namely, that one cannot dispose of one's property without first complying with an equality equation, would make a significant inroad upon the right to freedom of testation and may well produce unintended consequences, including those referred to above.
>
> . . .
>
> Whilst the relationship between the limitation of the right to freedom of testation in the present matter and its purpose is clear, it is difficult to conceive of a less restrictive means to achieve the purpose."[166]

[101] Relying on the minority judgment in *De Lange*,[167] the High Court held that because the discrimination occurred in "the private and limited sphere of testators and their direct descendants", the discrimination "effected by clause 7 of the will is reasonable and justifiable, particularly given the importance accorded to the right to freedom of testation."[168]

[166] Id at paras 73 and 76.

[167] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC).

[168] High Court judgment above n 5 at paras 75 and 80.

[102] It may well be that the High Court was inaccurate in the articulation of its reasons. What in effect it wanted to say was that the limitation on the applicants' equality right was brought about by the principle of freedom of testation and that clause 7 was authorised by that principle. If this was what the High Court intended to say, the question is whether the requirements of section 36 of the Constitution are satisfied.

[103] But the High Court defined the core issue that confronted it in these terms:

> "[T]he question must be whether public policy has advanced to the extent that courts should be empowered to act as the final arbiter of whether a testator may discriminate, even unfairly so, in his or her private will."[169]

[104] This definition of the real issue as seen by the High Court was influenced by the minority reasoning in *De Lange* which the High Court understood to be saying courts should not interfere in "people's private lives and personal preferences".[170] It was in this context that the High Court concluded that, even if it were to be assumed in favour of the applicants that they had a right to be treated equally with the testator's male descendants, the unfair discrimination that they were subjected to by clause 7 of the will was reasonable and justifiable.[171]

[105] It is unfortunate that, despite all these missteps in the High Court's judgment, the Supreme Court of Appeal merely issued an order dismissing the appeal to it without reasons.[172] This unusual approach in disposing of an appeal meant that the Supreme Court of Appeal endorsed the reasons of the High Court. Courts are under a duty to give reasons

[169] Id at para 78.

[170] Id at para 75; *De Lange* above n 167 at para 79.

[171] Id at para 80.

[172] The order was issued by Cachalia JA (with Tshiqi JA, Saldulker JA, Mokgohloa AJA, and Mothle AJA concurring).

for their decisions and here the Supreme Court of Appeal has failed to discharge that obligation.

[106] In *Mphahlele* this Court affirmed this principle and stated:

> "There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."[173]

[107] Courts of appeal may not furnish reasons only where they decide an application for leave to appeal. Here leave to appeal to the Supreme Court of Appeal was granted by the High Court. This illustrates that the High Court was persuaded that another court might come to a different conclusion. In these circumstances, the Supreme Court of Appeal was not excused from giving reasons for its order.

[108] It is now convenient to consider the claims presented to the High Court by the applicants.

[173] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

[109] The first claim was brought by the first applicant, Mr James King, in his capacity as the executor in the deceased's estate. Mr King is an attorney by profession. The will under which he was appointed executor was that of the late Mr Kalvyn de Jager who died in 2015. In his lifetime, the deceased had inherited and became co-owner of half of the undivided shares in the farms Nieuwdrift Nr 88, Doornkuil and Buffelsdrift Nr 260, all of which are located in the district of Oudtshoorn. But the deceased's co-ownership was subject to the fideicommissum in clause 7 of the will of the deceased's grandparents.

[110] These farms had been inherited by the deceased's father as a fiduciary heir. And upon the death of the deceased's father in 1957, these properties were inherited by the deceased and his two brothers in equal shares, as fiduciary heirs. When one of the deceased's brothers died with no children, his share in the properties devolved in equal shares between the deceased and his other surviving brother. This meant that the deceased and his surviving brother, Mr John de Jager, held equal half shares in the farms in question. The title deed reflected this and stipulated that each share was subject to clause 7 of the grandparents' will.

[111] Clause 7 of that will reads:

> "With respect to the bequest of grounds/land to their sons and daughters, as referred to under Clauses 1, 2, 3, and 4 of this, their Testament, it is the will and desire of the appearers that such grounds/land will devolve, following the death of their children, to said children's sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other Fidei Commissaire heirs from the lineage of the sons of the appearers by representation, in continuity, and in the case of the death of a daughter or a daughter's son without leaving a male descendant, her or his share will fall away in the same way and on the same conditions, and go to the other daughters or their sons, by representation, or the deceased's son's brothers or their sons per stirpes, respectively. And

> they stipulate furthermore that none of their heirs down to the third generation will renounce, by leasing, donating, selling, or in any other way whatsoever, his (or in the first generation, her) life right or any interest therein/on and should any heir who is subject to the Fidei Commissum, attempt such renunciation, or should such life right or any interest therein be arrested or be seized under the order/sentence of a court or as a result of insolvency of the person to whom the above belongs, then his right will, with immediate effect take an end and will be accepted by the hereinafter appointed administrators, who will, as they deem fit and at their discretion, from time to time, pay out the fruits thereof to such person, or invest said capital until his death when the said amount will devolve, together with the grounds/land, to the nearest and next heir in line."

[112] In terms of this clause, the fideicommissary property was supposed to pass from the deceased and his brother to their respective sons only. Indeed, when Mr John de Jager died in 2005, his half share was inherited by his three sons[174] who are the first to third respondents in these proceedings. They were cited as such in the High Court.

[113] The deceased had 5 children at the time of his death in 2015. They are Ms Trudene Forward; Ms Annelie Jordaan; Ms Elna Slabber; Ms Kalene Roux; and Ms Surina Serfontein. All of them are females. And in terms of clause 7 of the grandparents' will, the fideicommissary property that was held by their father could not devolve upon them for the sole reason that they were not sons. Yet in terms of the deceased's will, his five daughters inherited equally from his estate, including the fideicommissary property.

[114] The executor was then confronted by competing claims from the deceased's daughters, on the one hand, and the sons of the deceased's brother, on the other. The claim by the deceased's daughters was based on his will. While the claim by the sons of his brother was based on clause 7 of the grandparents' will which stipulated that on the deceased's death his share shall fall away and devolve upon the sons of the deceased's

[174] These sons were Mr Cornelius Albertus de Jager, Mr Johannes Frederick de Jager, and Mr Arnoldus Johannes de Jager.

brother, just like the share of the deceased's brother who died childless devolved on the deceased and his surviving brother. This was because the deceased had no sons.

[115] As the executor of the deceased's estate, the first applicant was advised to seek guidance from the High Court on who are the rightful heirs of the fideicommissary property. He instituted an application for a declaratory order. But he expressed a view that clause 7 unfairly discriminated against female descendants of the grandparents and therefore could not be enforced on the ground that it was contrary to public policy.

[116] The deceased's daughters joined the proceedings as second to sixth applicants. They did so both in their capacities as claimants and co-executors under the deceased's will. They cited the sons of the deceased's brother as the first to third respondents, the latter parties had laid claim to the fideicommissary property in terms of clause 7. The fourth to eighth respondents are sons of the deceased's daughters, the second to sixth applicants. The latter group had claimed that, as grandsons of the deceased, they were entitled to inherit his share, if their mothers' claims were not successful. They too sought to base their claim on clause 7.

[117] Each group of these claimants sought a decision in their favour from the High Court. The case pleaded by the deceased's daughters was two-fold. First, they supported the contention by the first applicant, the executor, that clause 7 was against public policy. Second, they contended that the clause violated their right to equality which is guaranteed by section 9 of the Constitution. Consequently, they asked the Court to invalidate the discriminatory terms of clause 7 and replace them with terms that cover both male and female descendants of the testators.

[118] For their part, the sons of the deceased's brother asserted that on a proper interpretation of clause 7, the fideicommissary property must devolve on them. They argued that in the past the clause was given the interpretation they were advancing. This

interpretation benefited the deceased and their father on the occasion of the death of an uncle who had no children. They argued that the testators' intention was manifestly that the fideicommissary property would remain in the De Jager family for three generations, devolving upon grandsons and great-grandsons. And where a fiduciary heir has left no son, their share would devolve upon his surviving brothers or their sons if a brother has died before that fiduciary heir. This, they argued, was the wish of the testators and it must be respected.

[119] Having considered a number of decisions on the relevant topics, the High Court concluded that clause 7 was not contrary to public policy. That Court also rejected the equality claim on the ground that the unfair discrimination imposed by clause 7 was reasonable and justifiable under section 36 of the Constitution. It will be recalled that the High Court took the view that the unfair discrimination complained of occurred "in the private and limited sphere of testators and their direct descendants", and thus it affected a limited number of persons for a limited duration.

[120] The High Court proceeded to consider the alternative claim by the sons of the deceased's daughters and concluded that they have failed to make out a proper case for the relief sought. Consequently, the application was dismissed with no order as to costs.

[121] For reasons which are not apparent from the judgment, the High Court failed to determine and declare who of the three groups was entitled to receive the fideicommissary property, as requested by the executor of the deceased's estate. That issue remains unresolved and the Supreme Court of Appeal did not consider it necessary to determine the issue, even though guidance was required by the executor.

[122] At the heart of the process of determining who is entitled to the fideicommissary property is clause 7 of the will. The answer to this question depends on whether the discriminatory part of the clause is presently enforceable.

Is clause 7 enforceable?

[123] The testator's testamentary freedom finds expression in her ability to dispose of her property in whatever manner she considers necessary. It is the freedom of testation right that entitles a testator to put in place whatever conditions she likes upon the disposal of her property by means of a will. And her wishes must be respected and enforced subject to one fundamental condition. That is whatever method she may choose, in the exercise of freedom of testation, must not be unlawful or contrary to public policy.

[124] Therefore, it cannot be gainsaid that freedom of testation, as a right, is protected in our law. It is protected not only because it forms part of our common law, but also because it advances the values of freedom and dignity which are the foundation of the Constitution, our supreme law.[175] The importance of freedom of testation to our law of succession was affirmed by this Court in *Moosa N.O.*[176]

[125] But freedom of testation, important as it is, is not a licence for testators to act unlawfully. This means that a testator may not dispose of her property in a will or trust deed by unlawful methods. Nor can she impose unlawful conditions. If she does any of these things, she renders the will unenforceable to the extent of the unlawfulness. This is because a testator cannot, after departing from this world, do what she could not achieve in her lifetime. The right of ownership, of which freedom of testation forms part, entitles the owner to do as she pleases with her property, as long as what she chooses to do is permissible under the law.

[126] In *Harvey*, the Supreme Court of Appeal captured this principle in these words:

[175] *Syfrets* above n 29 and *BOE Trust* Supreme Court of Appeal judgment above n 60.

[176] *Moosa* above n 124 at para 18.

> "The right of ownership permits an owner to do with her thing as she pleases, *provided that it is permitted by the law*. The right to dispose of the thing is central to the concept of ownership and is a deeply entrenched principle of our common law. Disposing of one's property by means of executing a will or trust deed are manifestations of the right of ownership. The same holds true under the Constitution."[177]

[127] Even before the Constitution came into force, unlawful terms of a will or trust deed were unenforceable on the ground that it was contrary to public policy for a court to enforce unlawful acts.[178] This was a principle of the common law which remains good law even today. But now the principle is reinforced by the Constitution which declares that any law or conduct which is inconsistent with it, is invalid.[179] The supremacy clause of the Constitution together with section 172(1) impose a duty on courts to uphold the Constitution.[180]

[128] This obligation entails that a court may not enforce a will or trust deed which is inconsistent with the Constitution. Instead, such will or trust deed must be declared invalid to the extent of its inconsistency with the Constitution. This means that if clause 7 of the will we are dealing with here is inconsistent with the Constitution, it cannot be enforced and it must be declared invalid.

[177] *Harvey* above n 20 at para 56.

[178] *Cool Ideas v 1186 CC Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

[179] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[180] Section 172(1) of the Constitution 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; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Inconsistency

[129] It is not in dispute that clause 7 limited inheritance of the fideicommissary property to male descendants, to the exclusion of female descendants of the testators. What this illustrates is that, beyond the first generation of the descendants of the original testators, the late Mrs Catherine Dorothea de Jager and the late Mr Carel Johannes Cornelius de Jager, the clause denied female descendants the benefit of inheriting the property. This denial on its own does not lead to an inconsistency with the Constitution, because it may constitute legitimate differentiation when account is taken of the testator's freedom of testation and the fact that no descendants had a right to inherit any of the fideicommissary property.

[130] Even if the denial amounted to discrimination, it would still not be inconsistent with the Constitution. This is because the Constitution does not prohibit fair discrimination. The inconsistency would arise if the discrimination is unfair to the second to sixth applicants. And this enquiry may be determined with reference to the specific facts of this case. Since the discrimination was based on gender, one of the grounds listed in section 9(3),[181] the applicants were assisted by the presumption in section 9(5)[182] in establishing that clause 7 creates unfair discrimination.

[131] This presumption shifted the burden to the first to third respondents to show that the discrimination in question was fair. These respondents have failed to do this. In fact, they admitted that clause 7 had caused unfair discrimination. This admission is crucial to the

[181] Section 9(3) of the Constitution provides:

> "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."

[182] Section 9(5) provides:

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

adjudication of this case. It means that the question whether the clause in question is inconsistent with the Constitution must be assessed on the basis that the clause unfairly discriminated against the second to sixth applicants.

[132] Section 9(4) of the Constitution is vital to the enquiry. It provides:

> "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."

[133] Plainly, this provision prohibits every person, including a testator, from unfairly discriminating against another person on one or more of the grounds listed in section 9(3). Evidently this restricts the scope of the right of freedom of testation. In exercising the right to dispose of her property, a testator may not unfairly discriminate against another person. If the manner in which the testator chooses to dispose of her property or the conditions she imposes on that disposal constitutes unfair discrimination against any person, her will becomes inconsistent with section 9(4) of the Constitution.

[134] In addition, the terms of a will must not violate the prohibition against unfair discrimination in the legislation contemplated in section 9(4) of the Constitution. It is not in dispute that the Promotion of Equality and Prevention of Unfair Discrimination Act is such legislation. This Act prohibits unfair discrimination in general and specific terms. Section 6 stipulates that no person may unfairly discriminate against another person, whereas section 8 provides that no person may unfairly discriminate against another person on the ground of gender, including on the specific grounds listed in that section.

[135] The High Court rejected the assertion that clause 7 was unlawful as it violated section 8 of the Act, on the basis that section 8(c) refers to "the system of preventing women from inheriting family property". The High Court reasoned that clause 7 does not

constitute a system in terms of which women were prevented from inheriting family property.[183] While it may be true that the clause does not amount to a system, it cannot be gainsaid that the clause prevented female descendants of the testators from inheriting the fideicommissary property of the De Jager family.

[136] The overly narrow interpretation of section 8 by the High Court is not supported by the scheme and the language of section 8. First, section 8 expressly states that it is subject to section 6 which provides for an overriding general prohibition against unfair discrimination based on gender. The reach of section 8 is not limited to the specific bases listed in section 8(a) to (i). This is so because the opening words of the section state that "no person may unfairly discriminate against any person on the ground of gender, including…". Then specific bases are listed. Properly construed, section 8 prohibits any unfair discrimination on the ground of gender, regardless of whether the discrimination is on the listed bases or not. The prohibition against unfair discrimination on the ground of gender is not limited but includes the listed bases. That this is so is made plain by *New Nation Movement* where, quoting from *New Clicks*,[184] this Court held that "[o]rdinarily, 'the terms "including" or "includes" are not terms of exhaustive definition but terms of extension'".[185]

[137] Consequently, the High Court erred in concluding that clause 7 does not violate section 8 of the Act. It does, and as a result, the clause is unlawful. It is this unlawfulness which renders clause 7 unenforceable, regardless of whether the unlawfulness stems from the inconsistency with section 9(4) of the Constitution or from a violation of section 8 of the Act. From time immemorial, our courts have declined to enforce clauses of wills or

[183] High Court judgment above n 5 at para 53.

[184] *Minister of Health v New Clicks South Africa (Pty) Ltd* (*Treatment Action Campaign as Amicus Curiae*) *(New Clicks)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 455.

[185] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 23.

wills that are unlawful or contrary to public policy. It appears to me that public policy requires no development in this regard.

[138] However, the first to third respondents have argued that when the unfair discrimination in issue here is subjected to a justification analysis in terms of section 36 of the Constitution, it is reasonable and justifiable. With regard to the claim based on public policy, there is no merit in this submission. As mentioned, a section 36 analysis applies to a limitation of a right in the Bill of Rights. It is not applicable to a case of unlawfulness which renders conduct unenforceable on the ground that enforcing it would be contrary to public policy.

[139] For a number of reasons, the proposition that the unfair discrimination arising from clause 7 is reasonable and justifiable, as contemplated in section 36, is misconceived. First, the invalidity attack mounted by the applicants here is not directed at a piece of legislation but at a clause in a will. The first to third respondents, in an attempt to ward off that claim, did not assert that the unfair discrimination complained of was imposed by a particular law and that it was a reasonable and justifiable limitation in terms of section 36. Instead, they contended that the impugned clause expresses the intention of the testators to keep the fideicommissary property in the De Jager family and as a result, it must be enforced, as it had been previously.[186]

[140] Had the respondents relied on a law to justify the unfair discrimination, I have no doubt that the focus of the challenge would have been directed at that law. Then, and only then, would the section 36 standard be applicable. It will be recalled that section 36 permits limitation of rights in the Bill of Rights only if the limitation is imposed by a law of general

[186] High Court judgment above n 5 at paras 22-4.

application. Indeed, it is clear from *Harksen*[187] that the test it lays down applies to an attack against a legal provision or an executive decision. In that matter, this Court said:

> "*Where section 8 is invoked to attack a legislative provision or executive conduct* on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1)."[188]

[141] But even if the *Harksen* test were to apply and that there was a limitation imposed by a law of general application, the respondent's argument would still face considerable difficulties. It is doubtful that unfair discrimination which is expressly prohibited by section 9(4) of the Constitution may constitute a reasonable and justifiable limitation under section 36 of the Constitution. If these two provisions of the Constitution were to be read this way, a conflict between them would arise. What is unlawful under one provision would be lawful under the other. It is a well-established principle of our law that the Constitution must be read harmoniously.[189] In addition, on the respondents' argument, a further conflict will be created between the law that imposes unfair discrimination as a limitation and the legislation envisaged in section 9(4). And for the unfair discrimination to withstand scrutiny, the former must prevail over the latter. Here this would mean that the common law trumps the statute. This does not accord with the principle that in the case

[187] *Harksen* above n 49 at para 54.

[188] Id at para 43.

[189] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 48 and *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party intervening; Institute for Democracy in South Africa as amicus curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83.

of conflict, a statute takes precedence over the common law. However, it is not necessary to determine this issue definitively in this matter.

[142] The second reason that renders the respondents' argument untenable is that the applicants were obliged by the principle of constitutional subsidiarity to base their challenge on the Act. Under the Act, which outlaws unfair discrimination, the applicant is merely required to prove that the conduct challenged amounts to discrimination.[190] He or she is not required to show that indeed the discrimination is unfair. The burden of proof shifts to the respondent who must refute that the discrimination has occurred or that it is unfair. Discrimination which is based on one of the prohibited grounds under the Act is presumed unfair unless the respondent shows that it is fair. Gender is one of the prohibited grounds.

[143] In terms of the Act, once a court is satisfied that unfair discrimination has occurred, the claim must succeed. There is no room for a justification analysis. Here the first to third respondents have conceded that clause 7 unfairly discriminated against the second to sixth applicants. This admission should have driven the High Court to the conclusion that clause

[190] Section 13 of the Act provides:

> "(1) If the complainant makes out a *prima facie* case of discrimination—
>
> (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
>
> (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
>
> (2) If the discrimination did take place—
>
> (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;
>
> (b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair—
>
> (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and
>
> (ii) unless the respondent proves that the discrimination is fair."

7 was unenforceable and that an appropriate order was warranted.[191] In each case where it is claimed that the testator in her will has discriminated against someone, a careful analysis will be essential to determine whether the discrimination was indeed unfair. But where, as here, the unfairness of the discrimination is conceded, the need to decide this issue falls away. In that event, the consequence would be that the discriminatory clauses are unenforceable.

[144] It bears emphasis that in our law, no one has a right to inherit the testator's property. This includes her children. And the testator is free to dispose of her estate in a will in whatever way she wishes, provided that she does not breach the law or public policy. When these principles are kept in mind, a bequeath to some, and not all, of the testator's children does not without more constitute unfair discrimination and cannot be rendered ineffective unless it is established that the will creates unfair discrimination.

[145] The fact that the will we are dealing with was executed in 1902, long before the Constitution and the Act came into operation, is immaterial. Both of them are rendered applicable to this matter by the fact that the first to third respondents seek to enforce clause 7 of the will now. The testators had intended the clause to continue to apply until the third generation of heirs has inherited the fideicommissary property. With regard to this matter, that could only take place upon the deceased's death in 2015.

Remedy

[146] The applicants had asked the High Court not only to declare that the discriminatory terms of clause 7 were not enforceable, but also that those terms be excised from the clause and replaced with non-discriminatory ones. Because the High Court did not consider the clause to be contrary to public policy and the Constitution, it did not reach the severance and reading-in remedies sought by the applicants. Generally, our courts are reluctant to

[191] Section 21 of the Act empowers a court to make an appropriate order if unfair discrimination is established.

change the terms of a will or trust deed. The rationale being that courts are not there to make wills for testators. And that freedom of testation, the foundation of our law of succession, is so important that once the intention of the testator is established effect must be given to it.[192]

[147] While this proposition may be true, it is not the alpha and omega of our law of succession. The respect enjoyed by the testator's intention depends on whether that intention was exercised within the confines of the law. Even at common law, wills which are contrary to public policy, whether they contain unlawful, improper or indecent terms, are not enforceable despite the intention of the testator.[193] And unfair discriminatory terms may be added to this list.[194]

[148] However, our courts have drawn a distinction between public and private trusts. In the case of public trusts, courts have been willing to amend the trust deed to remove terms that are unfairly discriminatory.[195] It appears from the reasoning in both *Syfrets* and *Emma Smith* that the distinction lies on the premise from which the courts departed. This is evident in *Syfrets* where it was stated:

> "What also serves to 'outweigh' the principle of freedom of testation, is the fact that one is dealing, in this instance, with an 'element of State action', in the sense that 'the institution appointed to distribute the rewards of the testator's beneficence' is a public agency or quasi-public body, i.e. the university. As *Du Toit* points out:
>
> > 'State action renders the distribution practice of such an institution with regard to the proceeds of a charitable bequest open to a constitutional

[192] *Ex parte Kruger* 1976 (1) SA 609 (O); *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan* 1967 (4) SA 397 (N); *Jewish Colonial Trust* above n 65; *Ex parte Trustees Estate Loewenthal* 1939 TPD 250.

[193] *Syfrets* above n 29. See also *William Marsh* above n 43 at 703C-704.

[194] *Emma Smith* above n 53 and *Syfrets* above n 29 at para 47.

[195] *Syfrets* id.

> challenge simply on the ground that the Constitution prohibits the State from conducting discriminatory practices.'
>
> Moreover, a trust, though usually created by a private individual or group, is an institution of public concern. This is *a fortiori* the position with regard to a charitable trust such as the present trust.
>
> Based on the foregoing analysis, I conclude that the testamentary provisions in question constitute unfair discrimination and, as such, are contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. It follows, in my judgment, that this Court is empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will."[196]

[149] Building on this reasoning, the Supreme Court of Appeal in *Emma Smith* said:

> "The curators contended that the amendment of the will would interfere with freedom of testation which, they argued, is not only a fundamental principle of the law of succession but also part of the fundamental right not to be deprived of property in an unjustifiable fashion. The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need and administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past. Given the rationale set out above, it does not amount to unlawful deprivation of property."[197]

[150] It is evident from both these cases that the relevant courts, although they referred to the Constitution and its values, put on their common law lens in search for a remedy for a breach of the Constitution. This has resulted in drawing this difference that lacks substance. A public trust deed or will that violates the values of the Constitution or one of

[196] *Syfrets* above n 29 at paras 45-7.

[197] *Emma Smith* above n 53 at para 42.

its provisions has the same impact as a private trust deed or will in breach of the same provisions. Both of them are inconsistent with the Constitution and the supremacy of the Constitution renders them both equally invalid.

[151] To hold otherwise would subvert the supremacy of the Constitution and would suggest that the Constitution does not reach individual conduct in the private sphere, despite the horizontal application of the Bill of Rights.

[152] In *Harvey*, the Supreme Court of Appeal substantiated the distinction between public and private testaments in these terms:

> "There is much to be said for public trusts being judged more strictly than private trusts. Unlike the dispositions in *Canada Trust* and *Curators, Emma Smith Educational Fund*, we are concerned here with what occurs in the private and limited sphere of the donor and his direct family. It affects a limited number of people, is of limited duration and is not manifestly discriminatory. Nor, can it be said that at the time when the deed was executed it was intended to infringe the dignity of the second and third appellants."[198]

[153] I cannot endorse this reasoning. It is difficult for me to appreciate how the sphere where the violation of the Constitution occurs can justify the breach and render valid what is invalid in the eyes of the Constitution. I do not think that freedom of testation empowers a testator to violate the rights of members of his or her family by unfairly discriminating against them. Lest I be misunderstood, the Constitution does not require the testator to treat his or her family equally when gifting them with his or her property. Nor does it oblige him or her to leave any of his or her assets to them. They too have no entitlement to his or her property. But what the Constitution prohibits is unfair discrimination on the part of the testator when disposing of his or her property.

[198] *Harvey* above n 20 at para 62.

[154] The fact that a testator may have decided to exclude some of her children from inheriting her property does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.

[155] Therefore, differentiation or even discrimination that arises from the terms of a will does not violate the Constitution as long as it does not constitute unfair discrimination. This is so because section 9(4) of the Constitution forbids unfair discrimination by one person against the other. In addition, this provision outlaws unfair discrimination that is based on one of the grounds listed in section 9(3). Consequently, a party that impugns the validity of a will on the basis of discrimination must establish that the discrimination complained of is unfair or that it is based on a listed ground, if reliance is placed on section 9(4) or a relevant provision of the Act.

[156] Here both these issues have been established. Clause 7 discriminates against the second to sixth applicants on the basis of gender. And the first to third respondents have admitted that the discrimination is unfair. Consequently, the clause is in breach of section 8 of the Act and as a result it is unlawful. As an unlawful clause it is unenforceable. There is nothing controversial in this proposition, even if it is looked at through the lens of the common law. Since time immemorial, unlawfulness has been recognised as one of the limitations to the exercise of freedom of testation. During the Group Areas Act of the apartheid era, if a testator were to leave her immovable property, situated in an area reserved for whites, to a black person, that testament would be unenforceable on the basis of unlawfulness. The fact that this would have occurred in a private and limited sphere of one testator and that it affected only one beneficiary would not have saved it from invalidity.

[157] Accordingly, the distinction drawn by the courts below between public and private testaments is artificial and cannot be sustained, especially where the challenge is based on the Constitution. Moreover, the search for the appropriate remedy in such matters must be informed by the Constitution itself. This is because section 172(1) of the Constitution, as mentioned, obliges courts to declare that conduct which is inconsistent with the Constitution is invalid. In addition, these courts are empowered to make orders that are just and equitable. Justice and equity require that the interests of parties affected by the order must be taken into account.

[158] But in the present matter the position is that clause 7 which contains the fideicommissary condition is invalid for being contrary to public policy. In our law the effect of this invalidity is that the bequest to the deceased which this clause purported to regulate is regarded as having been without a condition.[199] What this means is that the property concerned was transferred to the deceased, as a fiduciary unburdened with conditions. Therefore, it formed part of his estate that was subject to the will he had executed and in terms of which he had bequeathed that property to the applicants.

[159] This common law principle was lucidly articulated in *Levy*. With reference to common law authorities, on the point Price J distilled the principle that a fideicommissum condition that is contrary to law or public policy is treated *pro non scripto* (as if it was never written) and the heir under the will concerned succeeds unconditionally.[200] This position is altered only where the deletion of the condition renders the remaining bequest meaningless. Here that is not the position. It is clear from the will that the testators wished

[199] *De Wayer v SPCA Johannesburg* 1963 (1) SA 71 (T) and *Levy* above n 37. See also De Waal, Erasmus, Gauntlett and Wiechers "Wills and Succession, Administration of Deceased Estates and Trusts" in Joubert *LAWSA*, 2 ed (Lexis Nexis, Durban 2011) 31 at 356.

[200] *Levy* id at 937-8.

to keep the fideicommissary property in the hands of their male descendants until the third generation.

[160] The applicants' father received it as such heir and on condition that upon his death, it will pass to his male children. The applicants' father and his brother were the last generation on whom the offensive condition applied. The interim Constitution which came into effect in April 1994 brought about a change to the principles of law relating to public policy. This impacted on the validity of clause 7 which became contrary to public policy. As from April 1994, clause 7 was *pro-non scripto* in the eyes of the common law, as amended by the interim Constitution which changed public policy. Consequently the relevant property, which was still in the hands of the applicants' father, was free of the offending condition and formed part of his estate. Like all his assets, it became the subject of his will upon his death in 2015.

[161] In the special circumstances of the present matter, the application of the common law rule leads to a just and equitable outcome. This is because the respondents had already received the other half of the property from their own father. It would be unjust for them to be entitled to the half that was held by the applicants' father, over and above what they had already obtained

Costs

[162] While the applicants are successful in this Court, I do not think that the principle that costs follow the result is appropriate for the present matter. None of the parties is responsible for the offensive clause in the will and the legal position regarding its enforcement under the Constitution was not clear. Therefore, it became necessary for the courts to be approached to give clarity. It seems to me here that since the testator's estate was wound up a long time ago, it will not be fair to direct that costs be borne by the estate of the applicants' father. The applicants' father was not responsible for the offensive

clause. However, his estate must pay costs of the first applicant who acted in his official capacity as an executor with no personal interest in the matter. In the present circumstances, it would be fair to make no order as to costs in respect of other parties.

Order

[163] In the present result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders granted by the High Court and Supreme Court of Appeal are set aside.
4. It is declared that clause 7 of the will of the late Mr Carel Johannes Cornelius De Jager and the late Mrs Catherine Dorothea de Jager dated 28 November 1902 is inconsistent with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and therefore unenforceable.
5. The costs of Mr James King shall be paid from the estate of Mr Kalvyn de Jager.
6. There shall be no order as to costs in respect of other parties.

VICTOR AJ

Introduction

[164] I have had the pleasure of reading the judgment of my sister Mhlantla J (first judgment). Her judgment highlights that the law of testation reinforces patriarchal and "outdated ideas concerning sex, gender, property, ownership, family structures and

norms."[201] I have also had the privilege of considering the judgment of my brother Jafta J (second judgment) who sees no need for the development of the common law because wills contrary to public policy have never been enforceable and thus there is no need to revisit this aspect.

[165] I have benefited from reading both judgments. Why a separate concurrence then with the second judgment? While I agree with the outcome proposed in the second judgment and broadly its reasons, I arrive at the same conclusion from a somewhat multi layered perspective. I endorse the second judgment's conclusion that the common law does not have to be developed, but would rather emphasise the principle of constitutional subsidiarity because of the Equality Act. The Equality Act was promulgated in compliance with section 9(4) of the Constitution and thus constitutes a direct reflection of our public policy on furthering the needs of our constitutional democracy in terms of our fundamental vision of equality. It is within this framework that freedom of testation must be analysed. I would also add further reasons regarding the implementation and interpretation of the Equality Act based on a more constitutionally transformative basis. The applicants also rely to some extent on the Equality Act. They bemoan the fact that the High Court failed to fully interrogate the application of the provisions of section 8(d) of the Equality Act in the context of this matter.[202]

[166] In what follows, I will discuss the need to revisit the principle of freedom of testation in light of the obligation to ensure substantive equality. I will be guided by the principles of transformative constitutionalism to this end.

[201] First judgment at [79].

[202] Section 8(d) of the Equality provide as follows:

> "Prohibition of unfair discrimination on ground of gender.—Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
>
> (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child."

[167] In applying the principles of the Equality Act it is incumbent on every court to promote the spirit, purport and objects of the Bill of Rights.[203] My concurrence is therefore directed at focusing on the Equality Act and how it should be interpreted in a more robust manner on the issue of testation based on transformative equality. My analysis considers the constitutional framework and section 9 of the Constitution as being the source of the right sought to be enforced without circumventing the Equality Act. The Equality Act seeks to regulate unfair discrimination and the adoption of positive measures in the public and private spheres.

[168] Unless there is a transformative constitutional approach taken by courts when equality rights are affected, the historical and insidious unequal distribution of wealth in South Africa will continue along various fault lines such as in this case, gender. A more robust understanding of substantive equality within our constitutional framework is necessary.[204] Public policy is now deeply rooted in the Constitution and its underlying values. This means that substantive equality must be evaluated within the realm of public policy. The majority in *Barkhuizen* held:

> "[T]he proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[205]

[169] The concept of taking substantive equality seriously means that it should be a component of the public policy test and if necessary, a basis for restricting freedom of testation. This does not mean that testators can no longer elect to whom they wish to

[203] Section 39(2) of the Constitution.

[204] See generally Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441.

[205] *Barkhuizen* above n 22 at para 30.

bequeath their property; the limitation would only arise if the bequest amounts to unfair discrimination based on a recognised ground such as gender. The purpose of the limitation would be to prevent or prohibit unfair discrimination. It has been accepted that in a democratic society differentiation is permissible and even necessary.[206] However, differentiation becomes impermissible (and consequently results in unfair discrimination) when the right to equality and dignity of the person is violated.[207]

Direct or indirect application?

[170] The first judgment contends that the correct approach would be indirect application of the Bill of Rights because the question of whether the clauses of a will should be enforced is similar to the enforceability of contractual provisions. Relying on *Barkhuizen*, the first judgment argues that direct application of the Bill of Rights is inappropriate in the circumstances.

[171] On the other hand, the second judgment argues that there is no need for the development of the common law because wills contrary to public policy have never been enforceable. The second judgment contends that there is no need to revisit this test. What must rather be established is whether the provisions of this specific will should be enforced in light of section 9(4). The judgment goes through some lengths to explain why the High Court's approach of using a section 36 limitation analysis was wrong. I agree with these remarks. This is not a section 36 analysis.

[172] However, neither judgment answers the question whether direct or indirect application is warranted in these circumstances.

[206] *Prinsloo v van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24.

[207] Id at para 31.

[173] The starting point for the applicability of direct application is the case of *Khumalo.*[208] In that case this Court had to determine the question of horizontality and concluded that this question is determined primarily by section 8(2) and 8(3) of the Constitution.[209] Citing these provisions, the Court found that the right to freedom of expression was "of direct horizontal application" because of: (a) the intensity of the right; and (b) the potential invasion of the right by persons other than organs of state.[210]

[174] In *Daniels,*[211] this Court confirmed that the scheme of the Bill of Rights enables rights to be invoked against private parties in certain circumstances. Importantly, the Court made the following remarks in this regard:

> "I see no basis for reading the reference in section 8(2) to 'the nature of the duty imposed by the right' to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). *Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right?* If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[212]

[208] *Khumalo* above n 136.

[209] Id at paras 31-2.

[210] Id at para 33.

[211] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

[212] Id at para 39.

[175] In the recent decision of *Pridwin*,[213] this Court endorsed this approach and confirmed that direct horizontal application is possible in certain circumstances. Importantly it remarked that:

> "In subjecting private power to constitutional control, section 8(2) recognises that *private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage*."[214]

[176] Although the minority did not apply the same approach it similarly remarked on the importance of horizontal application by stating that "independent schools cannot be enclaves of power immune from constitutional obligations".[215]

[177] The majority went on to apply the Bill of Rights directly to the facts at hand and found that the right to a basic education and the best interests of the child principle necessitated that there be a fair process when an independent school decides to terminate a parent contract.[216] Notably, the majority opted not to follow the two-stage enquiry used for the enforcement of contracts as per *Barkhuizen.*[217] Instead, it used direct application. It based this conclusion in part on the basis that the rights in question formed an independent basis for a hearing that was separate from the contract itself and because a case for direct application had been pleaded by the parties.[218] Notably like in *Pridwin,* the applicants in this case have made out a case for direct application in their papers albeit via the Equality Act.

[213] *Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC).

[214] Id at para 131.

[215] Id at para 82.

[216] Id at paras 153 and 209.

[217] *Barkhuizen* above n 22 at paras 56-8.

[218] *Pridwin* above n 213 at para 130.

[178] Based on *Pridwin* and *Daniels*, it seems direct horizontal application is applicable here because of: (a) the intensity, history and nature of the right to equality and what it seeks to achieve – it is self-evidently applicable to private parties; (b) there is a danger that not reaching into the private sphere could "perpetuate inequality and disadvantage" and; (c) "letting private persons off the net" in these circumstances would "negate the essential content of the right" by undermining the constitutional goal of achieving substantive equality.

[179] The first judgment's reliance on *Barkhuizen* may need to be reconsidered. First, following from *Pridwin*, indirect application is not always the correct route, even in contract cases. Second, *Barkhuizen* concerned the right of access to courts which if relied on directly would pose certain conceptual difficulties. In this case, however, the impugned right is the right to equality. Section 9 is one of a few sections of the Constitution which mandates that national legislation be enacted to give effect to it. The Equality Act is such legislation.

[180] The present case presents a bit of a quandary. On the one hand, following precedent in *Daniels* and *Pridwin*, it seems that the requirements for direct application have been met and it would be defensible to invoke section 9(4) directly. This is countenanced furthermore by the fact that section 9(4) envisages special legislation to give effect to it. That makes this case distinct from cases in which this Court has gone the route of indirect application. On the other hand, this Court bears a duty under section 39(2) to develop the common law of freedom of testation to address the kinds of deficiencies that have been identified in the first judgment.[219]

[219] It should be noted furthermore that this Court has emphasised that when the common law is found to be deficient there is a duty on courts to develop it in line with section 39(2). See *Carmichele* above n 75 at para 39 where this Court said:

> "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the

[181] There is a seeming tension that must be resolved based on the principle of constitutional subsidiarity, which I address next.

Constitutional subsidiarity

[182] In *My Vote Counts,* Cameron J in a minority judgment defined the principle of subsidiarity as being "the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right".[220] It also "denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and significance of the Constitution".[221]

[183] Constitutional subsidiarity becomes a central consideration in this case. In *My Vote Counts*, it was outlined what subsidiarity means in cases such as this one where legislation (in this case the Equality Act) has been invoked to give effect to a specific constitutional right:

> "Once legislation to fulfil a constitutional right exists, *the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role*."[222]

> section 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."

[220] *My Vote Counts NPC v Speaker of The National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 53.

[221] Id at para 46.

[222] Id.

[184] It is notable that although they reached a different conclusion, the majority per Khampepe J concurred with Cameron J's exposition of the history behind constitutional subsidiarity.[223]

[185] The majority did caution as follows:

> "We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this Court has said that the principle may not apply. This Court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case.[224]

In finding that constitutional subsidiarity is not a hard and fast rule this Court has made it clear that the constitutional enquiry does not cease because there is legislation promulgated to give effect to a specific constitutional right. In other words, subsidiarity does not ringfence the meaning and import of the constitutional right to equality by legislative enactment.[225] In cases such as these, the primary concern of the Court should be whether the legislature has adequately fulfilled its section 9(4) obligation. The litigants in this case do not rely on the "restricted ambit" of the Equality Act.[226] Within the context of this case Parliament has adequately fulfilled this obligation through the enactment of the Equality Act and no suggestion has been made to the contrary.

[223] Id at para 121, the majority stated, "We further agree with the minority judgment's exposition of the history behind the principle of constitutional subsidiarity".

[224] Id at para 182

[225] Some academic commentators have criticized the Court's jurisprudence on subsidiarity and warned that courts should not delegate the responsibility of giving content to fundamental constitutional rights to the Legislature lest they water down the scope and promise of those rights. See generally Klare "Legal Subsidiarity and Constitutional Rights: A reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129.

[226] *My Vote Counts* above n 220 at para 72.

[186] In *My Vote Counts*, three inter-related principles for applying the principle of subsidiarity were illustrated. First, respecting the programmatic scheme and significance of the Constitution.[227] Second, according due respect to Parliament's legislative role in light of the separation of powers.[228] Third, the development of an integrated and consistent rights jurisprudence.[229]

[187] Langa CJ in *Pillay*[230]citing a few decisions of this Court,[231] confirmed that in cases concerning the horizontality of the right to equality, that is cases of unfair discrimination committed by private parties, it is the Equality Act, and not section 9(4) which must be invoked:

> "The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.' The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins."[232]

[188] Section 8(1) of the Bill of Rights provides for direct constitutional scrutiny into private relationships such as between testator and heir or *fideicommissary* as in this case. Section 8(2) provides that:

[227] *My Vote Counts* above n 220 at para 61.

[228] Id at para 62.

[229] Id at para 63.

[230] *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) (2008 (2) BCLR 99 (CC) (*Pillay*).

[231] *New Clicks* above n 184*; South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

[232] *Pillay* above n 230 at para 40.

> "A provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[189] As explained by Woolman, section 8(2) of the Bill of rights eliminates any doubt about (a) the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general; and (b) about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill of Rights, in particular developing the common law.[233]

[190] Evidently, this case requires direct application as opposed to indirect application. The direct application of the Bill of Rights, however, must be consonant with the principle of constitutional subsidiarity. Therefore, in applying the Bill of Rights directly in this case, reliance must be placed on the Equality Act because its definition of unfair discrimination "covers the field".[234]

[191] It is unassailable in this case and indeed in cases relating to the freedom of testation that the reach of section 8 of the Bill of Rights applies to these private parties. Whilst the Bill of Rights reaches into the private sphere this is perfectly congruent with the competing right to freedom of testation. It also follows, therefore, that the Equality Act which was promulgated pursuant to section 9(4) of the Constitution is the benchmark against which the freedom of testation must be measured within the private sphere.

[192] No case has been made out that the Equality Act does not give effect to the right to equality in testation. The first judgment opts for the development of the common law. But

[233] Woolman and Bishop above n 69 at 73.

[234] Cameron J uses this expression in *My Vote Counts* above n 220 at para 66 to refer to an argument that the scope of the constitutional right in question has been subsumed by a piece of legislation.

it can only develop the common law if the legislation does not give effect to that right. In this case the Equality Act was promulgated pursuant to section 9 (4) of the Constitution and in the absence of an attack on the validity of the Equality Act it must yield to the principle of constitutional subsidiarity.[235] Here there is neither an attack on the constitutional validity of the Equality Act nor is there any suggestion in the applicants' case that the protections do not go far enough. In addition, the respondents also do not attack any provision in the Equality Act.

[193] For all these reasons, in my view the tension between direct and indirect application in the first and second judgments must be resolved on the basis of the principle of constitutional subsidiarity. The Equality Act is now the benchmark for evaluating any conduct of a private person which has an impact on another person's right to equality and to be free from unfair discrimination to this end.

[194] It is necessary to consider a more robust approach to an analysis of what freedom of testation means after the advent of the Constitution. When dealing with freedom of testation it is cumbersome to lurch from case to case when the application of the Equality Act provides the framework in which to determine most matters relating to the freedom of testation going forward.

[235] This point was recently reiterated by this Court in *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25 in which the applicant argued for a convoluted interpretation of the Trespass Act instead of launching a frontal attack on its constitutionality. Mogoeng CJ in dismissing the interpretive argument made the following remarks at paras 74-5:

> "Since PIE owes its breath to section 26(3) of the Constitution, it is not unreasonable or inappropriate to read a reference to PIE as a pointer to the inescapability of the role of section 26(3) as the cardinal reference point in addressing this issue. The way the issue was raised renders it unavoidable that the constitutionality of section 1(1) of the Trespass Act be effectively pronounced upon, even if it might not be expressly referred to as such. Truth be told, this is another way of seeking to have us declare this section unconstitutional. This we will not do. *This approach, foisted upon us by the applicants, is very difficult if not impossible to manage to its intended end. They ought to have launched a frontal challenge to the constitutionality of section 1(1). Nothing stopped them from doing so. But, they chose not to*. Instead, they opted for this intractable interpretive route. They would therefore have to fall by their free choice."

Transformative constitutionalism and the implementation of the principle of freedom of testation

[195] Section 39(2) makes it clear that "*[w]hen interpreting any legislation,. . . every cour*t, tribunal or forum *must promote the spirit, purport and objects of the Bill of Rights*". The Constitution now requires courts to continuously ensure South Africa's transformation into a human rights state. The guiding principles of the Constitution demonstrate that the reach of equality must be substantive. It must advance more than merely formal or *de jure* equality.[236] Whilst the first judgment seeks to develop the common law, this is unnecessary in this case because the Equality Act cannot be circumvented.

[196] In this case the central question remains whether human dignity is enhanced or diminished, and whether the achievement of equality is promoted or undermined by the measure in whatever legal reasoning is to be applied.

[197] If courts fail to adopt a more innovative approach towards transformative substantive equality in its mission, this will entrench formal equality at the expense of substantive equality, and, especially in the private sphere, the deeper dimensions of the constitutional values of justice will be lost.

[198] It is generally accepted that the law both shapes and constructs relationships in society.[237] In addition to the role law plays in constructing societal relationships, it also draws from the *"*underlying moral or value choice*"* of society.[238] In this sense, the law

[236] See *Minister of Justice and Constitutional Development v SA Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 61 where Madlanga J expressed himself as follows:

> "Throughout the many many years of the struggle for freedom, the greatest dream of South Africa's oppressed majority was the attainment of equality. *By that I mean remedial, restitutionary or substantive equality, not just formal equality*."

[237] Davis and Klare above n 78 at 443-4.

[238] See Froneman J's dissent in *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 106.

should not be regarded as a neutral set of principles that has no bearing on power dynamics in society. So, the essential point here is that the law is not a neutral or amoral enterprise but is based on the interplay between its constitutive role of shaping society and the underlying moral or value choices which also shape our equality jurisprudence. In this case it is amply demonstrated that the law has "distributive" consequences because absent the proper application of the equality jurisprudence the powers, privileges and liabilities of both individuals and groups in society will go unchecked. In this case only male descendants will benefit. In the absence of a male descendant then other males will benefit. Female descendants are excluded simply because of being female.

Legislative framework of the Equality Act

[199] The provisions of the preamble to the Equality Act make its nature and intended purpose clear. The consolidation of democracy requires the eradication of inequalities especially those that are systemic in nature and which were generated in South Africa's history by colonialism, apartheid and patriarchy. The Equality Act also recognises that although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes. This undermines the aspirations of our constitutional democracy and the Equality Act still requires practical application and of course, the development of an appropriate body of jurisprudence.

[200] Section 9 (4) of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; the Equality Act is such a piece of legislation. The Equality Act endeavours to "facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".[239]

[239] Preamble to the Equality Act.

[201] It is clear from the scheme and tenor of the Equality Act that it aims to ensure substantive as opposed to merely formal equality. By ensuring that the right to equality can be invoked against private persons, the Constitution acknowledges that colonialism and apartheid were not only facilitated by a repressive state apparatus but also through the complicity of individuals who benefitted directly from an unjust status *quo*. The Equality Act is an acknowledgement that to those on the receiving end of discrimination, the source of the discrimination (be it public or private) matters not.

Transformative constitutionalism and freedom of testation

[202] A commitment to transformative constitutionalism and enabling substantive equality requires this Court to consider the "distributional and ideological consequences" of common law principles such as freedom of testation.[240] The first judgment provides a useful summary of the history of the principle in our jurisprudence. I will contend that, where appropriate, common law principles such as freedom of testation should be recalibrated towards more egalitarian and *ubuntu* based ends.

[203] The first judgment correctly suggests that by extending the common law there will be a clash between freedom of testation, which constitutes a right protected by section 25 (1) of the Constitution and the right to equality. The different provisions of the Constitution must be read in harmony.[241] By implementing the provisions of the Equality Act there is a recognition that freedom of testation brings with it the values of freedom and dignity and for this reason it must be evaluated against public policy. Freedom of testation is in essence freedom of contract. Freedom of testation cannot now be cloaked with

[240] Davis and Klare above n 78 at 449.

[241] *United Democratic Movement* above n 189 at para 83 this Court stated:

> "A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions and give effect to all of them."

constitutional protection under the guise of "human dignity and autonomy". There is an overemphasis on the use of individualist, libertarian and neo-liberal definitions of freedom of testation as opposed to a definition founded on the countervailing principles of equality and *ubuntu*. There is a failure to consider the appropriate context and the distributive consequences of freedom of testation.

[204] In my view, whilst the first judgment is trailblazing in many ways as it addresses patriarchy and sexism, it does not directly address the enquiry in terms of the common law. There is no need to develop the common law when there is a statute enacted pursuant to section 9(4) of the Bill of Rights to give effect to equality. Our nascent constitutional values are fully embodied in the Equality Act. However, the first judgment seems to conflate the principle of freedom of testation with the rights to dignity, privacy and property as opposed to establishing how the very principle itself must be recalibrated and understood within a constitutional framework based on equality and *ubuntu*. In doing so, it elevates the status of what is merely a common law rule and clothes it with constitutional protection. While the arguments that freedom of testation is supported by the rights to dignity, property and privacy have merit, they de-contextualise and overlook the way freedom of testation actually operates in a society with stark inequalities such as ours.

[205] The approach of the first judgment adopts a libertarian and neo-liberal basis for freedom of testation that imports and constitutionally sanctions market logics, in the problematic way described by Davis and Klare.[242] In addition, despite the first judgment's excellent analysis of the history of succession, it does not provide a contextual analysis which interrogates how freedom of testation sustains unequal wealth distribution in South

[242] See Davis and Klare above n 78 at 479-481 where they evaluate the approach taken by courts in cases involving the scope of the common law principle of *pacta sunt servanda* in light of our nascent constitutional values. Amongst other things, they argue that this line of decisions endorses libertarian and individualist ideas of rights and governance which unwittingly legitimise neo-liberal economic policies that are removed from the extent of deprivation that is the reality for the majority of South Africans.

Africa based on gender, class and so on.[243] The concept of patrimonial capitalism through inheritance continues unchecked.

[206] Piketty critiques what he refers to as "patrimonial capitalism."[244] Essentially this is the tendency for wealth to beget wealth and conversely for poverty to beget poverty.[245] He highlights how inheritance laws sustain and legitimize the unequal distribution of wealth in societies thus enabling a handful of powerful families to remain economically privileged while the rest remain systematically deprived.[246] In my view, this system entrenches inherited wealth along the male line. In applying this critique to the facts in this case, our common law principle of freedom of testation is continuing to entrench a skewed gender bias in favour of men. The Human Rights Commission has noted how patrimonial capitalism functions in the South African context.[247] There is no basis to avoid applying the principles of the Equality Act to eradicate the problems of inequality entrenched by the common law.

[207] Unfettered freedom of testation excludes women, and this results in negative distributive consequences for them. While it may be true that freedom of testation is related

[243] Recent studies on wealth inequality in South Africa illustrate the concerning distribution of wealth in South Africa. A study by the Southern Centre for Inequality Studies estimates that the richest top 10% of South Africans own 85% of all wealth whilst the richest 0.1% own about 25% of all wealth. The same study notes that the majority of the top earners are white. It stands to reason that given the gendered nature of poverty the majority of top earners are male as well. Notably the same study finds that "the bottom 50 per cent of the South African population have negative net worth: the levels of the debts that they owe exceeds the market value of the assets they own." The study concludes that there is no evidence that wealth concentration has decreased since apartheid. In fact, if anything, it is on the rise. See Chatterjee, Czajka, and Gethin *Estimating the Distribution of Household Wealth in South Africa* (Working Paper no 2020/06, April 2020), available at https://wid.world/document/estimating-the-distribution-of-household-wealth-in-south-africa-wid-world-working-paper-2020-06/.

[244] Piketty *Capital in the Twenty-First Century* (Harvard University Press, Cambridge 2014) at 267-302. When referring to patrimonial capitalism he means that the economic elite mostly attain their fortunes through inheritance rather than entrepreneurship or innovation. These inherited fortunes produce a class of rentiers who dominate politics with all sorts of (mostly implied, but very plausible) negative consequences.

[245] Id.

[246] Id.

[247] South African Human Rights Commission *Equality Report: 2017/18* (July 2018), available at:https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf.

to the rights to dignity, privacy and property it also has significant distributive consequences. In a society with stark inequalities based on gender, an unfettered approach to freedom of testation sustains class hierarchies inherited from the colonial and apartheid legacy and frustrates the establishment of a society based on equality and in particular gender equality. In this regard, interpreting the principle of freedom of testation to confer a broad right to disinherit based on gender undermines the constitutional objective to heal the injustices of the past and establish an egalitarian society.

[208] It is incumbent upon this Court to acknowledge that the importance the law has accorded to freedom of testation in the past is precisely what sustains the unearned privileges in society such as male privilege. By maintaining systems of privilege, it simultaneously traps vulnerable groups such as women in a cycle of poverty and entrenches systemic disadvantage.

[209] An analysis of freedom of testation that fails to take seriously its distributive consequences and iniquitous legacy may also result in a form of "colonial unknowing".[248] Decolonial scholars use the latter term to describe situations in which the "afterlife" of colonialism and apartheid and their effects on contemporary society are erased or overlooked when the law provides its unequivocal stamp of approval of the status *quo*.[249] This is the danger if the route of the common law is the determinative factor. It follows

[248] See Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" (2018) 34 *SAJHR* 300 at 308 where he expands on this concept as follows:

> "It is through colonial unknowing that the afterlife of colonial-apartheid can at once remain pervasive in the form of inequality, poverty, violence and suffering but not be 'comprehended as an extensive and constitutive living formation'. Colonial unknowing operates centrally through the disavowal, dissociation and normalisation of the history and horror of colonialism, land dispossession, white domination and racism. By making settler-colonialism illegible as a historical, political and moral problem, colonial unknowing normalizes white hegemony in South Africa, enforces the expiry of colonised people's right to historical justice, and structures the field of sense, knowledge, perception and imagination in such a way as to make substantive decolonisation appear 'unreasonable and unrealistic'."

[249] Id.

therefore that the implementation and application of the Equality Act ensures that the exercise of freedom of testation is consistent with the demands of our Constitution.

[210] It is also necessary to balance freedom of testation against substantive equality as a component of public policy.

Substantive equality as a component of public policy

[211] The first judgment correctly notes that equality is a founding value of essential importance to our new constitutional order and therefore an essential component of the public policy yardstick. It correctly contends that this stems from the constitutional commitment to heal the injustices of the past and establish a non-sexist society. Furthermore, this commitment is bolstered by South Africa's international obligations to advance gender equality.[250]

[212] Our equality jurisprudence has developed an approach where the right to equality has been interpreted to mean that individuals have equal dignity and respect.[251] Albertyn suggests that our equality jurisprudence needs to move beyond "equal concern and respect", towards deeper structural changes.[252] As such, she suggests that our equality jurisprudence to date has been powerfully inclusive, but not transformative nor has it required a fundamental re-ordering of the status quo.[253]

[213] Despite the notable achievements of our current equality jurisprudence in terms of including groups into the social and economic status quo, Albertyn argues that its legacy

[250] South Africa is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, amongst other treaties and covenants which require it to ensure gender equality.

[251] Albertyn above n 204 at 458.

[252] Id.

[253] Id.

"is contested by those who seek to centre ideas of disadvantage, structural inequalities, unequal power relations and more radical ideas of difference and systemic justice".[254] This requires social structures and their taken-for-granted norms to be uprooted and abolished if necessary.[255] It requires political, social and economic conditions, structures, processes and institutions to be radically transformed in society.[256] So substantive equality should pay close attention to the structures, norms and so on which reproduce hierarchies and marginalisation and should seek to dismantle them if necessary.

[214] It is this more robust framework for substantive equality which provides several important insights for this matter. The emphasis on moving beyond social inclusion towards systemic justice is relevant. This would mean that the Court should not only highlight how patriarchal traditions which endorsed women's disinheritance were an injury to their *dignity*, but also how they sustained inequality between men and women in terms of wealth and resources.

[215] As stated previously, allowing for unfettered freedom of testation as embedded in the common law enables these serious distributive consequences to go unchecked, shielding them from constitutional scrutiny. The Constitution requires a decisive break from the past. As it stands, freedom of testation in its private context remains unchecked and the goal of "substantive freedom" has been undermined as described by Albertyn.[257]

[216] This approach demonstrates why the equality enquiry in this matter should therefore extend beyond the failure to treat women with equal concern and respect. Instead, the equality enquiry should highlight the way freedom of testation sustains iniquitous gender-based hierarchies which the Constitution seeks to uproot or abolish.

[254] Id at 459.

[255] Id at 461.

[256] Id at 462.

[257] Id.

[217] So, a proper contextual analysis in this case should take seriously the wide chasm in both power and resources between men and women in society and how freedom of testation facilitates this unequal distribution. By doing so, freedom of testation threatens the achievement of substantive equality for those groups who are systematically disadvantaged based on their sex, gender or other characteristics.

[218] Context sensitive legal reasoning can advance transformative constitutionalism. However, contextual legal reasoning will only be truly transformative if a court explains what they hope the reformulated norm will accomplish in relation to the social relationships attached to the problem and the impact this will have on the lived experiences of the constituencies which are affected by it.[258]

[219] It is in the private sphere where freedom of testation within the context of transformative constitutionalism needs to be tested. Professor Penelope Andrews in interpreting feminist legal theory within the context of the South African Constitution, points to the false dichotomy between the public and the private sphere insofar as recognizing and protecting women's rights are concerned.[259] To ensure gender equality, a constitution with a Bill of Rights helps but it is not enough. It needs to be bolstered by an overarching vision that seeks to transform institutions, laws, and practices that subjugate women.[260] The Equality Act is that transformative statute that does "bolster" equality for women even in the private sphere where the "overarching vision" ought to ensure that testation is not a form of subjugation of women. It is this consideration which requires this Court's attention when determining the validity of the impugned clause in the will.

[258] Davis and Klare above n 78 at 496.

[259] Andrews *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights* (Ashgate Publishing Company, Burlington 2012) at 108

[260] Id at 174

[220] This matter needs to illustrate with greater clarity what the constitutional value of equality as a component of the public policy yardstick means for the scope of freedom of testation in future. In reformulating the public policy standard, it should indicate how far-reaching the commitment to equality is in the new dispensation. To this end, the attempt to subject private wills to a significantly lower standard of scrutiny than public charitable trusts is concerning. A horizontal application of rights between private individuals is part of our jurisprudence. Rights in the Bill of Rights are capable of horizontal application; in fact, in appropriate circumstances they may even impose positive obligations on private parties.[261]

[221] Equality is a fundamental organizing principle of the Constitution and the kind of society it seeks to bring into being. Our courts have not adopted different levels of scrutiny regarding claims of unfair discrimination based on a public/private distinction.[262] My view here is not that the public/private distinction is completely irrelevant. One could easily imagine a range of considerations that might bear on public charitable trusts as opposed to private wills such as various aspects of public policy.

[222] Equality, however, is fundamentally different from other public considerations in terms of how far-reaching it is. It is not clear therefore, how equality - as a foundational constitutional value – might impose certain obligations on public charitable trusts that it would not similarly impose on private wills. The attempt to establish a bright line between the public/private divide in respect of freedom of testation and the right to equality might risk the establishment of a private domain in which to discriminate.[263] The argument that

[261] *Daniels* above n 211 at para 39.

[262] The United States is notable for its difference in this regard. Its Supreme Court has adopted several different forms of judicial review for racial discrimination, discrimination on the basis of sex, and discrimination based on sexual orientation. By design, the South African Constitution embraces a relatively uniform approach to discrimination and rejects this compartmentalized and arbitrary approach.

[263] See Davis and Klare above n 78 at 416-7 where they argue that attempts to shield the common law from constitutional scrutiny would enable a sphere of private apartheid where gross violations of human rights continue unabated.

drafting a will by its nature includes some element of arbitrariness is not convincing. The above discussion on the distributive consequences of freedom of testation demonstrates why an attempt to shield the so-called private domain from scrutiny frustrates the achievement of a more egalitarian society.

[223] Thus, the second judgment correctly concluded that the distinction which both the High Court and the first judgment draw between the powers of the courts to vary provisions of a public charitable trust as opposed to private wills is misconceived.

[224] I reach this same conclusion based on the importance of achieving substantive equality through the lens of transformative constitutionalism. The second judgment also correctly concludes that the impact of the discrimination is no different depending on where it comes from. Whether the source of the discrimination is public or private, it will undermine the constitutional value of substantive equality.

[225] At paragraph 151, the second judgment makes a particularly powerful remark which I support:

> "To hold otherwise, would subvert the supremacy of the Constitution and would suggest that the Constitution does not reach individual conduct in the private sphere, despite the horizontal application of the Bill of Rights."

[226] This conclusion is important otherwise systems of oppression which manifest in the private sphere, such as sexism, will remain free from the scrutiny of the Bill of Rights.

The application of the Equality Act to the impugned provisions of the will

[227] The starting point in this regard is section 1 of the Equality Act which defines "discrimination" as follows:

> "[A]ny *act or omission*, including a policy, law, rule, practice, condition or situation which directly or indirectly—
>
> (*a*) imposes burdens, obligations or disadvantage on; or
>
> (*b*) *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds*."

[228] Notably section 8 of the Equality Act also prohibits gender discrimination. The relevant provisions read as follows:

> "Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
>
> (c) the system of preventing women from inheriting family property;
>
> (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and wellbeing of the girl child."

[229] In this matter, the impugned clauses of the will constitute "discrimination" in terms of the Equality Act because they withhold a "benefit, opportunity or advantage", namely the right to benefit from the deceased estate. Whilst it is true that no person has the "right to inherit", the reference in the Equality Act to a "benefit" refers to the broad array of privileges, rights and interests a person may not obtain merely on account of their sex, gender or other status. In this regard, the Equality Act recognises that systems of oppression are maintained by accruing certain privileges and opportunities to some groups whilst concomitantly imposing certain burdens or disadvantages on others. Substantive equality requires positive measures to be taken to actively redistribute resources and provide benefits to those who have not had the same opportunities in the past.[264]

[264] *Van Heerden* above n 146 at para 31 where Moseneke J remarked as follows:

> "Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. *However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to*

[230] The High Court erred when it found that because a will is a once-off testamentary instrument it does not qualify as a "system" in terms of section 8 of the Act. I agree with the second judgment that the words "including" at the beginning of section 8 means that it is not a closed list and other forms of gender discrimination are also prohibited. In addition, the applicant is correct that the impugned clauses would also fall foul of section 8(d) which prohibits any practice which impairs the dignity of women or undermines the equality of men and women.

[231] The Equality Act must be interpreted broadly and purposively to give effect to its fundamental objectives which include amongst others "the promotion of equality"; "the value of non-sexism"; and "the prevention of unfair discrimination and the protection of human dignity". The High Court erred when it construed the provisions of the Equality Act so narrowly that the common law principle of freedom of testation was considered out of reach. The clear and obvious purpose of section 8(c) is to abolish and proscribe the continuance of all forms of gender discrimination including in the sphere of inheritance. Its purpose is to address the distributive consequences of unfettered freedom of testation and its impact on achieving gender equality in terms of both the Equality Act and the Constitution.

[232] Having determined that a prima facie case of discrimination has been made, it remains to be considered if the discrimination is "fair" in terms of section 14 of the Equality Act. Section 14(3) outlines the relevant factors to consider:

> "(3) The factors referred to in subsection (2)(b) include the following:
>
> (a) Whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;
>
> *eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow*."

(c) the position of the complainant in society and whether he or she suffers from *patterns of disadvantage* or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether *the discrimination is systemic* in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
    (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
    (ii) accommodate diversity."

[233] This Court has noted that the fairness enquiry in section 14 is a hybrid test which incorporates elements of the fairness enquiry from *Harksen* whilst also incorporating elements of proportionality that resemble a limitation analysis.[265]

[234] There is no doubt that women are a vulnerable group in society who merit protection. Furthermore, as the first judgment correctly points out women have historically been discriminated against in the context of inheritance. The earlier discussion on the distributive consequences of unfettered freedom of testation furthermore highlights how the plight of women in this regard is *systemic* and that the continued uneven distribution of wealth sustains *patterns of disadvantage* based on gender, sex and related grounds. The impact of the exclusion of women from inheritance merely on account of their gender is indeed egregious.

[265] *Pillay* above n 230 at para 70.

[235] The only "legitimate purpose" which might be advanced in the present case is freedom of testation. To the extent that one conceives of freedom of testation in broad terms, it follows that excluding any category of individuals from inheriting one's assets is a component of that right.

[236] I do not agree with the second judgment that the definition of freedom of testation excludes the right to disinherit individuals in a way that contributes to unfair discrimination. It is important for this Court to acknowledge that there is indeed a clash of competing principles in this case: freedom of testation on the one hand versus substantive equality on the other. In my view, for the reasons enumerated above, there can simply be no contest between the *raison d'etre* (reason for being) of the Constitution, namely the abolition of patriarchy and sexism, and the "right" to freedom of testation.

Ubuntu and gender equality

[237] I will conclude with the importance of how the now constitutionally integrated value and norm of *ubuntu* applies. As outlined above, the facts in this case demonstrate a disregard for the dignity and value of women heirs. This Court has affirmed *ubuntu* as a principle in our law which should inform all forms of adjudication.[266] At the heart of *ubuntu* is the idea that a society based on human dignity must take care of its most vulnerable members and leave no one behind. It emphasises the adage that none of us are free until all of us are free.

[266] For example, in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC), at para 37, Sachs J said:

> "The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, *suffuses the whole constitutional order*. It combines individual rights with a communitarian philosophy. *It is a unifying motif of the Bill of Rights*, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[238] In *Makwanyane*, Langa J (as he was then) described *ubuntu* as a concept that recognises a person's status as a human being entitled to "unconditional respect, dignity, value and acceptance" from the community.[267] The essence of *ubuntu* and human dignity manifests through the recognition of every person in the community, from the infants to the dying because "the life of another person is at least as valuable as one's own".[268]

[239] In *Makwanyane* Mokgoro J stated:

> "In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence . . . While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."[269]

[240] Mohamed J (as he was then) in *Makwanyane* also described the inclusion of *ubuntu* in our constitutional jurisprudence:

> "The need for ubuntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.[270]

[241] Clearly therefore *ubuntu* is tightly integrated into our constitutional jurisprudence bringing to bear its transformative nature on all aspects of our law. This case illustrates this in an important way. Academic writers point out that in relation to *ubuntu*:

[267] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 224.

[268] Id at para 225.

[269] Id at paras 307-8.

[270] Id at para 263.

> "Efforts to pin it down and to contain it within overly strict boundaries or definitions are misguided. Proper understanding of this concept calls for wisdom and open-mindedness. This does not, however, mean that *ubuntu* has a mercurial nature that changes according to its context. Rather, it is more like humanity in its diversity, and serves to remind us that our diversity should not cover up our humanity, lest we forget."[271]

[242] Although Davis and Klare similarly argue strongly in favour of *ubuntu* as a principle to inform the development of the common law, this too is relevant to the interpretation of the jurisprudence emerging from the Equality Act. They argue as such that *ubuntu* has already transformed the common law principle of property. They note that property rights have never been absolute but always buttressed by social considerations.[272] The authors argue that such "social considerations" now include *ubuntu* as well.[273] As such, the traditional notion of "private property" is slowly morphing into a constitutionally recalibrated concept of "socially engaged property".[274]

[243] In the context of freedom of testation, *ubuntu* means that the Constitution places a high premium on establishing a compassionate society which does not discard the humanity of any of its members. As such, the right to dispose of one's property upon one's death must be balanced against the discriminatory effect it may have by precluding members of society from an adequate share in the wealth and resources of the nation.

Conclusion

[244] Transformative constitutionalism and the obligation to ensure substantive equality means that the first judgment should take this into account in its assessment of freedom of

[271] Himonga et al "Reflections on Judicial Views of *Ubuntu*" (2013) 16 *Potchefstroom Electronic Law Journal* 370 at 374.
[272] Davis and Klare above n 78 at 485-6.
[273] Id.
[274] Id.

testation. While the argument that freedom of testation is closely related to several rights - such as dignity, privacy and property - may have some merit, this approach de- contextualises what freedom of testation really means in a grossly unequal society such as South Africa. The countervailing values of equality and *ubuntu* require this Court to consider the significant distributive consequences that placing a high premium on freedom of testation has meant. Amongst these consequences is the glaring wealth inequality based on the fault lines of race, gender and class that has endured after apartheid. Balancing freedom of testation against equality both as a right and value should mean more than treating women with equal concern and respect. It should mean more than social inclusion and instead move towards systemic justice that seeks to abolish or root out common law rules which simultaneously sustain women's subordination and prop up male privilege.

[245] Lastly, considerations of *ubuntu* imply that the narrow-minded and self-indulgent understanding of freedom of testation should be tempered by considerations of social justice and equity. In this context *ubuntu* means nothing more than the adage that none of us are free until all of us are free when dealing with freedom of testation within the context of gender equality. The rights to privacy and property should not be used as a smokescreen to shield structural inequality from constitutional scrutiny.

[246] It is for these additional reasons that I concur in the order proposed in the second judgment.

For the Applicants	JA van der Merwe SC and M Adhikari instructed by James King and Badenhorst Incorporated
For the First to Third Respondents	HJ De Waal SC and HL Du Toit instructed by Coetzee and Van Der Bergh

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 306/19

In the matter between:

SYLVIA BONGI MAHLANGU	First Applicant
SOUTH AFRICAN DOMESTIC SERVICE AND ALLIED WORKERS UNION	Second Applicant
and	
MINISTER OF LABOUR	First Respondent
DIRECTOR-GENERAL FOR THE DEPARTMENT OF LABOUR	Second Respondent
ACTING COMPENSATION COMMISSIONER	Third Respondent
and	
COMMISSION FOR GENDER EQUALITY	First Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Second Amicus Curiae

Neutral citation: *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Victor AJ (majority): [1] to [131]
Jafta J (dissenting): [132] to [182]
Mhlantla J (concurring): [183] to [196]

Heard on: 10 March 2020

Decided on: 19 November 2020

Summary: Compensation for Occupational Injuries and Diseases Act 130 of 1993 — constitutionality of section 1(xix)(v) — provision is unconstitutional

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The declaration of constitutional invalidity of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
2. The order is to have immediate and retrospective effect from 27 April 1994.
3. The first respondent must pay the applicants' costs in this Court.

JUDGMENT

VICTOR AJ (Mogoeng CJ, Khampepe J, Madlanga J, Majiedt J, Theron J, Tshiqi J concurring):

Introduction

[1] Domestic workers are the unsung heroines in this country and globally. They are a powerful group of women[1] whose profession enables all economically active members of society to prosper and pursue their careers. Given the nature of their work, their relationships with their own children and family members are compromised, while we pursue our career goals with peace of mind, knowing that our children, our elderly family members and our households are well taken care of.

[2] Many domestic workers are breadwinners in their families who put children through school and food on the table through their hard work. In some cases, they are responsible for the upbringing of children in multiple families and may be the only loving figure in the lives of a number of children. Their salaries are often too low to maintain a decent living standard but by exceptional, if not inexplicable effort, they succeed. Sadly, despite these herculean efforts, domestic work as a profession is undervalued and unrecognised; even though they play a central role in our society.[2]

[3] At issue here is social security for domestic workers. The cornerstone of any young democracy is a comprehensive social security system, particularly for the most vulnerable members of society. Although passed before the advent of our constitutional democracy, the Compensation for Occupational Injuries and Diseases Act[3] (COIDA) partially contributes to our country's social security system. Unfortunately, 26 years into our democracy and despite the constitutional promise and aspirational expectations, in the event of injury, disablement, or death at the workplace, domestic workers do not enjoy the protection under COIDA.[4] By stark contrast, all other employees are.

[1] In a report by the International Labour Organisation titled *Domestic Workers Across the World: Global and Regional Statistics and the Extent of the Legal Protection* (2013) (ILO Report) it points out that in South Africa, more than three quarters of domestic workers are women.

[2] See further Clarke "Domestic Work, Joy or Pain? Problems and Solution of the Workers" (2002) 51 *Social and Economic Studies: Vulnerability and Coping Strategies* 153.

[3] 130 of 1993. COIDA was enacted on 24 September 1993 and commenced on 1 March 1994.

[4] This despite there being an opportunity to bring COIDA in line with the Constitution. The South African Law Reform Commission (Law Reform Commission) published a report in which it detailed the outcome of its review of national legislation with a view to align it with the right to equality entrenched in section 9 of the Constitution.

[4] Section 1 of our Constitution, which sets out our founding values, provides that:

> "The Republic of South Africa is one sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> (b) Non-racialism and non-sexism."[5]

[5] Arising from the founding values, one of the aims of the Constitution is to heal the divisions of the past, improve the quality of life of all citizens and free the potential of each person.[6] Unfortunately domestic workers have not basked in the fulfilment of this constitutional promise. Instead, their fate has been blighted as a result of being excluded from statutory protections.

[6] This Court is required to consider the constitutionality of section 1(xix)(v) of COIDA, which expressly excludes domestic workers from the definition of an "employee", thus excluding them from the social security benefits provided for under COIDA.[7] This case turns on the social security system enshrined in section 27(1)(c) of

Despite the Law Reform Commission's mandate, it unfortunately left in place this most egregious exclusion of domestic workers from the definition of "employee" in COIDA. The reason for this exclusion was ascribed to policy considerations and that this "*exclusion is not necessarily discriminatory or unfair*". It vaguely promised that sometime in the future a review of the exclusion of domestic workers would be considered.

[5] Section 1(a) and (b) of the Constitution.

[6] Preamble of the Constitution. Notably this Court has stressed that this principle in the Preamble imposes a constitutional obligation to eradicate all systems of subordination and oppression inherited from South Africa's colonial and apartheid past. In *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 8 this Court remarked on this obligation as follows:

> "As a people who were not only acutely divided but were also at war with themselves primarily on the basis of race, *one of several self-imposed obligations is healing the divisions of the past. The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently.* But the healing process will not even begin until we all make an effort to connect with the profound benefits of change. *We also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity*."

[7] Section 1 of COIDA defines an "employee" as follows:

> "'employee' means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral

the Constitution and its application to domestic workers who are not currently protected in the event of injury, disablement or death in the workplace. In addition, the rights to equality and dignity are also at the heart of this matter.

Background

[7] Ms Mahlangu was employed as a domestic worker in a private home at the time of her death. She was employed by the same family for 22 years in Faerie Glen, Pretoria. On the morning of 31 March 2012, Ms Mahlangu drowned in her employer's pool in the course of executing her duties. Her body was found floating in the swimming pool by her employer who had been present in the home at the time of the incident, but asserted that he heard no sounds of a struggle. It is alleged that Ms Mahlangu was partially blind and could not swim, which resulted in her drowning.

or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes—

(a) a casual employee employed for the purpose of the employer's business;

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

but does not include—

(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;

(ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household."

[8] Following Ms Mahlangu's death, her daughter, the first applicant, who was financially dependent on her mother at the time, approached the Department of Labour (Department) to enquire about compensation for her mother's death. She was informed that she could neither get compensation under COIDA, nor could she get unemployment insurance benefits for her loss which would ordinarily be covered by COIDA.

[9] Assisted by the second applicant, the South African Domestic Service and Allied Workers Union (SADSAWU),[8] she launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) to have section 1(xix)(v) of COIDA declared unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of "employee". The Commission for Gender Equality[9] (Gender Commission) and the Women's Legal Centre Trust[10] were granted leave to intervene as first and second amici curiae, respectively, in these proceedings. Both amici work tirelessly to advance the rights of women.

Litigation history

[10] On 23 May 2019 the High Court declared section 1(xix)(v) of COIDA invalid to the extent that it excluded domestic workers employed in private households from the definition of "employee", thereby denying them compensation in the event of injury, disablement or death in the workplace.[11] The High Court failed to provide reasons for

[8] SADSAWU has advocated for domestic workers over many years and was active in the process in South Africa for the adoption in 2011 of the International Labour Organisation (ILO) Convention Concerning Decent Work for Domestic Workers, No. 189, 16 June 2011 (Domestic Workers Convention).

[9] The Commission for Gender Equality is a state institution established in terms of section 187 of the Constitution. The Gender Commission's mandate is "to promote respect for gender equality and the protection, development and attainment of gender equality" and to do so through, *inter alia*, legislative initiatives, effective monitoring and litigation.

[10] The Women's Legal Centre Trust is a juristic person created in terms of a Trust Deed dated 3 August 1998. Clause 4 of its Trust Deed provides that the Women's Legal Centre Trust's core objective is to advance and protect the human rights of women and girls in South Africa, particularly those women who suffer multiple and intersecting forms of disadvantage, so as to contribute to redressing systematic discrimination and disadvantage. The Trust fulfils its main objective by providing free legal assistance to women, advocacy, education and outreach, and through public interest litigation, which includes amicus submissions to assist courts in constitutional and public interest matters that concern women's rights and gender equality.

[11] Section 172(1)(a) of the Constitution provides:

its declaration of constitutional invalidity. The issue of retrospectivity of the order of constitutional invalidity was postponed by the High Court to allow the parties to file further submissions on this aspect.

[11] On 17 October 2019 the High Court, having considered the submissions from the parties on retrospectivity, handed down a second order declaring that the declaration of invalidity must apply retrospectively and with immediate effect to provide relief to domestic workers who were injured or who had died at work prior to the granting of the order.

[12] Before us is an application for confirmation of that declaration of constitutional invalidity.

The High Court's failure to furnish reasons

[13] The High Court granted an order declaring section 1(xix)(v) of COIDA unconstitutional, but unfortunately did not furnish any reasons for making such an order. The High Court merely made its orders on the basis of draft orders prepared by the parties, who had "settled" the issue of the unconstitutionality of section 1(xix)(v) of COIDA. This failure to furnish full reasons is regrettable as this Court does not have the benefit of the High Court's reasoning. This Court has held on numerous occasions that it is always helpful to consider the reasoning of the court of first instance.[12] Reasons provide a window into the basis of the judgment and are a valuable tool as they highlight

> "(1) 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."

[12] In *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at para 20 Cameron J held that—

> "[r]elated is the respect this Court pays to the views of the High Court and for the Supreme Court of Appeal. Our precedents say that this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue".

See also *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 39; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 55; and *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

the process of reasoning in a transparent way.[13] This gives members of the public insight into and understanding of their constitutional rights.

[14] Section 167(5) of the Constitution provides that this Court makes the final decision whether "an Act of Parliament, a Provincial Act . . . is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force". It follows that in doing so the reasoning of the High Court or the Supreme Court of Appeal is of fundamental importance. The same section also provides that such an order will not come into force unless this Court confirms the order.

[15] Section 172(2)(a) of the Constitution provides for confirmation proceedings. In *Von Abo*[14] Moseneke DCJ held as follows:

> "This Court is the highest court on all constitutional matters and is clothed with both exclusive and concurrent jurisdiction. It enjoys exclusive jurisdiction in regard to specified constitutional matters and makes the final decision on other constitutional issues that are also within the jurisdiction of other superior courts and in particular, the Supreme Court of Appeal and the High Court. The exclusive and supervisory jurisdiction of this Court may be properly gathered by three constitutional provisions. They are sections 172(2)(a) and 167(5) of the Constitution, which regulate concurrent jurisdiction with the High Court and the Supreme Court of Appeal, and section 167(4) which carves out jurisdictional exclusivity for this Court."[15]

[16] *Von Abo* makes it clear that in respect of confirmation proceedings, this Court exercises its supervisory jurisdiction on orders of constitutional invalidity made by the High Court and the Supreme Court of Appeal. Our supervisory task becomes more challenging when the High Court, as in this case, does not provide well-reasoned

[13] The Supreme Court of Canada in *R v Shephard* [2002] 1 SCR 869 stated that "[j]ustice cannot be seen to be done if Judges fail to articulate the reasons for their orders".

[14] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC).

[15] Id at para 27.

judgments but merely rubber stamps draft orders prepared by parties. This renders this Court a de facto (in fact) court of first and last instance.

[17] Furthermore, in *Mphahlele*[16] Goldstone J held that if courts of first instance fail to furnish reasons for their decisions, this may amount to a violation of a constitutional duty.[17] In *Strategic Liquor Services* this Court stated that "[i]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing".[18] It is important to stress that the High Court ordinarily bears a constitutional duty to provide reasons for its decisions. Failure to do so is an abdication of this constitutional duty.[19]

In this Court

[18] The applicants and amici submit that the exclusion of domestic workers amounts to unfair discrimination and impairs the fundamental dignity of domestic workers. They submit that, because domestic workers are predominantly Black women, this means that the discrimination against them constitutes indirect discrimination on the basis of race and gender. Both the applicants and amici describe the intersectional impact of discrimination on domestic workers as a result of a breach of their rights to equality and dignity on grounds of social status, gender, race and class. They also argue that the effect of patriarchy and lack of access to education has equally had an impact on their

[16] *Mphahlele v First National Bank of South Africa Limited* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

[17] Id at para 18. See also *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* [2010] ZACC 14; 2011 (1) SA 267 (CC); 2010 (11) BCLR 1134 (CC) (*Stuttafords Stores*) at para 10 where the Court held as follows:

> "This Court has stated that furnishing reasons in a judgment—
>
> > 'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.'"

[18] *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) at para 15.

[19] This concern was recently echoed by Khampepe J in *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 18-20. Khampepe J heeded a warning that "[t]his duty to provide reasons is a vital strut to the Judiciary's legitimacy in our constitutional democracy, which is based on a culture of justification".

rights and lived realities. In order to conclude that their exclusion from COIDA is indirect discrimination on the basis of gender and race, the amici submit that an analysis within an intersectional framework is appropriate because it leads to a nuanced, purposive and socio-contextual consideration when interpreting the implementation and amendment of COIDA. The cumulative effect of intersectional discrimination exacerbates the already compromised position of domestic workers in society and marginalises them further.

[19] The applicants and amici assert that domestic workers are one of the most vulnerable groups in society.[20] They suffer past and present disadvantages on the basis that their work is not taken seriously. The fact that they are deprived of the benefits of social insurance provided under COIDA is an apt example of this. They also argue that the exclusion of domestic workers under COIDA means that the only remedy currently available to domestic workers is a common law delictual claim for damages which is fault-based. On the other hand, those employees covered by COIDA are afforded a remedy, regardless of fault and independent of the financial means of their employer. It also precludes domestic workers from equal access to social security protection.

[20] They further argue that the exclusion cannot be justified under the limitation clause in section 36 of the Constitution. There is no apparent legitimate governmental purpose for any of the provisions of COIDA that justifies this impairment of the rights of domestic workers. The applicants assert that the exclusion of domestic workers from COIDA is not rationally connected to the ends sought to be achieved by COIDA, which are to afford social insurance to employees who are injured, contract diseases, or die in the course of their employment.

[20] In the ILO Report above n 1 it records Africa as the third largest employer of domestic workers, after Asia and Latin America. Approximately 5.2 million domestic workers are employed throughout the region, of which 3.8 million are women. Domestic workers account for at least 4.9% of wage employment, and women domestic workers represent 13.6% of all female paid employees. In Southern Africa domestic work is more common than in other parts of the continent, with South Africa having the highest number of domestic workers in the region. More than three-quarters of all domestic workers in South Africa are female. It further records that the racial distribution of domestic workers is highly uneven, with the vast majority classified as "black" (91%) and the remainder as "coloured" (9%).

[21] The Gender Commission relies on the Domestic Workers Convention, which emphasises that—

> "[d]omestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights."[21]

[22] The Gender Commission argues that Article 14 requires South Africa, as a state party to the Domestic Workers Convention, to ensure that domestic workers enjoy equal protection and have access to social security. Article 14 obliges member states to take appropriate measures—

> "in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection."

[23] These considerations apply equally to this Court's decision in respect of constitutionality and retrospectivity. The Women's Legal Centre Trust submits that women who are employed as domestic workers are also often the financial heads of their families. These families, within an African context, often include extended family, where domestic workers provide for the financial needs of their children. They also provide for the financial needs of their grandchildren, as well as the children of other relatives within the broader family unit. Cycles of generational poverty are difficult to break. Women have long been viewed as matriarchs, whose indomitable strength ensures that both their immediate and extended families are able to respond to hardships. Ms Mahlangu is an example of such a woman.

[24] The Women's Legal Centre Trust submits that the generational impact of South Africa's apartheid history on Black women is also relevant. The values in the

[21] Preamble to the Domestic Workers Convention above n 8.

Preamble of the Constitution recognise the injustices of our past and that respect should be shown to those who have worked to build and develop our country, such as domestic workers. It further submits that historically the occupation of domestic work has been stigmatised and that stigma continues to this day. The Women's Legal Centre Trust's argument continues that the fact that domestic workers were viewed as unworthy of receiving social protection in the workplace, and that this remains unchanged, is an example of how this stigma continues to permeate within our constitutional dispensation.

[25] The respondents initially contended that it is unnecessary to challenge the constitutionality of COIDA through a court application on the basis that the relief sought by the applicants would only be of academic value, because the Minister is spearheading the drafting of amendments to COIDA in order to include domestic workers. In oral argument, the respondents concede that the provision should be struck from COIDA.

[26] Furthermore, the respondents concede that the exclusion of domestic workers limits their rights under sections 9, 10 and 27(1)(c) of the Constitution. Given the absence of any justifiable purpose for the limitation which would satisfy the requirements of section 36 of the Constitution, the respondents do not oppose the application for the confirmation of the order of invalidity.

[27] The Department has the capacity to successfully administer COIDA in the domestic sector, following its successful administration of the Unemployment Insurance Act[22] in the sector.

[22] 63 of 2001.

Issues

[28] The applicants contend that section 1(xix)(v) is irrational and infringes a number of constitutional rights: the right to equality,[23] the right to human dignity[24] and the right to have access to social security.[25] The applicants and amici also raise the effect of intersecting forms of discrimination on these rights, referred to in more detail below. The respondents accepted in the High Court and accept in this Court that the provision is unconstitutional on the bases listed by the applicants.

[29] In *Phillips*[26] this Court explained that it will not merely confirm an order of constitutional invalidity made by the High Court and the Supreme Court of Appeal; this Court must satisfy itself that the impugned provisions are indeed inconsistent with the Constitution.[27] Despite the respondents' concessions, it remains necessary for this Court to analyse all the issues raised prior to confirming the High Court's order.

[30] A further issue is that of an appropriate remedy. Should the order of constitutional invalidity have immediate and retrospective effect?

[23] Section 9 of the Constitution, in relevant parts, provides:

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

[24] Section 10 of the Constitution provides:

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

[25] Section 27(1)(c) of the Constitution provides:

> "Everyone has the right to have access to . . . social security."

[26] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

[27] Id at para 8.

Legislative history of COIDA

[31] On 1 March 1994 the enactment of COIDA repealed the Workmen's Compensation Act. COIDA made several significant changes to the system of statutory compensation for employees involved in occupational accidents or who contract occupational diseases, regardless of their earnings level.

[32] In *Jooste*[28] Yacoob J described this compensation as follows:

> "[COIDA] is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate."[29]

An analysis of how COIDA achieves its objectives

[33] The Director-General is entitled in terms of section 15 of COIDA to collect levies from employers, the amount of which is determined by the actuarial risk profile of the relevant sector in which these employees are employed. The levies collected from employers form one part of the contributions to the Compensation Fund.[30] The Compensation Fund consists of assessments and other payments (including penalties paid by employers), interest on investments, amounts transferred from the Reserve Fund[31] and contributions by individually liable employers and mutual associations.[32]

[34] Section 16 of COIDA describes how money in the Compensation Fund must be applied. The Compensation Fund is the central institution for the financial

[28] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC).

[29] Id at para 9.

[30] The Compensation Fund is established by section 15 of COIDA. The purpose of the Compensation Fund is to provide compensation to employees who are injured, disabled or die during the course and scope of their employment. The Compensation Fund has several sources of revenue including levies, assessments and penalties.

[31] The Reserve Fund is established by section 19 of COIDA.

[32] Section 15 of COIDA.

administration of COIDA. It is administered by the Director-General who receives all monies payable to the Compensation Fund and is responsible to account for their receipt and utilisation.

[35] Section 19(3) of COIDA states that the object of the Reserve Fund is to provide for unseen demands on the Compensation Fund and to stabilise the tariffs of assessment. Section 22(1) provides that if an employee meets with an accident resulting in disablement or death, that employee (or in the event of death, their dependent) *shall* be entitled to benefits provided by COIDA. The exclusion of domestic workers from the definition of an "employee" means that they and/or their dependents are not entitled to claim compensation under this section.

South Africa's obligations in respect of social security

[36] Social security is recognised as a human right in the Universal Declaration of Human Rights (Declaration).[33] Article 22 of the Declaration provides that "[e]veryone, as a member of society, has a right to social security". Article 25(1) of the Declaration provides that "[e]veryone has the right . . . to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their] control". In addition, Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[34] provides that "[t]he state parties recognise the right of everyone to social security, including social insurance".

[37] Article 13 of the Maputo Protocol[35] entitled "Economic and Social Welfare Rights" requires states parties to—

[33] Universal Declaration of Human Rights, 10 December 1948.

[34] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[35] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003.

> "adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:
>
> . . .
>
> (f) establish a system of protection and *social insurance for women working* in the informal sector and sensitise them to adhere to it."

[38] Furthermore, the Southern African Development Community (SADC) requires states parties to recognise the provision of social security as a human right. Article 10 of the Charter of Fundamental Social Rights in SADC provides:[36]

> "Member states shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, *regardless of status and the type of employment*, enjoy adequate social security benefits."

[39] The Women's Legal Centre Trust submits that South Africa's obligations go further. South Africa has committed itself to the eradication of extreme poverty and the implementation of appropriate social protection systems for all in terms of the United Nations Sustainable Development Goals (SDGs). SDG 8 seeks to promote the protection of labour rights including safe and secure working environments. In the face of SDG 8, there is no basis for COIDA's exclusion of domestic workers from the definition of "employee" in section 1(xix)(v).[37]

[40] Because South Africa is a signatory to these international instruments, the exclusion of domestic workers from COIDA benefits is inexplicable. The provisions of these international instruments call for domestic workers to benefit from the same protections as other employees.

[36] Charter of Fundamental Social Rights in SADC, 1 August 2003.

[37] By amending our legislation to ensure that there is no discrimination against domestic workers, this will demonstrate that South Africa is one of the countries in Africa that is already taking steps to implement the ambitions articulated in the 2030 Agenda into tangible outcomes for their people and also integrating the SDGs into their national visions and plans.

[41] When interpreting rights in the Bill of Rights, courts must prefer an interpretation which is consistent with international law.[38] Evidently, the various instruments alluded to above would regard benefits in terms of COIDA as a component of the fundamental right to social security. This is based on the interdependence of rights and how such an interpretation will further South Africa's international obligations to advance gender equality and just and favourable conditions of work for vulnerable groups. As will be seen from the analysis below, international and regional benchmarks must be attained for domestic workers, and their continued exclusion as employees under COIDA means that South Africa is not compliant with these obligations.

South Africa's international law and regional law obligations

[42] The applicants and the amici urge this Court, when considering the constitutional challenge of unfair discrimination against domestic workers, to consider South Africa's international and regional legal obligations. Section 39(1)(b) of the Constitution requires this Court to have regard to international law when interpreting the rights in the Bill of Rights. This applies to the interpretation of the right of access to social security guaranteed in section 27(1)(c) of the Bill of Rights: in other words, do the COIDA benefits constitute social security as envisaged in section 27(1)(c)? It is important and helpful in assessing discrimination against a group or class of women of this magnitude that a broad national and international approach be adopted in the discourse affecting domestic workers.

[43] South Africa has ratified various conventions to eliminate all forms of discrimination against women. These include the Convention on the Elimination of All

[38] See section 233 of the Constitution which states:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Forms of Discrimination Against Women[39] (CEDAW), ICESCR,[40] the Convention on the Elimination of All Forms of Racial Discrimination[41] and the Convention on Domestic Workers.[42] Article 2 of CEDAW requires states parties to adopt appropriate legislative measures to protect women against discrimination. Article 11(f) of CEDAW makes specific provision for equality in the workplace.

[44] Article 2 of ICESCR requires states to introduce legislative measures in a manner that does not result in discrimination on grounds of race, sex or social origin. Article 3 of ICESCR provides for equal enjoyment of economic and social rights by men and women.[43] It is noteworthy that in the first report of the Concluding Observations to

[39] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

Notably, CEDAW adopts an intersectional vision of gender equality by referencing the relationship between racism and gender equality. This is recognised in its Preamble as follows:

> "Emphasising that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women."

[40] To this end, in expanding on the meaning of the obligations under the ICESCR, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 23 on the right to just and favourable conditions of work on 27 April 2016. Notably, regarding domestic workers, at para 47(h), the Committee stresses the following:

> "The vast majority of domestic workers are women. Many belong to ethnic or national minorities or are migrants. They are often isolated and can be exploited, harassed and, in some cases, notably those involving live-in domestic workers, subject to slave-like conditions. They frequently do not have the right to join trade unions or the freedom to communicate with others. Due to stereotyped perceptions, the skills required for domestic work are undervalued; as a result, it is among the lowest paid occupations. Domestic workers have the right to just and favourable conditions of work, including protection against abuse, harassment and violence, decent working conditions, paid annual leave, normal working hours, daily and weekly rest on the basis of equality with other workers, minimum wage coverage where this exists, remuneration established without discrimination based on sex, and social security. Legislation should recognise these rights for domestic workers and ensure adequate means of monitoring domestic work, including through labour inspection, and the ability of domestic workers to complain and seek remedies for violations."

[41] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. Notably, the Committee on the Elimination of Racial Discrimination has emphasised the gendered implications of racism in its General Recommendation No. 25 on the gender-related dimensions of racial discrimination, 20 March 2020. It is also noteworthy that the Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has also called for an intersectional approach in addressing racial discrimination. See for example her following reports: UN Doc A/HRC/38/52; UN Doc A/74/321; and UN Doc A/HRC/41/54.

[42] Domestic Workers Convention above n 8.

[43] Notably, the Committee on Economic, Social and Cultural Rights found that this Article calls for an intersectional vision of gender equality. See for example, General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, 11 August 2015 at para 5 which states the following:

South Africa submitted in terms of ICESCR, the Committee on Economic, Social and Cultural Rights pointed out that "domestic workers . . . often labour under exploitative conditions."[44] To this end, the Committee recommended that South Africa strengthen the legislative framework applicable to domestic workers by extending the benefits of COIDA to this class of workers.[45] In its view, this would be consistent with ensuring just and favourable conditions of work in terms of the ICESCR.[46]

[45] The Domestic Workers Convention recognises the vulnerabilities of domestic workers and Article 3 places a duty on the state to promote and protect them. Article 13 of the Convention further provides that states must ensure the health and occupational safety of workers.

[46] At a regional level, it is necessary to consider the impact of African-based initiatives on the treatment of women in employment. In terms of Article 66 of the African Charter on Human and Peoples' Rights (African Charter), to which South Africa is a signatory, special protocols may be adopted to supplement its provisions. In line with Article 66 of the African Charter, the Maputo Protocol was adopted.[47] Today, the Maputo Protocol constitutes a model framework and an endless

> "Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. *Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage*."

[44] Concluding observations on the initial report of South Africa, UN Doc E/C12/ZAF/CO/1.

[45] Id.

[46] Id.

[47] Portions of the Preamble of the Maputo Protocol provide as follows:

> "Considering that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;
>
> . . .
>
> Further noting that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater

source of inspiration for women in Africa. It aims to put an end to gender stereotypes and discrimination against women and bring about the economic emancipation of women in the fields of civil, political, and reproductive health rights.

Social Security Challenge

[47] The Constitution brought with it fundamental reforms to social security. Section 27(1)(c) and (2) of the Constitution provide:

> "(1) Everyone has the right to have access to—
>
> . . .
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[48] This right covers social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease.[48] Economic, social and cultural rights, of which the right of access to social security is a part, are indispensable for human dignity and equality. It is important to note that although COIDA predates the Constitution and that this may steer COIDA away from social security as envisaged in section 27 of the

> attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;
>
> Recognising the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;
>
> . . .
>
> Concerned that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices."

[48] I explain this shortly.

Constitution, item 2 of Schedule 6 makes it clear that "old order legislation" continues in force subject to its consistency with the Constitution.[49]

[49] COIDA therefore must be interpreted through the prism of the Bill of Rights and the foundational values of human dignity, equality and freedom. To interpret COIDA as a mere enactment of the common law would constrain the objectives of the Constitution and have anomalous results. This Court has warned that to limit the reach of the Constitution because law or conduct took place before its enactment would negate its fundamental objectives and aspirations.[50] In interpreting COIDA through the prism of the Bill of Rights, it is noteworthy that in *Khosa*[51] this Court considered the now repealed Social Assistance Act[52] against the provisions of section 27(1)(c) and (2); even though that Act also predated the Constitution. This Court found that the denial of access to social grants to permanent residents did not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.[53]

[50] What is the reach or scope of the right of access to social security? Does it include social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease?

[51] In answering these questions, one must first consider whether COIDA is social security legislation as envisioned by section 27(1)(c) of the Constitution. In *Jooste* this

[49] Item 2 of Schedule 6 of the Constitution provides that:

> "(1) All law that was in force when the new Constitution took effect, continues in force, subject to—
>
> (a) any amendment or repeal; and
>
> (b) consistency with the new Constitution."

[50] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8.

[51] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

[52] 59 of 1992.

[53] *Khosa* above n 51 at para 82.

Court described COIDA as "important social legislation".[54] It went on to describe COIDA's objectives as follows:

> "Section 35(1) of the Compensation Act is therefore logically and rationally connected to *the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.*"[55]

[52] The definition of "social security" in the Bill of Rights expressly includes social assistance to provide support to persons and their dependents when they are unable to support themselves.[56] In circumstances such as these, where a breadwinner has died or cannot work due to injury or illness, her dependents may be left destitute and unable to support themselves. Evidently in these circumstances, the benefits provided to those dependents by COIDA serve a similar purpose to the social grants which are provided in terms of the now Social Assistance Act[57] insofar as they intend to ameliorate the circumstances of those who would otherwise be condemned to living in abject poverty. To regard COIDA only as a statutory mechanism to address former common law claims between employers and employees is, in my view, unduly restrictive. To divorce COIDA from social security because it amounts to "compensation" misses the wide net of social security, which section 27 provides for and seeks to address. For the reasons that follow, COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality.

[53] In determining the scope of the right to social security, one must have regard to section 39(1)(a) of the Constitution which requires that an interpretation of the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

[54] *Jooste* above n 28 at para 9.

[55] Id at para 17.

[56] See section 27(1)(c) of the Constitution.

[57] 13 of 2004.

[54] In *Khosa* this Court held that equality is a foundational value which must inform the interpretation of the Bill of Rights, including the right to have access to social security.[58] The Constitution itself makes it clear that socio-economic rights must be bestowed on an equal footing by declaring that those rights are held by "everyone".[59]

[55] The approach to interpreting the rights in the Bill of Rights and the Constitution as a whole is purposive and generous and gives effect to constitutional values including substantive equality.[60] So, when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism.[61]

[56] It is unassailable that the inability to work and sustain oneself, or the loss of support by dependents as a result of the death of a breadwinner subjects the worker or dependents to a life of untold indignity. The interpretative injunction in section 39(1)(a) of the Constitution demands that this indignity and destitution be averted. Surely then, social assistance that seeks to heed this injunction falls within the ambit of that right.[62]

[58] *Khosa* above n 51 at para 42.

[59] Id.

[60] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 15 and *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 9.

[61] *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*TAC*) at para 24 and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) at para 25.

[62] Underscoring the importance of coming to the aid of the needy and vulnerable, Mokgoro J said in *Khosa* above n 51 at paras 52 and 74:

> "The right of access to social security, including social assistance, for those unable to support themselves and their dependents is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.
>
> . . .
>
> There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect."

[57] More importantly, the amici submit that the exclusion of domestic workers from COIDA's reach traps both them and their dependents in a cycle of poverty which is a direct legacy of the country's colonial and apartheid past. It is that very system of racialised and gendered poverty that the Constitution seeks to undo.

[58] Lastly, this Court is enjoined to interpret rights in the Bill of Rights consistently with international law. The international instruments alluded to above certainly demand that the type of benefits provided by COIDA be considered a component of the right to social security.

[59] For all these reasons, I find that social security assistance in terms of COIDA is a subset of the right of access to social security under section 27(1)(c) of the Constitution. But that is not the end of the enquiry.

[60] Section 27(1)(c) and 27(2) must be read together.[63] Section 27(1)(c) guarantees everyone a right to have access to social security. Section 27(2) enjoins the state to take reasonable legislative and other steps to progressively realise this right. It is clear that these sub-sections are inextricably linked: section 27(2) is an internal limitation which qualifies the section 27(1) right.[64] COIDA is an example of the very type of legislation that the Constitution envisages as a "reasonable legislative measure, within its available resources, to achieve the progressive realisation of [the] right". The fact that COIDA predates the Constitution does not take it outside of the state's obligation to enact legislation and take other measures. Nor does it allow that legislation to be immune

[63] In *TAC* above n 61 at para 39, this Court held:

> "We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). *Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil" such rights*. The rights conferred by sections 26(1) and 27(1) are to have "access" to the services that the state is obliged to provide in terms of sections 26(2) and 27(2)."

[64] *Khosa* above n 51 at para 83.

from the section 27(2) requirement of reasonableness. The question, therefore, is whether the exclusion of domestic workers from the definition of "employee" in COIDA is reasonable.

[61] In *Grootboom* this Court expounded upon the reasonableness standard of judicial review that applies to measures taken to give effect to socio-economic rights.[65] Notably, in both *Grootboom* and *Khosa* this Court remarked on the interdependence of rights in the Bill of Rights and the task of evaluating the reasonableness of a policy against its impact on the rights to dignity and equality.[66] To that end, a core aspect of the reasonableness enquiry is whether a law or policy takes cognisance of the most vulnerable members of society and those in most desperate need.[67] A law or policy that fails to do so would be considered unreasonable.

[62] In *Khosa* this Court was faced with a similar exclusion to that found in COIDA, also in respect of the right of access to social security. There, this Court pointed out that context is indispensable in determining the reasonableness of such an exclusion. Mokgoro J expounded upon this as follows:

> "In dealing with the issue of reasonableness, context is all-important. We are concerned here with the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, *it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose*."[68]

[63] The purpose of social security is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life

[65] *Grootboom* above n 61 at para 39.

[66] Id at paras 23-4 and *Khosa* above n 51 at paras 40 and 44.

[67] *Grootboom* above n 61 at para 44 and *TAC* above n 61 at para 68.

[68] *Khosa* above n 51 at para 49.

of dignity.[69] Moreover, social security legislation serves a remedial purpose: namely, to undo the gendered and racialised system of poverty inherited from South Africa's colonial and apartheid past.

[64] In the present matter, it is clear that no legitimate objective is advanced by excluding domestic workers from COIDA. If anything, their exclusion has a significant stigmatising effect which entrenches patterns of disadvantage based on race, sex and gender. The amici have highlighted the lived experiences of domestic workers, the majority of whom are Black women, and the structural barriers which they and their dependents continue to face.

[65] In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds. To allow this form of state-sanctioned inequity goes against the values of our newly constituted society namely human dignity, the achievement of equality and *ubuntu*. To exclude this category of individuals from the social security scheme established by COIDA is manifestly unreasonable.

[66] For all these reasons, I find that the obligation under section 27(2) to take reasonable legislative and other measures, within available resources, includes the obligation to extend COIDA to domestic workers. The failure to do so in the face of the respondents' admitted available resources constitutes a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.

[67] Section 27(2) contains an internal limitation whereby the state may defend its failure to give effect to a socio-economic right listed in section 27(1) based on a lack of available resources to do so. I consider this at the end of this judgment where I discuss the appropriate remedy, the actuarial report and the issue of retrospectivity.

[69] Id at para 52.

[68] This leads me to consider the right to equality that the applicants also rely on in their constitutional challenge to section 1(xix)(v) of COIDA.

Equality challenge

[69] The Constitution, through its founding values and section 9 makes it peremptory for both racial and gender equality to be advanced. Section 9 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.
>
> (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."

[70] The respondents correctly concede that there is no basis for the differentiation between "employees" and the disadvantaged group of domestic workers. The applicants submit that failing to include domestic workers under the protection of COIDA constitutes unequal treatment in breach of section 9(1). While the constitutional attack is based on both sections 9(1) and 9(3), the attack on section 9(1) was not strongly pressed by counsel for the applicants or the amici. It is necessary, however, to consider section 9(1) briefly within the context of these facts.

Section 9(1) challenge

[71] In *Prinsloo*[70] Ackermann J stated that:

> "It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner."[71]

Prinsloo was concerned with section 8 of the interim Constitution. What I have quoted applies equally to section 9(1) of the Constitution. For completeness, let me add only that part of the "*Harksen* test"[72] that is relevant to the present enquiry. In *Harksen* this Court held:

[70] *Prinsloo v Van Der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[71] Id at para 25.

[72] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC). The full *Harksen* test is as follows:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government I 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).

> "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."[73]

Yet again, this finds application to section 9(1) of the Constitution.

[72] A question that arises then is whether the differential treatment of not affording domestic workers benefits under COIDA serves any rational government purpose. In their submissions the applicants correctly answer this question in the negative. As indicated, the respondents who are conceding the challenge understandably do not proffer a basis for the differentiation. In these circumstances, the differentiation between domestic workers and other categories of workers is arbitrary and inconsistent with the right to equal protection and benefit of the law under section 9(1). As such, even on the first stage of the *Harksen* test, COIDA would be constitutionally invalid.

Section 9(3) challenge and the application of intersectionality

[73] In this case however, the differentiation between domestic workers and other categories of workers also amounts to discrimination albeit indirectly. I say indirectly because, as the applicants and amici submit, domestic workers are predominantly Black women. This means discrimination against them constitutes indirect discrimination on the basis of race, sex and gender. Section 9(3) proscribes unfair discrimination by the state on certain specified grounds, which include race, sex and gender. Clearly the race, sex and gender of domestic workers is woefully apparent in the discrimination against them. In terms of section 9(5), which is quoted above, these grounds are presumptively unfair. As I will demonstrate below, with these grounds

> (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)."

[73] Id at para 54.

intersecting, not only is the discrimination presumptively unfair but the level of discrimination is aggravated.

[74] In their written submissions, the applicants contend that "section 1(xix)(v) of COIDA discriminates on the grounds listed in section 9(3) of the Constitution, specifically the grounds of race, sex and/or gender". They also include social origin. As such, they argue that the exclusion discriminates against domestic workers both directly (as a class of workers) and indirectly on numerous listed grounds. They contend further that the section 9(3) analysis should consider how the implicated grounds intersect. Section 9(3) defines the grounds of discrimination by enumerating a defined list which is by no means a *numerus clausus* (closed list) of grounds of discrimination. This proscribed discrimination can be direct or indirect, but importantly, it also provides that there may be more than one ground of discrimination,[74] thus anticipating multiple grounds of discrimination simultaneously converging. It is in this notion of multiple grounds of discrimination that the importance of an intersectionality analysis becomes unavoidable.

[75] In my view, even though COIDA is invalid on a section 9(1) analysis alone, it is in the interests of justice to also deliberate on the unfair indirect discrimination challenge. In light of the unique circumstances of domestic workers, this case provides an unprecedented opportunity to expressly consider the application of section 9(3) through the framework of intersectionality. This Court has also had the benefit of hearing full oral argument on the benefits and implications of the intersectional approach.

[76] There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an

[74] Section 9(3) also states "on one or more grounds".

array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination.

[77] At the early stages of our constitutional dispensation, Sachs J pertinently invoked it in so many words in *National Coalition for Gay and Lesbian Equality* where he explained:

> "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, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.* Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and [Black people] 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 [Black people], 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*."[75]

[78] Although this was a concurring judgment, the majority judgment by Ackermann J concurred in by all other Justices expressed agreement with it.[76]

[79] Furthermore, in *Hassam*[77] this Court looked at sameness and difference in group disadvantage on the question of intestacy between Muslim women in polygamous

[75] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 113.

[76] Id at para 78.

[77] *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC).

marriages and other women. Such textured analysis in relation to discrimination is an indispensable legal methodology and, using the intersectionality framework as a legal tool, leads to more substantive protection of equality. Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve "the progressive realisation of our transformative constitutionalism".[78]

[80] Two further examples stem from *Van Heerden* and *Brink*.[79] Here is how Moseneke J in *Van Heerden* recognised the intersectional effects of different forms of disadvantage:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but situation sensitive approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."[80]

[81] O'Regan J in *Brink* in dealing with the dynamic of sameness and difference in patterns of group disadvantage and discrimination, did not characterise it using the word "intersectionality", but nevertheless described multiple and intersecting forms of harm:

[78] Id at para 28.

[79] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) and *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

[80] *Van Heerden* id at para 27.

> "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)."[81]

[82] Recently, albeit in different contexts, this concept was endorsed in the concurring judgment of Khampepe J in *Tshabalala* in the context of the causes and effects of rape on Black women.[82] In the majority judgment in *Centre for Child Law,* when discussing agency and stigma, Mhlantla J noted the presence of "intersecting axes of discrimination".[83]

[83] The intersectional approach is evident in other jurisdictions. For instance, in 2012 the European Court of Human Rights introduced for the first time an intersectional interpretation of discrimination in the case of *BS v Spain*.[84] Analysing discrimination within the framework of intersectionality proved to be a useful tool in determining the presence and extent of the discrimination. That Court considered ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege. A single-axis comparison by contrast, may not yield the full extent of the discrimination. For example, assessing discrimination against women in general does not consider the differing impacts of certain discrimination on Black women as compared to that experienced by White women.

[81] *Brink* above n 79 at para 42.

[82] *S v Tshabalala* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC) at paras 68-9 and fn 38.

[83] *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 86.

[84] *BS v Spain* no 47159/08, ECHR 2012-III.

[84] It is undisputed between the parties that domestic workers who are in the main Black women, experience discrimination at the confluence of intersecting grounds. This simultaneous and intersecting discrimination multiplies the burden on the disfavoured group. It is now apt to consider how scholars have developed and grappled with the intersectional lens and how it is a helpful framework in determining the nature of the discrimination in the current matter.

[85] Crenshaw,[85] who coined the concept of the "intersectional" nature of discrimination, writing as a Black feminist on women studies, recognised and demonstrated how overlapping categories of identity (such as gender, sex and race) impact individuals and institutions. Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms of discrimination, vulnerability and subordination.[86] As such, at times Black women may experience compounded forms of discrimination as compared to Black men or White women. In other cases, they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups.[87] The power of an intersectional approach lies in its capacity to shed light on the experiences and vulnerabilities of certain groups that have been erased or rendered invisible. Unless there is recognition and an articulation of intersectional discrimination, the enormous burden experienced by, in this case, domestic workers will not be sufficiently acknowledged.

[86] Intersectionality has been described as one of "the most important theoretical contributions that women studies has made thus far".[88] Intersectionality is an approach

[85] Crenshaw "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies" (1989) *University of Chicago Legal Forum* 139. Crenshaw is a pioneer and leading scholar on intersectionality. Intersectionality as a concept has been used and developed by legal scholars and lawyers in the field of discrimination law.

[86] Id at 149. See also Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241 at 1249-50.

[87] Id at 148.

[88] McCall "The Complexity of Intersectionality" *Signs: Journal of Women in Culture and Society* (2005) 30 at 1771.

that recognises that different identity categories can intersect and co-exist in the same individual thus creating a qualitatively different experience when compared to that of another individual. These overlapping burdens can lead to excessive hardship for an individual.[89]

[87] The discrimination in this case illustrates what Albertyn posits as the need for the concept of equality to be developed beyond the idea of *equal concern and respect*. In discussing the plasticity of the concept of equality, she reminds us that—

> "the goal of equality . . . is to remove systemic barriers to substantive freedom and actively to create conditions of equality, including attention to restructuring relations of equality at individual, institutional and societal inequalities. It is also to take account of the intersectional nature of inequalities in comprehending the problem and identifying its solutions".[90]

[88] By including domestic workers in the definition of "employee" under COIDA, the goal of substantive equality is advanced at a structural level by granting the remedy sought. To this end, it empowers domestic workers and brings them closer to the kind of "substantive freedom" that Albertyn persuasively argues should be the main object of equality jurisprudence.

[89] Atrey explains that intersectionality consists of several strands, such as sameness and difference of experiences within the context of multiple forms of discrimination.[91] This is the notion that individuals within the same group may simultaneously experience discrimination in the same way, and also differently. One cannot generalise. The applicants and amici submit that not recognising these patterns of intersecting grounds of discrimination, exacerbates patterns of group disadvantage. The outcome of an

[89] Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" *The Equal Rights Review* (2016) 16 at 73.

[90] Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 at 462.

[91] Atrey *Intersectional Discrimination* (OUP, United Kingdom, 2019) at 36. Atrey discusses sameness and difference as well sameness and difference in group disadvantage.

intersectional analysis, on the other hand, results in a transformative outcome which addresses systemic disadvantage. This will hopefully remove, rectify and reform the disadvantage suffered as a result of intersectional discrimination.

[90] This brings to the fore the need to consider patterns of group disadvantage and discrimination along intersectional lines. Multiple axes of discrimination are relevant to the case of domestic workers. Domestic workers experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes.[92] The application of an intersectional approach helps us to understand the structural and dynamic consequences of the interaction between these multiple forms of discrimination.

[91] Atrey, in referring to the concept of group disadvantage as raised by O'Regan J in *Brink*, explains that this phrase requires some analysis:

> "First of all, intersectionality conceives of 'disadvantage' broadly, including every kind of harm, oppression, powerlessness, subordination, marginalisation, deprivation, domination and violence. Moreover, the disadvantage is defined not by isolated or stray incidents but by systemic or structural nature. It represents a pattern of historic motifs of disadvantage which have been entrenched over time. Such disadvantage is also not personally towards random individuals but suffered by individuals because of their membership to a social group."[93]

[92] Some may contend that because COIDA only excludes certain categories of workers such as domestic workers, this only amounts to an irrational differentiation, as opposed to unfair discrimination in terms of section 9(3). I disagree. First, this Court has already established that a seemingly benign or neutral distinction that nevertheless

[92] See for example, Mantouvalou "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour" (2012) 34 *Comparative Labour Law & Policy Journal* 133 at 138.

[93] Atrey above n 91 at 41.

has a disproportionate impact on certain groups amounts to indirect discrimination.[94] Secondly, this Court has established that for the purposes of a section 9(3) enquiry, there is no qualitative difference between discrimination that occurs directly or indirectly.[95] Once indirect discrimination on a listed ground has been established, then the law or conduct in question is presumed to be unfair.[96]

[93] In the present case, the uncontested evidence is that the overwhelming majority of domestic workers are women, and Black women for that matter. It is also noteworthy that the domestic work sector is the third largest employer of women in the country.[97] In addition, as I will demonstrate below, these various grounds of discrimination intersect, thus rendering domestic workers amongst the most indigent and vulnerable members of our society. In my view, there is no doubt that although the distinction in COIDA could be said to refer to a category of worker which, on the face of it, would not trigger a section 9(3) enquiry, the same cannot be said of the historical and contemporary marginalisation of domestic workers, and the various listed grounds of discrimination that intersect where discrimination is made between domestic workers and other workers.

[94] While it is true, as pointed out by my brother Jafta J in the second judgment, that COIDA also excludes members of the South African National Defence Force (SANDF) and the South African Police Service (SAPS) from its provisions, this omits to take into account that, because domestic workers are predominantly Black women, their exclusion indirectly discriminates against them on grounds of sex, gender and race. In terms of section 9(5) that discrimination is presumptively unfair. That is all that is relevant. It is noteworthy that the omission of members of the SANDF and SAPS is not

[94] *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (*Walker*) at paras 31-2.

[95] Id at para 35.

[96] Id.

[97] ILO Report above n 1 at 33.

the same as that of domestic workers. Section 57 of the Defence Act[98] establishes a fund for SANDF members to claim compensation for death or injury. In the case of the SAPS, a special medical scheme has been established of which only members of the SAPS can become members.[99] In terms of this scheme, SAPS' members can lodge claims for death, injury or disability to this scheme the way they would have lodged claims under COIDA. Hence, it is only domestic workers who are in a legislative vacuum without any coverage whatsoever. In addition, the historical exclusion domestic workers have faced, which I outline below, demonstrates that an analogy between them and members of the SAPS or the SANDF is inapposite.[100]

[95] Intersectionality requires that courts examine the nature and context of the individual or group at issue, their history, as well as the social and legal history of society's treatment of that group. Thus, this Court is required to consider the particular history of social security in South Africa, as it relates to domestic workers. Furthermore, this Court must consider the historical disadvantage that Black women have faced as a group.

[96] It is often said that Black women suffer under a triple yoke of oppression based on their race, gender and class.[101] The racial hierarchy established by apartheid placed Black women at the bottom of the social hierarchy.[102] During apartheid, Black women were oppressed both by codified apartheid laws and a patriarchal form of customary

[98] 42 of 2002.

[99] South African Police Service Medical Scheme (POLMED) is a closed medical scheme registered under the Medical Schemes Act 131 of 1998. Only employees of the SAPS, appointed under the South African Police Service Act 68 of 1995 and their dependants are eligible to be members of POLMED. "POLMED" available at http://www.polmed.co.za/about-us/. Also see sections 34 (1)(f) and (g) of the South African Police Service Act 68 of 1995.

[100] To the extent that the exclusion of labour brokers is similar to that of domestic workers, this Court need not make any pronouncement on it, because the question of its constitutionality is not properly before this Court.

[101] Nolde "South African Women Under Apartheid: Employment Rights with Particular Focus on Domestic Service and Forms of Resistance to Promote Change" (1991) *Third World Legal Studies* 203 at 204.

[102] Wing and de Carvalho "Black South African Women: Toward Equal Rights" (1995) 8 *Harvard Human Rights Journal* 57 at 60.

laws and norms, which rendered them perpetual minors who were at the mercy of White men and women as well as Black men.[103]

[97] This Court has on a number of occasions stressed the importance of "the need to make a decisive break from the ills of the past".[104] This constitutional imperative stems from the Constitution's commitment to establishing a non-racist and non-sexist society based on human dignity, equality and freedom. At the heart of the constitutional project is an aspiration to achieve substantive equality and undo the burdens of our past.[105]

[98] But ensuring that the vestiges of our racist past are eradicated, also requires an exploration of the lingering gendered implications of apartheid's racist system.[106] The combination of influx control laws and the migrant labour system also had a particularly onerous effect on Black women.[107] Taken together, they restricted the ability of Black women to seek and obtain employment opportunities, thus rendering them dependent on absent husbands or sons.[108] Essentially, this all sedimented a gendered and racialised system of poverty, that was particularly burdensome for Black women.

[99] Being at the bottom of the social hierarchy meant that Black women were often required to do the "least skilled, lowest paid and most insecure jobs".[109] The case of domestic workers was particularly severe. Domestic workers, the majority of whom

[103] Id.

[104] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para 5 and see further *Tshwane City* above n 6 at para 6.

[105] *Minister of Justice and Constitutional Development v SA Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 61.

[106] See for example Poinsette "Black Women Under Apartheid: An Introduction" (1985) 8 *Harvard Women's Law Journal* 93 at 105 where she discusses the implications of the Immorality Act for Black women. Amongst other things she points out that that most prosecutions under the Immorality Act were against White men having sex with Black women. Also, because White men were often Black women's employers, Black Women were effectively pressurised into these sexual relationships.

[107] Andrews "From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa" (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 693 at 695.

[108] Id at 696.

[109] Wing and de Carvalho above n 102 at 67.

were – and still are – Black women, were denied both a family life and social life.[110] They lived in poor conditions devoting more time to caring for the children of their employers, than their own.[111]

[100] The marginalisation that domestic workers currently face is therefore historical. During apartheid, domestic workers had a tenuous form of employment which was excluded from fair labour standards including compensation for workplace injuries, minimum wage standards and unemployment insurance.[112] Their employment conditions were not formalised and their lives were often based on the whims of their White employers.

[101] Poinsette captures the tragic lives of domestic workers during apartheid with the following remarks:

> "Black women who work as servants in white homes sometimes describe themselves as 'slaves'. Their typical living conditions are restricted, bare, and cramped. Amenities basic to any white home are often denied to the servants who work in such homes. One commentator tells of a domestic servant who was forced to wash in the toilet in her servant's quarters."[113]

[102] Because Black women found themselves at the intersection or convergence of multiple oppressions, some argue that the indignities they face can tell us something about the "grand design" or brutality of apartheid.[114] Intersectionality indeed becomes a useful analytical tool to understand the convergence of sexism, racism and class stratification and the discriminatory logic embedded in these systems. Unravelling the multiple layers of discrimination that Black women faced and still face might aid us in

[110] Poinsette above n 106 at 116-7.

[111] Id. Poinsette goes on to argue that the state targeted Black women to destabilise African families and undermine their "procreative capacity" in order to keep the black population under control.

[112] Wing and de Carvalho above n 102 at 68.

[113] Poinsette above n 106 at 116.

[114] Id at 118.

the quest to make a decisive break from our past towards the establishment of a democratic, compassionate and truly egalitarian society.[115] An intersectional framework therefore enables this Court to shift its normative vision of equality and the "baseline" assumptions embedded in anti-discrimination law.[116] The marginalisation that domestic workers and Black women in general faced during apartheid has regrettably been extended to the present day.

[103] The exclusion of domestic workers from the protections under COIDA has resulted in a situation where domestic workers have for decades into our democracy, had to bear work-related injuries or death without compensation. They are a category of workers that have been lamentably left out and been rendered invisible. Their lived experiences have gone unrecognised. It took the tragic death of Ms Mahlangu to bring this egregious form of discrimination into vivid focus.

[104] Much like their apartheid counterparts, domestic workers today remain in an unenviable position. Domestic work is a circumstance-driven employment decision, driven by financial need. Domestic workers remain shackled by poverty, because the salaries they earn are low and not nearly enough to take care of all their daily needs and those of their families. In some instances, they are single parents who do not have an additional salary to help support them and their children.

[115] See *Makwanyane* n 60 at para 262 where Mahomed J describes the transformative nature of the Constitution as follows:

> "In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

[116] For a more comprehensive discussion on how intersectionality shifts the normative vision of anti-discrimination law by interrogating its baseline assumptions see Crenshaw (1989) above n 85 at 145 and further Carbado and Crenshaw "An Intersectional Critique of Tiers of Scrutiny: Beyond Either/or Approaches to Equal Protection" (2019) 129 *Yale Law Journal Forum* 108.

[105] Section 1(xix)(v) of COIDA differentiates between employees as defined and domestic workers employed in private households who are excluded from that definition. It is evident from the above discussion that the state has discriminated against domestic workers indirectly in ways already referred to. They are a critically vulnerable group of workers. It is this very right to equality that the state has violated. If the equality breach is analysed through an intersectional lens with all the multi-axes of indirect discrimination taken into account, this can have an impact on achieving structural systemic transformation.

[106] The Constitution serves a transformative purpose that is advanced through our equality and dignity jurisprudence. It recognises that the values of equality and human dignity, although linked, each serve as independent rights and constitutional values which must be given specific content. Section 1(xix)(v) of COIDA does not advance the material well-being of domestic workers. Declaring that section invalid will fulfil the transformative mandate set by our Constitution, at both an individual and a group-based level.

[107] To conclude on equality, the exclusion of domestic workers and, therefore, their dependents from deriving benefits under COIDA limits the rights to equality before the law and equal protection and benefit of the law under section 9(1) and the right not to be discriminated against unfairly guaranteed in section 9(3).

Human dignity challenge

[108] It is undisputed in this case, that the dignity of domestic workers is being impaired by their exclusion from the definition of "employee" in COIDA. Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". The exclusion of domestic workers from benefits under COIDA has an egregious discriminatory and deleterious effect on their inherent dignity. The exclusion demonstrates the fact that not only is domestic work undervalued, it is also not considered to be *real work* of the kind performed by workers that do fall within the definition of the impugned section of COIDA. One can only

imagine the pain of these women who work graciously, hard and with pride only for their work and by consequence them, to go unrecognised. This amounts to domestic workers themselves not being treated with dignity.

[109] Counsel for the respondents properly concede the constitutional values and principles that apply in this case and that these include the dignity of domestic workers. Mogoeng CJ in *Freedom of Religion South Africa*[117] dealt with the right to human dignity and explained:

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights."[118]

[110] Historically, in varying contexts across the world, domestic work has generally not been regarded as *real work* and has been undervalued for that reason.[119] In the American context, it has been argued that the historical undervaluation of domestic workers stems primarily from the gendered and racialised nature of those who have traditionally done this work, namely African-American women.[120] To this end, domestic work there has been undervalued for two reasons. First, it has been described as work done by a "despised race".[121] Second, it has been regarded as "women's work" or a "labour of love" having no economic currency.[122] In my view, the same rings true

[117] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 BCLR 1321 (CC).

[118] Id at para 45.

[119] See for example, Mantouvalou above n 92.

[120] Shah and Seville "Domestic Worker Organizing: Building a Contemporary Movement for the Dignity and Power" (2011) *Albany Law Review* 413 at 416.

[121] Id.

[122] Id.

in the South African context, where domestic work has been undervalued precisely because of who performs this work: poor Black women. The injury to dignity hence stems from the same intersectional harms elaborated upon above.

[111] The reasons for undervaluing this work and not according it the necessary dignity are deeply gendered and reflect the patriarchal values which inform what counts as *real work*. In one of its reports, the International Labour Organisation captures this point succinctly:

> "Domestic work, however, is still undervalued. It is looked upon as unskilled because most *women have traditionally been considered capable of doing the work, and the skills they are taught by other women in the home are perceived to be innate.* When paid, therefore, the work remains undervalued and poorly regulated."[123]

[112] The idea that the duties performed by domestic workers do not constitute *real work,* and that they are merely engaging in an inherently feminine endeavour is deeply sexist and has a significant stigmatising effect on their dignity.

[113] The often exploitative relationship between domestic workers and their employers is also relevant to the dignity enquiry. This exploitative relationship, coupled with the undervaluation of their work demonstrates how the labour of domestic workers has been commodified and how they have been objectified to that end.[124] But, the Constitution's commitment to human dignity prohibits the idea that people can be reduced to objects and treated as a means to achieve an end.[125] The Constitution

[123] International Labour Organization Report: "Decent Work for Domestic Workers" Report IV (1) International Labour Conference 99th session (2010).

[124] Mantouvalou above n 92 at 161.

[125] Steinmann "The Core Meaning of Human Dignity" (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 17. This particular understanding of human dignity is neatly summed up in the following quote in *Prinsloo* above n 70 at para 31 where this Court said the following:

> "We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. *They were treated as not having inherent worth; as*

unequivocally confers self-worth on and demands respect for each individual, which must be protected and jealously guarded by courts.

[114] It is apparent that the exclusion of domestic workers from COIDA calls for a re-examination of the legal and moral foundations of the discrimination against them. The multiple intersecting forms of discrimination illustrate the indignity domestic workers have endured for so long. When this case is measured along an intersectional framework, it is plainly evident that there are still disadvantaged groups who have not benefitted from democracy, or from the transformative constitutional project and whose dignity remains impaired and unprotected.

[115] For all these reasons, it is clear that the exclusion of domestic workers from COIDA is an egregious limitation of their right to dignity, alongside its infringements on their other constitutional rights. It extends the humiliating legacy of exclusion experienced during the apartheid era into the present day, which is untenable.

Justification analysis

[116] The limitation of the rights I have dealt with is quite egregious and far-reaching in nature. No reasons were tendered to justify it pursuant to a section 36 limitation analysis.[126] The intersectional discrimination could not be objectively justified by the state on any criteria. This is understandable because the state is conceding

> *objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth.* In short, they were denied recognition of their inherent dignity."

[126] Section 36(1) of the Constitution provides:

> "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."

unconstitutionality. That notwithstanding, this Court must satisfy itself that the limitation of the affected rights is not justified.[127]

[117] Unquestionably, the right to equal protection of the law, the right not to be discriminated against unfairly and the right to dignity are of singular importance in our constitutionalism. Unsurprisingly they even feature in our Constitution's founding values.[128] Equally, the right of access to social security is important. It seeks to uplift the vulnerable and marginalised from destitute conditions and for that reason, it is also closely linked to the value of and right to dignity.

[118] On the other hand, the limitation serves no governmental purpose whatsoever. That much has been conceded by the state. All the state has said is that the continued exclusion of domestic workers from the enjoyment of benefits under COIDA was simply a matter of timing. It explained that it needed to prepare itself for handling the increased numbers of beneficiaries that would result from an extension of the benefits. Without suggesting that this was an acceptable reason, the state contends that it is now prepared to handle the numbers.

[119] The justification analysis must end here. The limitations on the fundamental rights outlined above are neither reasonable nor justifiable in terms of section 36(1).

Conclusion

[120] The invalidation of section 1(xix)(v) of COIDA will contribute significantly towards repairing the pain and indignity suffered by domestic workers. It should result in a greater adjustment of the architectural focus as to their place and dignity in society. Not only should this restore their dignity, but the declaration of invalidity will hopefully have a transformative effect in other areas of their lives and those of their families, in the future.

[127] *Phillips* above n 26 at para 20.

[128] See [4].

Remedy

[121] The starting point on the issue of an appropriate remedy is found in section 172 of the Constitution. Section 172(1)(b) empowers this Court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. This Court is further empowered to make any order that is just and equitable, which may include an order limiting the retrospective effect of the declaration of invalidity or its suspension with the aim of allowing Parliament to correct the defect.[129]

[122] The applicants seek an order confirming the High Court's order of constitutional invalidity of section 1(xix)(v) of COIDA with immediate and retrospective effect.

[123] Jafta J held in *Mvumvu*:[130]

> "Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed, the discretion conferred on the courts by section 172(1) must be exercised judiciously."[131]

[129] Section 172(1) 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; and
>
> (b) may make any order that is just and equitable, including–
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect."

[130] *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

[131] Id at para 46.

[124] The default position in the law is that a declaration of constitutional invalidity will apply retrospectively. When the declaration is made in relation to a statutory provision, it will be retrospective from the date that the Constitution came into effect, or in the case of post-constitutional legislation, from the date that the statutory provision came into force. This principle is based on the doctrine of objective constitutional invalidity.[132] The question then is whether the declaration of constitutional invalidity should be qualified to limit the retrospective effect of the order or whether this order of invalidity should be effective from the date the Constitution took effect.

[125] The respondents concede that the applicants are entitled to effective relief. While they do not oppose the relief sought by the applicants in respect of retrospectivity of any order this Court may make, they faintly put up two justifications in support of limiting the retrospective effect of the order being: the administrative and financial burdens this may have on the Compensation Fund. Without any evidence, the respondents claim that such burdens will arise from old injuries or diseases. In particular, if claims arising from old injuries or diseases are to be met, that will impact on the Compensation Fund's ability to meet future claims.

[132] Id at para 44, where Jafta J held as follows:

> "In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force. But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force."

See also *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) where this Court stated at para 28:

> "A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of section 98(5) of the Constitution to postpone the operation of invalidity and, in terms of section 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of section 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."

Actuarial Report

[126] The respondents filed an abbreviated actuarial report, dubbed a high-level assessment. A more detailed actuarial report would have been helpful. The respondents are in possession of their own financial information and this would have assisted the actuary in producing a full report on the effect of the retrospectivity of the order. It is incumbent on the respondents to place cogent evidence before this Court on why this Court should limit the retrospectivity of the order of constitutional invalidity.

[127] Reverting to the abbreviated actuarial report on the question of retrospectivity, the actuary states that her mandate was limited to simply perform a high-level consideration report.[133] No basis was laid as to why the actuary was given this specific and very limited mandate. The state is not a naïve, inexperienced and impecunious litigant that had to limit the actuarial report to a high-level assessment for costs or other reasons which has resulted in an unhelpful report full of unsupported generalisations. This chosen approach is a curious one when it comes to the state assisting the Court on something as important as domestic workers' rights. Its presumed intention was to assist the Court regarding the practical realities faced by the state, and to assist it in determining a viable way forward on the important issue of domestic workers' rights under COIDA. The respondents tender no evidence which suggests that the Reserve Fund would be unable to meet the demand should there be no limiting of retrospectivity. Importantly, one of the objects of the Reserve Fund is to provide for unforeseen demands on the Compensation Fund.[134]

[128] The fact that this case concerns intersectional discrimination is a relevant factor in determining whether a retrospective order should be granted.[135] As discussed above,

[133] High-level means "general" or "big picture". Some may consider a "high-level overview" to be redundant, like saying "brief summary". A "high-level overview" is one that does not cover details. It provides a very basic and general explanation or presentation of the material/subject.

[134] Section 19(3)(a) of COIDA.

[135] In this case a retrospective order will address the systematic disadvantage faced by domestic workers and their dependents. Crenshaw (1991) above n 87 at 1250 argues that intersectional discrimination cannot be addressed unless the remedy is designed to address the "intersectional location" of the affected women.

I am hopeful that the inclusion of domestic workers in the definition of "employee" under COIDA will contribute towards the amelioration of systemic disadvantage suffered by these women and contribute to breaking the cycle of poverty they suffer. The above discussion dismisses any argument that the state is unable to include domestic workers based on a lack of available resources.

[129] I conclude that a just and equitable order is to not limit the retrospective effect of the declaration of invalidity. The impugned provision has been in place since before the advent of our constitutional democracy. During the hearing, the parties agreed that in the event of the retrospective effect of the order not being limited, the cut-off date should be the date of the interim Constitution which took effect on 27 April 1994. I agree with that cut-off date.

Costs

[130] The applicants have been successful, and costs must follow the result.

Order

[131] The following order is made:

1. The declaration of constitutional invalidity of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
2. The order is to have immediate and retrospective effect from 27 April 1994.
3. The first respondent must pay the applicants' costs in this Court.

JAFTA J (Mathopo AJ concurring):

Introduction

[132] This matter concerns the validity of a statutory exclusion in the COIDA,[136] of domestic workers from receiving compensation for injuries sustained in employment. The background against which the claim arises is the following. The mother of Ms Sylvia Bongi Mahlangu was a domestic worker and Ms Mahlangu was her dependant. Ms Mahlangu's mother sadly died in an accident that occurred in the course of her employment. Consequently, Ms Mahlangu lost the financial support she had received from her mother.

[133] Following this loss, Ms Mahlangu duly submitted a claim for compensation to the Director-General for the Department of Labour. The claim was lodged in terms of COIDA. She was advised that her claim was not successful because she was not eligible to claim compensation on the ground that domestic workers and their dependants were excluded from compensation payable in terms of COIDA. Dissatisfied with this decision, Ms Mahlangu and the trade union, South African Domestic Service and Allied Workers Union instituted proceedings in the Gauteng Division of the High Court. They challenged the validity of the exclusion. The Minister of Labour, the Director-General for the Department of Labour and the Compensation Commissioner were cited as respondents.

[134] By agreement between the parties, the High Court issued an order declaring the impugned provision invalid, without rendering a judgment. The Court merely converted the parties' draft order into a court order.

[135] I have had the benefit of reading the judgment of my colleague Victor AJ (first judgment). I agree that the impugned provisions are inconsistent with the

[136] Above n 3.

Constitution and invalid for reasons that differ materially from those contained in the first judgment. First, I do not think that the socio-economic right guaranteed by section 27(1) of the Constitution is at all violated[137]. Second, I do not think that in this matter it has been shown that denying domestic workers the COIDA benefits enjoyed by other workers impairs the right to dignity. It is not shown how the denial, of itself alone, degrades domestic workers or lowers their dignity, especially because the exclusion applies to police, soldiers and other workers.

[136] Third, although the first judgment invokes section 9(3) of the Constitution[138] to decide the equality claim, it does not follow the test laid down in *Harksen*[139]. And since the applicants did not rely on a ground listed in section 9(3) for their unfair discrimination claim, the unfairness of the discrimination could not be presumed. The failure to apply the *Harksen* test makes it difficult to determine whether the applicants have established that the impugned provision constitutes unfair discrimination.

[137] It was incumbent upon the applicants to prove by way of evidence that the discrimination was indeed unfair. The first judgment mentions that the impugned provision violates the equality right of domestic workers under section 9(3) and proceeds to conclude that "the State has discriminated against domestic workers indirectly . . .".[140] The actual act of discrimination is the Director-General's failure to

[137] Section 27(1) provides:

> "Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[138] Section 9(3) of the Constitution provides:

> "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."

[139] *Harksen* above n 72.

[140] See the first judgment at [105].

compensate domestic workers for injuries sustained at work on the basis that COIDA does not authorise him or her to pay compensation. It is not clear to me how this constitutes indirect discrimination.

[138] But I think there is a simpler and straightforward pathway to the outcome reached in the first judgment. That is section 9(1) of the Constitution which guarantees equality before the law and equal protection and benefit of the law[141]. But before illustrating how the impugned provision breaches section 9(1), I must address the process followed by the High Court in declaring the impugned provision invalid.

Process in the High Court

[139] The High Court followed an unusual and impermissible procedure in disposing of this matter. At the hearing of the matter, it appears that the High Court was presented with a draft order, declaring the impugned provision invalid. That Court approved and granted the order requested by consent by the parties and postponed the determination of whether the declaration of invalidity should operate retrospectively, to a date approximately six months later. The Court failed to render a judgment on the matter.

[140] Therefore, it is not clear from the record which sections of the Constitution the High Court had found the impugned provision to be inconsistent with. It will be recalled that the applicant had invoked sections 9, 10 and 27 of the Constitution as the benchmark against which the impugned provision was to be tested. Consequently, there is no indication whatsoever why the High Court has declared the provision in question invalid. This is unacceptable, more so in view of the fact that the High Court was alert to the principle that its order could not be effective until confirmed by this Court[142].

[141] Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[142] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act

This is so because this Court occupies a special place in our constitutional order and is at the apex of the Judiciary arm of the state. The orders that have to be confirmed by it under section 172 relate to decisions of the highest organs in the other arms of the state.

[141] In *Pharmaceutical Manufacturers* this Court stated:

> "This is the context within which s 172(2)(a) provides that an order made by the [Supreme Court of Appeal], a High Court or a Court of similar status 'concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President' has no force unless confirmed by the Constitutional Court. The section is concerned with the law–making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of state and head of the Executive, is the highest functionary within the State. The use of the words 'any conduct' of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State."[143]

[142] Declaring an Act of Parliament invalid is a serious intrusion into the domain of Parliament but that intrusion is permitted by the Constitution. However, it remains a serious matter which must be done only where a competent court is persuaded that the impugned legislation is inconsistent with the Constitution and a declaration of invalidity should be limited to the extent of the inconsistency. It is the duty of the court itself and not the litigants, to determine whether an inconsistency with the Constitution has been established. A court may not abdicate this responsibility to litigants, as happened here. It is explicit from section 172(1) that it is the court which is vested with the power to decide whether a law is inconsistent with the Constitution[144].

> or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[143] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 56.

[144] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—

[143] Although procedurally it is permissible to cite only the Minister responsible for the administration of the impugned law, the consent order presented to the High Court here was not shown to have been supported by Parliament. Yet the order struck down an Act of Parliament. Without reasons being furnished by the High Court, Parliament and other parties affected by that order would have no knowledge of reasons why the Act was declared invalid. This Court has emphasised that reasons in a judgment explain to the parties and the public at large why a particular decision in a case was taken[145]. Those reasons are also helpful to a higher court which is called upon to consider the decision of the court of first instance, either on appeal or in confirmation proceedings. Without those reasons it is impossible for the higher court to determine whether the decision of the court of first instance was correct. Here this Court was driven to approach the matter as if it is a court of first instance.

[144] In *Stuttafords Stores*[146] this Court also pointed out that the discipline of furnishing reasons prevents arbitrary judicial decisions. It was stated that reasons reveal whether the decision taken was correct.[147] If the High Court had given reasons, it probably would have realised that the application has not established the inconsistency between the impugned provision and some of the sections of the Constitution relied on by the applicants. I illustrate this below.

[145] The High Court erred in failing to furnish reasons for the order it issued. As the declaration of invalidity was granted, which could not come into effect unless confirmed

> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[145] *Mphahlele* above n 16.

[146] *Stuttafords Stores* above n 17.

[147] Id at paras 10 and 11.

by this Court, we must consider the matter and determine whether a proper case has been made out for the declaration. Otherwise the validity of the impugned provision would be left in limbo and this would generate considerable uncertainty.

Invalidity

[146] After the death of her mother the first applicant, Ms Sylvia Bongi Mahlangu, who was the deceased's dependant at the time of her accidental death, sought compensation from the compensation fund under the control of the Director-General for the Department of Labour. The Director-General rejected her request because her mother was a domestic worker in a private household. The Director-General is mandated to pay compensation from the Fund in respect of damage suffered by employees or their dependants as a result of injuries sustained at the workplace or during the course and scope of employment. Ms Mahlangu did not accept the Director-General's decision. She challenged the validity of the statutory provision on which that decision was based.

[147] The attack mounted against that provision in the High Court was three-pronged. The first ground on which the provision was impugned was based on section 9 of the Constitution. The applicants contended that the provision was irrational and that it authorised unfair discrimination against domestic workers. The second ground was that the impugned provision violated the dignity of domestic workers in breach of section 10 of the Constitution. Lastly, it was contended that the provision concerned infringed domestic worker's right of access to social security enshrined in section 27(1)(c) of the Constitution.

[148] It is necessary to consider the terms of the impugned provision with a view to determining whether it unjustifiably limits the rights on which the applicants rely.

Impugned provision

[149] In declining to compensate Ms Mahlangu for her loss, the Director-General relied on section 1 of COIDA. Section 1 defines an employee and tabulates categories of workers which constitute employees as defined in COIDA. It goes further to list classes of workers who are excluded. The exclusion mentions the following:

> "(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;
> (ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;
> (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;
> (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;
> (v) a domestic employee employed as such in a private household…"

[150] The effect of this exclusion with regard to domestic workers is that they do not enjoy the statutory entitlement to compensation for injuries sustained during the course and scope of employment. In so doing, COIDA differentiates between domestic workers, members of the South African National Defence Force and members of the South African Police Service, on the one hand and other workers on the other. It also differentiates between domestic workers who are not employed in private households and those who are so employed. The question that arises is whether that differentiation is consonant with the three sections of the Constitution on which the applicants rely. The answer to this question requires consideration of the relevant sections of the Constitution. The first is section 9.

Equality Claim

[151] 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.
>
> (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."

[152] This is one provision of the Constitution which has frequently received the attention of our courts, including this Court, on numerous occasions. Almost all of its terms have been interpreted and here ours is to apply those constructions to the present matter. Importantly, in *Harksen* this Court laid down the test to be applied in determining whether the impugned provision amounts to unfair discrimination[148]. That test applies to every claim based on unfair discrimination.

[153] In the context of an equality claim, the rationality test is sourced from section 9(1) of the Constitution. This section guarantees three distinct rights. First, the right to equality before the law. This right has been construed by this Court in *Prinsloo*[149] as meaning that everybody is entitled to equal treatment by our courts of law. The second one is the right to equal protection under the law and the third is the right to equal benefit of the law.

[148] *Harksen* above n 72 at para 43.

[149] *Prinsloo* above n 70 at para 22.

[154] This Court had to determine quite early in its existence that not every differentiation should be the subject of judicial scrutiny. Otherwise courts would be "compelled to review the reasonableness or the fairness of every classification of rights".[150] In *Prinsloo*, it was held that the State must act in a rational manner:

> "It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner".[151]

[155] Consequently this Court concluded that for an equality claim to succeed, the claimant must prove either that the differentiation is irrational in the sense that there is no rational link between the differentiation and a legitimate governmental purpose or that the differentiation amounts to unfair discrimination. It is not enough to show that the differentiation constitutes discrimination, for section 9(3) proscribes unfair discrimination only. Having identified these two types of constitutionally objectionable differentiation, this Court proceeded to lay down the test for determining unconstitutional differentiation. The test has sequential stages and in *Prinsloo* it was stated:

> "Accordingly, before it can be said that mere differentiation infringes s 8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element . . . is present".[152]

[150] Id at para 17.

[151] Id at para 25.

[152] Id at para 26.

[156] Later in *Harksen*, this Court laid down a more detailed test for determining an equality claim. The Court proclaimed:

> "[I]t may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:
>
> (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 s 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 (s 33 of the interim Constitution)".[153]

[153] *Harksen* above n 72 at para 54.

[157] It bears emphasis that this test applies in full where the claim for equality is based on both subsections (1) and (3) of section 9. Where the claim is limited to section 9(3) the first stage relating to rationality would be inapposite. This is because section 9(3) is dedicated to anti-discrimination claims. In *Walker* this Court said:

> "I am satisfied that the differentiation in the present case was rationally connected to legitimate governmental objectives. Not only were they measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources, during a difficult period of transition. This is, however, not the end of the enquiry as differentiation 'that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purpose of section 8(2)'".[154]

Applying the Harksen test

[158] As mentioned here the applicants relied on section 9(1) and (3) of the Constitution. This means that the entire test including rationality is applicable. It will be recalled that in sequence the rationality test applies at the very first stage. And it is important to recall what this test requires. In *Law Society of South Africa*[155] we are reminded of what rationality entails. There it was stated:

> "It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad".[156]

[154] *Walker* above n 94 at para 27.

[155] *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC).

[156] Id at para 35.

[159] Here the differentiation arising from excluding domestic workers from compensation and benefits payable to employees and their dependants for injuries sustained at work has no rational link to any government purpose. Let alone any legitimate one. This is because no purpose has been identified by the respondents as the objective of the exclusion. On the contrary, the respondents have conceded, rightly so, that the exclusion serves no purpose. Accordingly, the impugned provision fails the rationality standard and as a result it is inconsistent with section 9(1) of the Constitution. For this reason alone it should be declared invalid to the extent of the inconsistency.

Other grounds of invalidity

[160] For various reasons it is not necessary to determine whether the other grounds on which the applicants relied, for challenging the validity of the impugned provision, were established. First, the conclusion on rationality is sufficient for striking the provision down. Second, the respondents have conceded that the provision is invalid. Third, the rationality issue which is the easiest of them all to determine, shows that the impugned provision is indeed inconsistent with the Constitution. Fourth, in the context of an equality claim, rationality falls to be determined first under the *Harksen* test. Fifth, there are no reasons compelling that the unfair discrimination claim and the other two grounds also be adjudicated in this matter. If these issues were not addressed in the first judgment, I would not mention or consider them.

Unfair Discrimination

[161] As mentioned, it is not clear from the first judgment whether this claim was based on the discrimination against domestic workers, as a class of workers or not. This is important as it determines how the *Harksen* test should be applied. For example, as 'domestic worker' is not one of the grounds listed in section 9(3), it does not trigger the presumption in section 9(5). The effect of this is that the burden was on the applicants to establish not only that the differentiation rises to discrimination but also that it amounts to unfair discrimination.

[162] The fairness of the discrimination would have to be assessed in the context of COIDA. COIDA abolishes the employees' common law claim against employers for compensation for injuries suffered in the course and scope of work. The abolished claim is replaced with a statutory claim against the compensation fund controlled by the Director-General. Classes of workers excluded from COIDA, retain their common law right but they do not enjoy the COIDA statutory right. Domestic workers are not the only class excluded. The exclusion also applies to members of the South African National Defence Force and members of the South African Police Service, Black and White. In addition, it applies to labour brokers, regardless of their race just as it covers all domestic workers in private households, Black and White. The true position is that COIDA creates two categories of employees who enjoy compensation for injuries sustained at work. One category benefits from the statutory right and the other is entitled to compensation under the common law.

[163] It is in this context that it must be established whether the differentiation constitutes discrimination and if it does, whether that discrimination is unfair. The first judgment overlooks this inquiry which entails the application of the *Harksen* test. In the view I take of the matter, it is not necessary to evaluate the evidence to determine whether the unfair discrimination claim has been proved. The breach of the rationality requirement suffices for declaring the impugned provision invalid.

Right to Dignity

[164] The first judgment finds that domestic work is undervalued. Proceeding from this premise, it holds that the failure to recognise domestic work as real work in the impugned exclusion amounts to "domestic workers themselves not being treated with dignity".[157] This is mistaken. The dignity of domestic workers is not bound up with the type of work they do. If that work is not recognised as real work, it does not follow as a matter of course that the dignity of those who perform the work is undervalued.

[157] First judgment at [108].

Dignity attaches to individuals regardless of the work they do which is not a personal attribute of an individual.

[165] But even if it is true that domestic workers are undervalued, this does not flow from the exclusion from COIDA benefits. It is difficult to appreciate how COIDA, by the exclusion alone, can be regarded as impairing the dignity of domestic workers. The real issue is that the exclusion treats domestic workers and other workers, including members of the South African National Defence Force and the South African Police Service, differently to other workers who receive statutory compensation. It may well be that the advantages of the statutory compensation outweigh those of the common law claim. But this does not lower or degrade the dignity of the soldiers, the police, labour brokers and domestic workers.

[166] The exclusion does not target domestic workers on the basis of human attributes. Instead, they are excluded on the ground of their occupation just like members of the South African National Defence Force, South African Police Service and labour brokers. Of itself, the exclusion does not have a dehumanising or degrading effect on the groups of workers to whom it applies. Nor does it reduce their worth as human beings.

[167] With regard to members of the South African National Defence Force, the exclusion is apparently justified because they enjoy the same right under a different statute. Consequently, the COIDA exclusion has no impact on them. This illustrates the simple point that the impugned exclusion does not inherently have an effect that impairs the dignity of those it excludes from the COIDA benefits. Therefore, the exclusion in these circumstances may impair the dignity of domestic workers only if there is proof that it accords them a status inferior to the one enjoyed by the workers entitled to COIDA benefits. In other words, it must be established that the common law claim retained by the excluded groups is inferior to the COIDA statutory right.

[168] All this has not been established here. Instead, what we have is that employers undervalue domestic workers. But as mentioned the employers' conduct in this regard does not stem from the impugned exclusion. If employers violate the domestic workers' dignity, this can be stopped by enforcing the workers' right to dignity against employers. The removal of the exclusion cannot protect domestic workers from the employers' abuse. More so because under COIDA it is not the employers who pay benefits. Therefore, there is no correlation between the abuse and the benefits concerned.

Right of access to social security

[169] The first judgment holds that the impugned provision infringes section 27(1)(c) of the Constitution. It reasons that by failing to extend the benefits of COIDA to domestic workers employed in private households, the impugned provision violates section 27(1)(c).[158] The reasoning is based on the proposition that section 27(1)(c) read with (2) requires the state to take reasonable legislative and other measures to achieve progressive realisation of access to social security, including appropriate social assistance.

[170] In determining whether COIDA is legislation contemplated in section 27(2) of the Constitution, the first judgment holds that COIDA benefits payable to dependants of a deceased employee serve a similar purpose to social grants. Therefore, the first judgment concludes from this that COIDA provides for social security envisaged in section 27 of the Constitution[159].

[171] I disagree. This reasoning proceeds from an incorrect premise. The question whether COIDA regulates the section 27(1)(c) right may be determined with reference to the text of section 27. There is nothing in the language of the section suggesting that

[158] Id at [67].

[159] Id at [53].

some of the conditions to enjoying the right guaranteed by section 27(1)(c) are that there must be harm suffered as a result of bodily injuries sustained by an employee in the course of her employment[160]. The section confers on everyone the right of access to social security which includes access to social assistance if the person concerned cannot support herself and her dependants. The condition for social assistance is the right bearer's inability to support herself and nothing else.

[172] Incorporating COIDA into section 27 of the Constitution leads to new and further conditions being introduced for the enjoyment of the right in section 27(1)(c). In addition, that interpretation is not supported by the text of the section. But more importantly, that interpretation creates a separate right of access to social security which is limited to only employees and their dependants. This is contrary to the express provision that the right is available to everyone unable to support themselves and their dependants.

[173] Moreover, a claim for compensation under COIDA is not subject to limitations in section 27(2)[161]. The enforcement of the statutory right in COIDA is not subject to a progressive realisation requirement. Nor is it contingent upon available resources. Once it is established that an employee is injured at work, the Director-General of the Department of Labour must pay compensation. All this illustrates the distinction between the statutory right in terms of COIDA and the constitutional right in section 27(1)(c).

[160] Section 27(1) of the Constitution provides:

> "Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[161] Section 27(2) of the Constitution provides:

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[174] As the facts on record show that Ms Mahlangu depended solely on financial support from her late mother, it appears that she cannot support herself and this alone qualified her for social assistance from the State. And if she had demanded such assistance, the State would have been obliged to provide it. The State could not have resisted her claim on the ground that she does not meet COIDA requirements or that her mother, as a domestic worker, was excluded from having access to COIDA benefits. COIDA has no bearing on the enforcement of the right in section 27(1)(c) of the Constitution. Consequently, it cannot be inconsistent with that section.

[175] Ms Mahlangu's right which was contingent upon her mother's death, is her claim for loss of support. That is her common law right which she still has. Because it was her mother who lost the right to life as a result of the accident, no constitutional right under section 27(1) of Ms Mahlangu was affected. This means that she retained all her rights under this section which she could enforce without any reference to her mother's death.

[176] When an employee sustains an injury in the course of her employment, the constitutional rights affected are those of the employee alone. One of them is the right to security of the person, which includes freedom from all forms of violence guaranteed by section 12(1)(c) of the Constitution[162]. In *Mankayi*, Khampepe J held that COIDA implicates this right:

> "The issue that the High Court was required to decide was whether section 35(1) of COIDA extinguishes the common law claim of an employee, who is not entitled to

[162] Section 12(1) of the Constitution reads:

> "Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

> claim for compensation under COIDA but only under [Occupational Diseases in Mines and Works Act]. If AngloGold's contention is correct then this provision extinguishes Mr Mankayi's common law right to sue it for negligence. This issue ineluctably implicates the right to freedom and security of a person as enshrined in section 12 of the Constitution. The right in section 12(1)(c) confers on everyone the right to be free from all forms of violence from either public or private sources."[163]

[177] And after referring to *Law Society of South Africa*, my colleague proceeded to say:

> "The protection of the right to the security of the person may be claimed by any person and must be respected by public and private entities alike. Neither counsel addressed specific argument on whether the alleged extinction of a common law right infringed upon section 12(1)(c). Despite the absence of pointed argument on this issue, in my view the question whether this Court entertains jurisdiction to decide a case does not depend on counsels' approach. What is evident is that the right to security of the person is engaged whenever a person is subjected to some form of injury deriving from either a public or a private source. This is because the common law right to claim damages for the negligent infliction of bodily harm constitutes an effective remedy required by section 38 of the Constitution in order to protect and give effect to the section 12(1)(c) right, as in *Law Society*."[164]

[178] The conclusion reached in the first judgment is at odds with the decisions in *Mankayi* and *Law Society of South Africa*. In the latter case, Moseneke DCJ observed:

> "A plain reading of the relevant constitutional provision has a wide reach. Section 12(1) confers the right to the security of the person and freedom from violence on 'everyone'. There is no cogent reason in logic or in law to limit the remit of this provision by withholding the protection from victims of motor vehicle accidents. When a person is injured or killed as a result of negligent driving of a motor vehicle, the victim's right to security of the person is severely compromised. The state, properly

[163] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 13.

[164] Id at para 15.

> so, recognises that it bears the obligation to respect, protect and promote the freedom from violence from any source."[165]

[179] The rights to security of the person and freedom from violence entrenched in section 12 of the Constitution also exist under the common law. These rights have received statutory protection in COIDA and its predecessors. The history of that legislation is comprehensively set out in *Mankayi* and as a result, there is no need to repeat it here[166]. Unlike the socio-economic rights which were introduced by the Constitution, the right to have compensation for bodily injuries has been part of our law since time immemorial. This illustrates that the right regulated by COIDA differs from the socio-economic rights in section 27(1) of the Constitution.

[180] The approach preferred in the first judgment would also lead to anomalies. The first anomaly is that, having concluded that COIDA was legislation envisaged in section 27(2) of the Constitution, the first judgment holds that section 27(1)(c) is infringed. This is at variance with our jurisprudence which states that measures adopted in compliance with section 27(2) may be challenged only on the ground of reasonableness.[167] If a legislative measure is found to be unreasonable, it constitutes a violation of section 27(2) and not 27(1).

The other anomaly is that under COIDA, compensation is payable on demand and under section 27 social security assistance is not. With regards to payment of compensation under COIDA, if the Director-General fails to compensate a claimant who is entitled to compensation, a court of law may intervene, determine the amount payable and order the Director-General to pay with immediate effect. This is not the position in relation to socio-economic rights. This was made plain in *Mazibuko*:

[165] *Law Society of South Africa* above n 155 at para 63.

[166] *Mankayi* above n 165 at paras 41-55.

[167] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 59-67.

> "Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."[168]

[181] Evidently, payment of compensation under COIDA is not subject to the reasonableness of measures taken by the state. Nor is it contingent upon available resources. Yet, it cannot be gainsaid that the right in section 27(1)(c) is subject to all these constitutional conditions, including progressive realisation of socio-economic rights.[169] Therefore, the COIDA claim for compensation for bodily injuries does not constitute a socio-economic right enshrined in section 27(1) of the Constitution. And a failure to pay compensation does not amount to a breach of that section.

[182] With regard to remedy, I embrace the first judgment's analysis and for all these reasons I support the order proposed in the first judgment.

[168] Id at para 61.

[169] *Grootboom* above n 61.

MHLANTLA J:

Introduction

> "What amazed me as a worker is that she is a woman just like me. But when she want[s] to shout at me, she will shout at me. Then it seems to me that I am a child. And one day I stood up and I said to her that she must remember and she must also respect me as a worker and as a *woman*, because I am a woman just like she is."[170]

[183] I have had the pleasure of reading the two judgments by my colleagues, Victor AJ (first judgment) and Jafta J (second judgment). I agree that the impugned provision is unconstitutional and thus support the order. I support the judgment of my sister Victor AJ when it comes to her reasoning on equality, unfair discrimination and dignity. However, I depart from her approach and support my brother Jafta J when it comes to the particular issue of social security for the reasons he gives. I agree that, based on the plain reading of the section coupled with other key differences between the statutory right juxtaposed against the constitutional right, one cannot merely incorporate COIDA into section 27(1)(c).[171]

[184] I write this concurrence to underscore the historical significance of this matter coupled with its intersectional nature. Importantly, it is to recognise the fundamental role domestic workers play in building and nurturing our society that has often gone unacknowledged due to the informal and private nature of their role.

[170] Fish "Engendering Democracy: Domestic Labour and Coalition-Building in South Africa" (2006) 32 *Journal of Southern African Studies* 107 at 112 quoted from a domestic worker interview, February 2001.

[171] See second judgment at [171] to [173].

Historical perspective

[185] The role of the domestic worker, and failure to deem them – by *them*, predominantly Black women[172] – worthy of COIDA's protection, is a manifestation of our past that seeps through to our present. This is a complex history entrenching racism, sexism and social class.

[186] I accept the warning lamented by Cameron J in *Daniels* that "it is not within the primary competence of judges to write history".[173] An attempt to write history or overcome the "perils of writing history"[174] is not the aim of this concurrence. Rather, this concurrence wishes to "give voice to history"[175] and afford "recognition of the historical injustice that underlies"[176] the plight of domestic workers in this matter. Considering this issue through a historical lens is particularly relevant – and necessary – given the injustices experienced by domestic workers, and that they are labelled as a ghost;[177] "invisible";[178] plagued with "historical silence";[179] and rendered "powerless".[180] But, why is this so?

[172] In South Africa, domestic work represents a sizeable segment of the employment base. Of those employed in this sector, the majority are female. See Department: Statistics South Africa *Quarterly Labour Force Survey* (P0211, February 2020). It is worth noting that the inescapable cycle that has led to black women making up the majority of domestic workers comes from the fact that some black women were and are systematically excluded from contributing to the economy, and as a result, are left to take up domestic responsibilities in their own homes. See further Department: Women *The Status of Women in the South African Economy* (1 August 2015).

[173] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 150.

[174] Id at para 152.

[175] Id at para 147.

[176] Id at para 116.

[177] Baderoon "The Ghost in the House: Women, Race and Domesticity in South Africa" (2014) 1 *Cambridge Journal of Postcolonial Literary Inquiry* 173 at 179.

[178] Cock *Maids and Madams: A Study in the Politics of Exploitation* (Ravan Press Johannesburg 1980) at 278.

[179] Gaitskell et al "Class, Race and Gender: Domestic Workers in South Africa" (1983) 27/28 *Review of African Political Economy* 86 at 107.

[180] Gwynn "Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid" *South African History Online* (10 June 2015), available at https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn. See further Cock above n 178 at 232.

[187] The reasons originate from the grinding together of the tectonic plates of racism, sexism, and social class, which are all exacerbated by the private nature of their place of work – the household. This intersectional picture of discrimination is not novel. It was also painted by the scholar Cock. In the 1980s, she reported that "domestic workers are situated at the convergence of three lines along which social inequality is generated: sex, class and race".[181] She went on to state that domestic workers' experiences typify "ultra-exploitation" and that:

> "Domestic service in South Africa is a social institution that has a special significance, firstly in the sense that it constitutes the largest single source of employment for Black women after agriculture. Secondly, domestic service constituted an initial point of incorporation of Black women into colonial society . . . while domestic service until 1890 was a kaleidoscopic institution [that involved various races], men as well as women, it has gradually been transformed into a predominantly black female institution. As such, it reflects changing patterns of sexual and racial domination. Thirdly, domestic service is a microcosm of the existing pattern of inequality in South Africa, and contributes to these inequalities in important ways. Fourthly, domestic service is significant in that it is an important route of incorporation into urban-industrial society for many Black women."[182]

[188] It is worthwhile to further unpack the patterns of race, sex, gender and class from a historical perspective. First, there is the discriminatory notion that domestic work, with its low wages and poor working conditions, should be performed in most instances by black people, as a form of slavery, servitude, subordination and oppression.[183] Through white settlers and colonialism, the role of the domestic worker shifted from

[181] Id at 263.

[182] Id at 307. See also Women in Informal Employment: Globalizing and Organizing (WIEGO) "Domestic Worker's Laws and Legal Issues in South Africa" (November 2014), available at http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-South-Africa.pdf.

[183] Gaitskell et al above n 179 at 88 states that:

> "[A]s has already become clear, domestic service, especially in colonial societies, has a racial character. Almost everywhere in the world it is performed by 'socially inferior' groups: immigrants, blacks, and ethnic minorities. In South Africa, from the turn of the century, household-based domestic service has been above all a black institution".

white women to women of colour, again with the majority being Black women. Initially, black men conducted domestic services and in certain areas, black men dominated the domestic services space.[184] However, over time the domestic work has increasingly been done by a black female-dominated workforce. This has been attributed to black male labour being absorbed by growing industrial sectors such as mining and manufacturing,[185] coupled with the concomitant increase in the demand for domestic workers.[186]

[189] This is where the intersection of sex, gender and class is pertinent. It is said that "domestic service for [Black women] above all meant access to a wage" and that "[Black women] stayed in domestic service because of a lack of alternative job opportunities".[187] The disparities in the relationship between domestic workers and their employers were formalised and further entrenched by the apartheid regime.[188] In addition, the plight of domestic workers is ignored because the work these women perform is seen as inferior and not as challenging as a traditional man's job.[189] That view perpetuates the gendered character of domestic work and the notion that household work – such as washing, cleaning, cooking and child-care – is naturally women's work, and is not as psychologically challenging, physically strenuous, and socially productive as men's work. It also fails to acknowledge the long-hours, quiet monotony, and close

[184] Id at 100, in which Gaitskell et al note that "the labour of African so-called 'houseboys' was in great demand and well-paid".

[185] Id at 101. Gaitskell et al state that:

> "In the context of a racially segregated job market, domestic service for African women above all meant access to a wage. They got a foothold in the domestic service market when women of other races were not available or had escaped its low wages and poor conditions; or when employers found men more expensive to employ or hard to recruit, or when men were considered unsuitable".

[186] Id at 100.

[187] Id at 101.

[188] See Lund and Budlender "Research Report 4: Paid Care Providers in South Africa: Nurse, Domestic Workers, and Home-Based Care Workers" *United Nations Research Institute for Social Development* (April 2009), available at https://www.unrisd.org/unrisd/website/document.nsf/8b18431d756b708580256b6400399775/57355f8bebd70f8ac12575b0003c6274/$FILE/SouthAfricaRR4.pdf.

[189] Gwynn above n 180.

supervision that domestic work entails. All these cruel injustices tend to go unnoticed simply because they operate in the private sphere.[190]

Post-apartheid

[190] Let us consider the plight of domestic workers since the advent of the Constitution. While domestic workers have achieved unionisation, minimum wages, and are included in the Basic Conditions of Employment Act,[191] according to a study many domestic workers report that despite ongoing and abundant regulation to secure their rights the reality in their lived-experiences at work is that they are yet to see any fundamental and tangible changes.[192] They claim that some employers "remain uninformed about domestic labour laws" and others are defiantly reluctant to abide by them.[193] One of the reasons may stem from the "severe power asymmetries that continue to privilege employers and to protect the private household employment space".[194] This is experienced despite the fact that our post-apartheid households have changed, and domestic workers are employed in households of diverse races, religions, cultures and varying socio-economic classes.

[191] The impact of this judgment must go beyond a symbolic victory for domestic workers, and should also, practically speaking, cement their rights and place in our society. Domestic workers have for many years reported being unable to vindicate rights through legislative protection;[195] this may, to an extent, be attributed to traditional attitudes towards domestic workers. Generally speaking, women have been expected to shoulder cooking and cleaning as well as caring for children, the elderly, and the disabled, among others. And this has notoriously come without real recognition under

[190] See further Cook *Human Rights of Women: National and International Perspectives* (Penn Press, Pennsylvania 2016) at 70.

[191] 75 of 1997.

[192] Fish above n 170 at 117.

[193] Id. One interviewee reported that: "after employing the same woman for over eighteen years . . . she had no knowledge of the labour legislation nor any intention of implementing it in her household work context".

[194] Id at 117.

[195] Id at 116.

the women's own household and a similar lack of acknowledgement in the professional sphere. The perceptions about the innate nature, as opposed to the formal acquisition, of skills and competencies required to perform these tasks persist. In turn, this feeds into the reason why the exclusion of domestic workers from COIDA has gone unremedied for far too long.

[192] That domestic workers are afforded protection by COIDA is critical for various reasons. Women conducting domestic work are often the financial head of their families. In our African context, this is often an extended family where one provides for her children, grandchildren, other relatives and, at times, others who are not even relatives. Whilst they deserve to be lauded as family matriarchs who respond to situations of hardship by providing aid, they remain stuck in the historical cycle of poverty.[196] To add to their plight, apartheid, and further discrimination, resulted in Black women being historically and generationally impacted, such women were often singlehandedly providing the foundation to their family, and, collectively, to millions of families.[197]

[193] Furthermore, the working hours for domestic workers have been described as long and unpredictable. In reality, this class of Black women dedicates a substantial amount of time to provide support to another family while being away from their own

[196] In addition, female-headed households suffer a greater incidence of poverty than male-headed households and the women in the former tend to be the main earner despite earning significantly less than men. See Nwosu and Ndinda "Female Household Headship and Poverty in South Africa: An Employment Based Analysis" *Economic Research Southern Africa* (August 2018), available at https://econrsa.org/system/files/publications/working_papers/working_paper_761.pdf.

[197] Gywnn above n 180. Further, this trend is seen in other countries as well, where women commonly from comparatively lower socio-economic statuses are the ones who gravitate towards domestic work. Thus, having a large and crucial yet silent role in being foundational to supporting the progression of the economy in countries all over the world. See ILO Report above n 1: in Asia, domestic work is one of the most important sources of employment for Asian women, comprising predominantly women (at 82%) and up to 7.8% of all women in paid employment. In the Middle East, domestic work, often taken up by migrant workers, accounts for almost 6% of employment, but in specific countries accounts for up to 21%. The gender demographic differs, however, as men make up a third of domestic workers. This is in part due to the low employability of women; 32% of all female wage workers in the Middle East are domestic workers. Africa has 5.2 million domestic workers employed throughout, with 3.8 million being women. Figures in European nations vary drastically with women in countries such as France, Italy and Spain making up 80-90% of the sector, versus 60% in the United Kingdom. Still the trend dictates that it is a highly female-saturated field, where many are "migrants or members of historically disadvantaged groups" at 28-39.

children.[198] Cock aptly captures this tragic bind as follows: "cheap, black, domestic labour is the instrument whereby white women [today, women of any colour]" escape from some of the constraints of their domestic roles. They do so at a considerable cost to Black women, especially mothers.[199] This pattern, largely created by the apartheid system that perpetuated migrant labour, is said to have dismantled the family unit. The tragic consequence is felt to this day. This lived reality of predominant time spent in their employers' households coupled with the pressure of being the breadwinner, demonstrates the importance of COIDA's protection and the assurance of safe and decent working conditions.

[194] The plight of domestic workers has a unique and entrenched history in the South African context and these battles persist to this day. Yet, this problem transcends our borders. It is a global phenomenon fought by many women of vulnerable, disadvantaged and minority backgrounds.[200] The International Labour Organisation, through the Domestic Workers Convention,[201] recognises that part of what lends to vulnerability and the precarious situation is the private and informal nature of the job.[202] The International Labour Organisation further recognises that domestic work is work like no other and that it has special characteristics which lead to domestic workers facing particular vulnerabilities, warranting specific responses to ensure the vindication of their rights.[203]

Concluding remarks

[195] Domestic workers – despite the advent of our constitutional dispensation – remain severely exploited, undermined, and devalued as a result of their

[198] Cock above n 178 at 75.

[199] Id at 259.

[200] See further United Nations Sustainable Development Goals; CEDAW above n 39; and ICESCR above n 34.

[201] Domestic Workers Convention above n 8.

[202] Id.

[203] Id at 43 states that "[e]xtending the reach of labour law is a means of bringing domestic workers within the formal economy and into the mainstream of the Decent Work Agenda".

lived experiences at the intersecting axes of discrimination. Yet, these Black women are survivors of a system that contains remnants of our colonial and apartheid past. These Black women are brave, creative, strong, and smart. They are committed mothers and caretakers and have the ability to perform work in conditions that are challenging both psychologically and physically. These Black women are not "invisible" or "powerless". On the contrary, they have a voice, and we are listening. These Black women are at the heart of our society. Ensuring that they are afforded basic rights, and an avenue to vindicate these rights, is central to our transformative constitutional project.

[196] Therefore, I support the order proposed in the first judgment.

For the Applicants:	K Moroka SC and M Lekoane instructed by the Socio-Economic Rights Institute of South Africa
For the Respondents:	N H Maenetje SC and R Ramashia instructed by State Attorney, Pretoria
For the First Amicus Curiae:	E Webber and L Phasha instructed by Norton Rose Fulbright South Africa Incorporated
For the Second Amicus Curiae:	P Khoza instructed by the Women's Legal Centre

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/20

In the matter between:

AGNES SITHOLE First Applicant

COMMISSION FOR GENDER EQUALITY Second Applicant

and

GIDEON SITHOLE First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

Neutral citation:	*Sithole and Another v Sithole and Another* [2021] ZACC 7
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Tshiqi J (unanimous)
Heard on:	17 September 2020
Decided on:	14 April 2021
Summary:	Matrimonial Property Act 88 of 1984 — constitutionality of section 21(2)(a) — section is unconstitutional.

ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, KwaZulu-Natal Local Division, Durban:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
5. In terms of section 172(1) (b) of the Constitution, the orders in paragraphs 1 and 2 shall not affect the legal consequences of any act done or omission in relation to a marriage before this order was made.
6. From the date of this order, Chapter 3 of the Matrimonial Property Act will apply in respect of all marriages that have been converted to marriages in

community of property, unless the affected couple has opted out in accordance with the procedure set out in paragraph 3 above.

7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. The second respondent is ordered to pay the costs of this application and such costs to include the costs of two counsel, where so employed.
9. It is ordered that the first respondent's attorney, Mr Dlamini, should forfeit his legal fees in respect of this application.

JUDGMENT

TSHIQI J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This application for confirmation of an order of invalidity by the High Court[1] concerns a constitutional challenge aimed at the provisions of section 21(2)(a) of the Matrimonial Property Act[2] (MPA). The section is attacked on the basis that it is inconsistent with the Constitution and should be declared invalid to the extent that it maintains the default position of marriages of Black people entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act[3] (Amendment Act). Historically marriages of Black people had a separate dispensation from other marriages. They were governed by the Black Administration Act[4] (BAA). In terms of section 22(6) of the BAA these marriages were automatically out of community of property, except where certain conditions were met. Section 22(6) was repealed by the Amendment Act. The Amendment Act deleted section 22(6) and

[1] Section 167(5) of the Constitution.

[2] 88 of 1984.

[3] 3 of 1988.

[4] 38 of 1927.

inserted sections 21(2)(a) and 25(3) into the MPA, thereby giving persons married out of community of property in terms of section 22(6) of the BAA the opportunity to change their matrimonial property regime within two years from 2 December 1988. Those parties who did not know that they could change their matrimonial property regime and those who were simply not aware that their marriages were automatically out of community of property, or did not appreciate the legal consequences of this, are still married out of community of property.

[2] The first applicant, Mrs Sithole, is one of those who did not know that their marriages are out of community of property. Her version will become more apparent below when I traverse the facts. She challenged section 21(1) and 21(2)(a)[5] of the MPA on the basis that it unfairly discriminates against women in her position on the grounds of gender and race. The challenge compels us to focus sharply on the effects of the alleged unfair discrimination on the capacity of Black couples, especially women in her position, to own property. It also requires us to examine the intersectional effects of the unfair discrimination on the constitutional rights of women to dignity, healthcare, food, water and social security. It further obliges us to deal with the uncomfortable reality that even after twenty-five (25) years into our constitutional democracy, Black people are still subjected to the remnants of the oppressive and discriminatory laws of the apartheid regime, notwithstanding the Constitution, which envisages that everyone be equally protected by the law. Our Constitution enjoins us to adopt restitutionary measures that remedy the cruel effects of these past discriminatory laws and deliver substantive equality. As Aristotle aptly observes:

> "Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal."[6]

[3] The High Court agreed that section 21(2)(a) of the MPA does not pass constitutional muster, in that it discriminates unfairly on the grounds of gender and race.

[5] Section 21(1) and (2)(a) are quoted below.

[6] Jyakhwo "Right to Equality" (2019) 28 *Nepal Law Review* 477 at 477.

The High Court thus declared that all marriages concluded out of community of property under section 22(6) of the BAA are deemed to be marriages in community of property from the date of its order. It permitted couples who wish to opt out of this position and who wish to alter the matrimonial property system applicable to their marriage as a result of the declaratory order to do so by executing and registering a notarial contract to this effect. The High Court further ordered that existing burdens on the property falling into the joint estate as a result of its order will remain in place; and that from the date of its order, Chapter 3[7] of the MPA will apply in respect of all marriages that have been converted to marriages in community of property, unless and until the affected couple has opted out of such a matrimonial property regime. The High Court, however, did not agree that section 21(1) of the MPA is discriminatory.

Parties

[4] The first applicant is Mrs Agnes Sithole, a seventy-two (72) year old housewife residing in KwaZulu-Natal. She brings this application in her own personal interest, as well as in the interests of many other Black women whose marriages were subject to section 22(6) of the BAA. Those women remain married out of community of property because they did not know that they could opt out of their matrimonial regime or knew they could, but did not, due to several socio-economic factors. Ms Deborah Jean Budlender, an expert who is a social policy researcher and who filed an affidavit in support of the application in the High Court, acknowledges that it is not possible to estimate the exact number of women in the first applicant's position because the data that is available is incomplete. Drawing on evidence, which is set out in her affidavit, she concludes that there could be more than 400 000 women in the same position as Mrs Sithole.

[5] The second applicant is the Commission for Gender Equality established in terms of section 187 of the Constitution to promote respect for and the protection, development and attainment of gender equality. It brings the application in furtherance

[7] Chapter 3 of the MPA deals with the provisions relating to marriages in community of property.

of its constitutional mandate. Through this application, the applicants seek to address the legacy of section 22(6) of the BAA in terms of which Black couples who concluded civil marriages were married out of community of property by default. The first respondent is Mr Gideon Sithole, a then seventy-four (74) year old male electrical contractor. Mr Sithole sadly passed away on 23 January 2021, after the application was argued. The second respondent is the Minister of Justice and Correctional Services, cited herein as the executive member responsible for the administration of the MPA, and as the representative of the Government of the Republic of South Africa.

Background facts

[6] Mr and Mrs Sithole got married to each other on 16 December 1972, out of community of property under section 22(6) of the BAA. At the time Mrs Sithole launched the application, they had been married for a period of 47 years and the marriage still subsisted. It was out of community of property due to the fact that the provisions of section 21(2)(a) of the MPA did not automatically alter their matrimonial regime.

[7] Between 1972 and 1985 Mrs Sithole was a housewife and raising her family. She ran a home-based business selling clothing. Her earnings were utilised to pay for the education of their children at private schools. The remainder was used for family and household expenses. In 2000, she and her husband purchased a house which was registered in Mr Sithole's name. After a while the relationship between the parties deteriorated. Mr Sithole then threatened to sell the house.

[8] Mrs Sithole sought and obtained an order interdicting and restraining Mr Sithole from selling the house or in any manner alienating it pending the finalisation of the present application. She is a devout member of the Roman Catholic Church, and divorce in her church is discouraged and frowned upon. She still entertained hope of reconciling with her husband. She was therefore, not willing to divorce her husband in order to secure an equitable distribution of the parties' assets by utilising the remedy

which section 7(3) to (5) of the Divorce Act[8] provides for, in the event parties who are married out of community of property, get divorced.

[9] Mr Sithole admitted that the relationship between them had deteriorated. He also admitted that he intended to sell the house but denied that he threatened to do so. Regarding the matrimonial regime, Mr Sithole submitted that he and Mrs Sithole agreed to a marriage out of community of property while fully cognisant of its consequences and that there was never any interest by either of them to conclude a marriage in community of property. In support of this averment, he attached an affidavit from a priest, Father Mdabe of the Catholic Church, stationed at Marianhill Monastery Church, who was only ordained in 1989, 17 years after their marriage was solemnised. It sets out the procedure generally followed before marriages are concluded in that church.

[10] Apart from the fact that the affidavit does not deal with the procedure that was followed 17 years previously when Mr and Mrs Sithole got married, the contents of the affidavit are irrelevant to whether the provisions of section 21(2)(a) of the MPA are consistent with the Constitution. Whether they deliberately elected to marry out of community of property is also not before this Court.

Issues

[11] The core issue for determination is whether the order of constitutional invalidity made by the High Court should be confirmed.[9] The outcome of that inquiry is predicated on whether the impugned provisions discriminate unfairly against Black couples whose marriages were concluded in terms of the BAA, including the applicant and other women similarly placed. If they do, the next question would be whether there is a justification that saves the challenged provisions from constitutional inconsistency. Lastly, if unfair discrimination is found and it cannot be justified, this Court must

[8] 70 of 1979.

[9] Section 167(5) of the Constitution.

confirm the order of constitutional invalidity and make an order that is just and equitable.[10]

Statutory scheme of Marriages concerning Black persons

[12] Section 22(6) of the BAA provided:

> "A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native Commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community."

[13] Section 22(6) of the BAA created the default position that Black couples were married out of community of property. They were permitted to marry in community of property if, in the month prior to their marriage, they jointly declared to a Magistrate, commissioner or marriage officer that they intended their marriage to be in community of property and of profit and loss. That could only occur if the marriage was not contracted during the subsistence of a customary union between the husband and any woman other than his wife. As the text indicates, section 22(6) of the BAA only governed marriages of Black people and not marriages of other races.

[14] Section 22(6) of the BAA was repealed by the Amendment Act. The Amendment Act deleted section 22(6) of the BAA and inserted sections 21(2)(a) and 25(3) into the MPA. The effect of the repeal for Black couples was that those who were married out of community of property under section 22(6) of the BAA had the

[10] Id.

opportunity to change their matrimonial regimes within two years from 2 December 1988. Couples were required to do so by executing and registering a notarial contract to that effect. Section 21(2)(a) of the MPA permitted couples to make the out of community accrual system provided for in Chapter I of the MPA applicable to their marriages. It provides:

> "(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property –
>
> . . .
>
> (ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,
>
> may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case maybe, or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect."

[15] Section 25(3)(b) of the MPA permitted couples married out of community of property under section 22(6) of the BAA, where the wife was subject to the marital power of their husbands, to convert their marriage to a marriage in community of property. Section 25(3)(b) of the MPA provided:

> "(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may –

. . .

(b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in a Gazette, of a notarial contract to the effect, and in such a case those provisions apply from the date on which the contract was so registered."

[16] The marital power was fully abolished by section 11 of the MPA as amended by section 29 of the General Law Fourth Amendment Act,[11] including in respect of marriages entered into before the commencement of the MPA. Prior to the amendment, section 11 of the MPA partially abolished the marital power. It provided that subject to the provisions of section 25, the marital power which a husband has under the common law over the person and property of his wife is hereby abolished in respect of marriages entered into after the commencement of this Act.

[17] Section 21(1) of the MPA permits couples to apply to a court at any time, to alter the matrimonial property regime applicable to their marriages. To achieve this both spouses must consent and certain procedural requirements must be complied with. Section 21(1) provided:

"(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that-

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the ` creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

[11] 132 of 1993.

> order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."

[18] The Divorce Act was also amended by section 36(b) of the MPA and then by section 2 of the Amendment Act to address part of the legacy of the BAA. Section 7(3) to (5) of the Divorce Act now provides that a divorce court may order the equitable distribution of assets between spouses married out of community of property under section 22(6) of the BAA as the court may deem just. The applicants contend that although these amendments have ameliorated the discriminatory legacy of section 22(6), they do not remedy or reverse the negative impact of section 22(6) on Black spouses. The default position of these marriages continues to be out of community of property, unless the couples have taken steps to alter their matrimonial regime. For the reasons that will be explored later during the analysis, this submission has merit. Before embarking on the analysis, it is helpful to contextualise this submission and briefly set out a conspectus of the relevant equality and discrimination jurisprudence.

Equality and discrimination

[19] The idea of differentiation lies at the heart of equality jurisprudence in general.[12] Equality jurisprudence deals with differentiation in two ways: differentiation which does not involve unfair discrimination and another which does.[13] The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. However, the government may classify people and treat them differently for a variety of legitimate reasons. For, "[i]t is impossible to [regulate the affairs of inhabitants] without differentiation and without classifications which treat people differently and which impact on people differently".[14]

[12] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 23.

[13] Id.

[14] Id at para 24.

Mere differentiation will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law in violation of section 9(1) of the Constitution.

[20] In *Harksen v Lane N.O.*,[15] this Court said that where the equality clause is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the following stages of the enquiry into a violation of section 8 are helpful:[16]

> "(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. …
>
> (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, 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 [now section 36 of the Constitution])."[17]

[21] The first question in the *Harksen* enquiry must be answered in the affirmative. The provisions perpetuate the existence of a special matrimonial regime for Black

[15] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[16] In *Harksen* this Court was dealing with section 8, the equality clause under the interim Constitution, which has been replaced by section 9 of the Constitution.

[17] *Harksen* above n 15 at para 54*; Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 42.

couples who concluded their marriages before 1988. In this regard marriages of Black people were different from those of other races. No evidence was tendered in support of a government purpose for which the differential treatment of marriages between Blacks existed. I cannot conceive of any such purpose either. Therefore, the question of a rational connection between the differention and a legitimate government purpose does not arise.

[22] I now consider whether the impugned provisions amount to unfair discrimination. The discrimination complained about is on the listed grounds of race, gender and age in section 9(3) of the Constitution. In terms of this section, the state may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in the section.[18] In terms of section 9(5) of the Constitution, discrimination on one or more of the grounds listed in section 9(3) is presumed to be unfair unless proven otherwise. It was thus open to the respondents to prove that the discrimination is fair and none of them have contended that it is. This is not suprising, as there is no basis upon which such a submission could have been made.

[23] The discriminatory effect of the provisions can be traced back to the provisions of the BAA. The differentiation under the BAA was on a racial basis in that it created a special dispensation for Black couples. Section 22(6) of the BAA had the effect that unless Black couples expressed a desire to enter into a marriage in community of property their marriage was automatically out of community of property. This was different to what pertained in respect of other racial groups whose marriages were automatically in community of property.

[24] Section 21(2)(a) of the MPA did not have the effect of automatically converting the default position of marriages of Black people so that they were automatically in

[18] Section 9(3) of the Constitution provides:

> "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."

community of property like those of other races. Instead, it required all spouses in marriages out of community of property, entered into before the commencement of the MPA either (i) in terms of an antenuptial contract; or (ii) in terms of section 22(6) of the BAA, to cause the provisions of Chapter I of the MPA (the accrual system) to apply for the conversion of their marriages, within two years after the commencement of the MPA. Thus, although the amendment brought by section 21(2)(a) formally rectified the discriminatory provisions of the BAA, it failed to address the lasting discriminatory effects of these provisions. Instead, it imposed a duty on Black couples who wanted their matrimonial regimes to be similar to those of the other racial groups, to embark on certain laborious, complicated steps to enjoy equality with other races.

[25] The kind of equality envisaged by section 9 of the Constitution was aptly articulated by this Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* in these terms:[19]

> "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."[20]

[26] Thus, although section 21(2)(a) may superficially seem to have afforded the same treatment to couples of all the different races, it effectively guaranteed formal equality but not substantive equality (equality of outcomes and opportunity), which is the kind of equality promised by our Constitution.[21] Furthermore, section 9(3) prohibits both direct and indirect discrimination. A provision is indirectly discriminatory against

[19] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 17; 1998 (2) SACR 556 (CC); 1998 (12) BCLR 1517 (CC).

[20] Id at para 62.

[21] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 73.

a group where it has a disproportionate impact on that group.[22] Therefore, when examining the constitutionality of section 21(2)(a), the emphasis should not be on the fact that it provided an option for Black couples to convert their marriages, but rather on its failure to level the playing field and place marriages of Black people under the same umbrella as marriages of couples of other racial groups.

[27] The challenged provisions also have indirect unfair discriminatory consequences for women. The evidence led at the High Court showed that Black women are hard hit by the impugned provisions disproportionately to their husbands and the challenged provisions have far reaching intersectional effects on Black women's rights compared to their male counterparts. It is thus necessary, before I venture into whether the provisions can be justified under the limitations clause, which is the third stage of the *Harksen* enquiry, to elaborate on the intersectional consequences of the impugned provisions on women's constitutional rights, especially the rights to dignity (section 10), property (section 25), housing (section 26), and health care, food, water and social security (section 27). It is to this that I now turn my focus.

[28] Intersectionality is a recognised concept in our law of equality. In *National Coalition for Gay and Lesbian Equality*,[23] Sachs J's concurring judgment acknowledged the concept and held:

> "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, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. … Alternatively, a context rather than category-based approach might suggest that overlapping

[22] Id.

[23] *National Coalition for Gay and Lesbian Equality* above n 19 at para 78 the judgment penned by Ackermann J and concurred in by all other members of this Court, agreed with this concurrence.

> vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as [Black people], as Africans, as women, as African women, as widows and usually, as older people."[24]

[29] In *Van Heerden*[25] this Court said:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."[26]

[30] Recently in *Mahlangu*,[27] this Court, dealing with the Compensation for Occupational Injuries and Diseases Act[28] and the exclusion of domestic workers from its protection, said the following about multiple forms of discrimination:

> "Crenshaw who coined the concept of the 'intersectional' nature of discrimination, writing as a Black feminist on women studies, recognised and demonstrated how overlapping categories of identity (such as gender and race) impact individuals and institutions. Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms

[24] Id at para 113.

[25] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*).

[26] Id at para 27.

[27] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC).

[28] 130 of 1993.

> of discrimination, vulnerability and subordination.[29] As such, at times Black women may experience compounded forms of discrimination as compared to say Black men or White women. Yet still in other cases they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups." [30]

[31] Societal dynamics such as patriarchy, gender stereotyping, inflexible application of oppressive cultural practices etc, perpetuate the intersectional consequences of the challenged provisions on Black women. Patriarchy has resulted in different forms of discrimination against women with dire consequences. It is therefore one of the main drivers of the oppression of women through gender stereotyping and the abuse of cultural practices. These dire consequences have rendered women vulnerable and this vulnerability is an aspect of social reality. In unpacking patriarchy Coetzee[31] traces its origin and evolution as follows:

> "The 'ideology of patriarchy' … seems to have developed as a result of the elevation of 'the idea of the leadership of the fathers', to a position of paramount importance in society. … However, as a result of the elevation of this ideal to acquire hyper-normative status, women were regarded as inferior to men. An uneven power-relationship developed through which the male sex obtained supremacy over women, resulting in their subordination to men throughout society."[32]

She then observes how it has been used to oppress women for generations and says:

> "In the first instance, women have been oppressed for generations and have been kept from liberating themselves by structures of domination, designed to maintain the ideology. In the struggle to maintain the supremacy of the fathers, women were kept in their position of subservience through measures such as less educational

[29] Crenshaw "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies" (1989) *University of Chicago Legal Forum* 139 at 149. Crenshaw is a pioneer and leading scholar on intersectionality. Intersectionality as a concept has been used and developed by legal scholars and lawyers in the field of discrimination law.

[30] *Mahlangu* above n 27 at para 85.

[31] Coetzee "South African Education and the Ideology of Patriarchy" (2001) 21 *South African Journal of Education* 300.

[32] Id at 300.

> opportunities than men, economic dependence, physical harassment, exclusion from leading roles in education, politics, the church and society at large.'[33]

[32] It is uncontroverted that the devastating impact of the challenged provisions on women, which is in turn aggravated by the multiple forms of discrimination and societal dynamics, manifests itself in different ways. For instance, women traditionally bear the main responsibility for house work and child care. The result is that women are less likely to be employed than men and, if employed, are more likely to earn less than men.[34] Most of these women depend on their husbands for maintenance.

[33] Men, as income earners, are also more likely to obtain credit and therefore acquire property. The consequence is that women in the position of Mrs Sithole are not able to register property or valuable assets in their own names. Their husbands, who are generally breadwinners, are able to have property, usually the residential home of the couple, registered in their names. The effect of this is that the wife will have no control over the family property. The husband may recklessly fritter away the family's wealth, leave the property to somebody else other than his wife upon his death or unilaterally sell the family house. This in turn may impact negatively upon the rights and interests of the wife in various ways: she may be evicted out of her home, and possibly leaving her vulnerable and unsafe; and she may be left with no livelihood or nothing to ensure that her basic needs are met (including healthcare, food and security).

[34] This is the kind of situation that Mrs Sithole found herself in when she experienced marital problems. She had utilised her own meagre earnings to pay for the other needs of the family, yet, according to her, her husband threatened to dispose of the property unilaterally with no regard for her welfare and security. In order to avoid losing her home, she had to seek an interdict. Had she not sought legal advice in order to obtain the interdict, she would probably have been rendered homeless. The fact that

[33] Id at 301.

[34] Sinden "Exploring the Gap Between Male and Female Employment in the South African Workforce" (2017) 8 *Mediterranean Journal of Social Sciences* 37 at 37.

she had used her own income for the other household expenses would not have been factored in.

[35] Women of other racial groups who got married before the 1988 amendment and who did not opt out of the default position, did not suffer the prejudices suffered by the likes of Mrs Sithole. The default position was that they were married in community of property and this meant that assets acquired with their husbands' income fell into the joint estate and they became co-owners of those assets.

[36] Most women did not change their matrimonial regimes, because they were unaware of their legal rights and were not apprised of the provisions of section 21(2)(a). The fact that a majority of Black women in the position of Mrs Sithole did not convert their matrimonial regimes as envisaged in section 21(2)(a) can be attributed largely to the legacy of our ugly racial and unequal past. As is commonly known a majority of Black women in South Africa live in the rural areas and townships and are not fully apprised of their legal rights. Ms Budlender, in her affidavit, highlights the fact that the apartheid government did not place the same emphasis as the current democratic government on informing people of their rights.

[37] For these reasons, few people took up the opportunity to execute and register notarial contracts to modify their matrimonial regime. The second applicant corroborates, to a certain extent, Ms Budlender's evidence that some women are simply ignorant of their matrimonial regimes. It states that, "it is not a rare occurrence for persons married under the BAA to wrongly assume that their marriage is in community of property. For such persons, the 1988 amendment of the MPA, creating the right to change the matrimonial property regime by registering a notarial contract, was a dead letter."

[38] Although section 21(1) was held to pass constitutional muster by the High Court, it is important to highlight that to the extent that it envisages consensus between the parties in order to vary the matrimonial regime, it is not disputed that many women are

unable to obtain their husband's consent to alter their matrimonial regime. This is because a marriage in community of property would generally benefit the wife as the man would be compelled to share the estate with the wife. Ms Budlender, in her affidavit, says that "research showed that many men believe that they should be the primary decision-makers rather than make decisions through discussion and consensus. Such men are unlikely to agree to change their matrimonial property system, specifically when such a change would shift a significant portion of the decision-making power to their wives. For women in this position, the protective measures under section 21(1) and 21(2)(a) were thus not available."

[39] In any event, in order for a woman to seek the consent of her husband to the alteration of the matrimonial regime, she must have had the knowledge of her rights and the necessary access to legal services, to enable her to approach a court or arrange the execution and registration of a notarial contract. It is not in dispute that a substantial number of the women married under the BAA were not in such a position.

[40] Section 7 of the Divorce Act does not assist women in Mrs Sithole's position. Although section 7(3) to (5) gives a divorce court the discretion to redistribute the assets held by the parties as it deems just, this does not assist women who cannot (or will not) divorce their husbands for religious or social or family reasons. Furthermore, as this solution is only available in the event of a divorce, it does not address the inherent discrimination during the course of the marriage. The Constitution does not contemplate that a woman must divorce her husband and rely on the exercise of a discretion by a court, in order to achieve her right to equality.

[41] This Court in *Gumede*,[35] dealing with the effect of section 8(4)(a) of the Recognition of Customary Marriages Act,[36] (Recognition Act) first acknowledged that Mrs Gumede could have approached the Divorce Court for an order that is just and

[35] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 45.

[36] 120 of 1998.

equitable in relation to the marriage property. It said that the persisting difficulty is that the provisions of section 8(4)(a) of the Recognition Act, read together with section 7(3) to (7) of the Divorce Act, apply only upon dissolution of the customary marriage. It also said that the fact that a divorce court may make the equitable order in relation to family property only when the marriage is dissolved, does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage.

[42] The second respondent did not dispute the evidence that shows the intersectional effects of the challenged provisions on women, nor did he contend that this form of discrimination against women is fair. It follows that the impugned provisions do not only amount to unfair discrimination on the basis of race, but also on the basis of gender.

[43] There can be no doubt that the provisions of section 21(2)(a) of the MPA perpetuate the discriminatory effect of section 22(6) of the BAA. The measures taken to remedy the discriminatory legacy of section 22(6) of the BAA are inadequate.

[44] Having held that the provisions amount to unfair discrimination, the next enquiry is whether they can be justified under the limitations clause.[37] The second respondent did not contend that there was any basis on which the unfair discrimination suffered by Black couples can be justified. The genesis of the provisions was the orchestrated pattern of racial discrimination and segregation. They resulted from a legislated, deliberate, unjust and senseless system of separation between races that was based on a twisted notion that Black and white people were not worthy of the same treatment. Blacks specifically were regarded as inferior to all other races and not worthy of being respected nor protected by government.

[45] The fact that the ghosts of our ugly past still rear their ghastly heads in the form of provisions like this many years after the advent of democracy is unacceptable. The only possible explanation for the retention of these remnants of past discriminatory laws

[37] Section 36 of the Constitution.

in our statutes is that they have been overlooked. The dire consequences suffered by Black people as a result of such discriminatory laws make it compelling that such laws should be obliterated from our statutes urgently.[38] To do so would have the effect that the constitutional right to dignity[39] of all Black couples affected by the impugned provisions is respected and protected as commanded by the Constitution. The pressing need for the vindication of the dignity of Black couples points away from any possibility of the unfair discrimination being reasonable and justifiable. The Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[40] In terms of section 7(1) of the Constitution, the Bill of Rights is the cornerstone of our democracy and "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The right to human dignity is therefore one of the core constitutional rights.

[46] Recognising the right to dignity is an acknowledgment of the intrinsic worth of human beings. This right therefore is the foundation of many other rights that are specifically entrenched in the Bill of Rights. One of these is the right to equality. Black couples, like all others have to be afforded equal protection and benefit of the law[41] so that their inherent dignity is respected and protected.[42]

[47] To conclude, the unfair discrimination is not saved by section 36(1) of the Constitution. The provisions of section 21(2)(a) of the MPA are thus inconsistent with the Constitution and invalid and the High Court order to this effect should be confirmed. Henceforth, the default position must be that all marriages which, in terms of the BAA, were automatically out of community of property are in community of property. The

[38] *Bhe v Magistrate, Khayelitsha; Shibi v Sithole ; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 61.

[39] Section 10 of the Constitution guarantees everyone's right to "inherent dignity and the right to have their dignity respected and protected."

[40] Section 1 of the Constitution.

[41] Section 9 of the Constitution.

[42] Section 10 of the Constitution.

affected couples must then have the option, like other races, to opt out and change their matrimonial regime to be out of community of property.

Remedy

Order and retrospectivity

[48] Having held that the impugned section is inconsistent with the Constitution and thus invalid, this Court must make an order that is just and equitable. That order may entail an "order limiting the retrospective effect of the declaration of invalidity; and suspending the declaration of invalidity" to allow the legislature to correct the defect. The second respondent has not asked this Court to limit the retrospective effect of the order of invalidity, as contemplated in section 172(1)(b)(i) of the Constitution.

[49] As already indicated, the fact that these kinds of provisions are still in our statute book is unacceptable. It would thus not be just and equitable to limit the retrospective effect of the declaration of invalidity. Furthermore, a prospective order would not grant any, or effective relief to Black couples in marriages concluded before 1988. The retrospective regime which the order would permit is properly aligned with the prospective regime created by Parliament for other couples of other racial groups and the effect is that the default position in all marriages would be marriages in community of property.

[50] There is no basis to delay and thus perpetuate the unjustified unequal treatment of Black couples. However, the order should not affect the legal consequences of any act or omission existing in relation to a marriage before this order was made. Also, the order must not undo completed transactions in terms of which ownership of property belonging to any of the affected spouses has since passed to third parties. Further, a saving provision or generic order should be made in favour of a person claiming specific prejudice arising from the retrospective change of the matrimonial regime, to approach a competent court for appropriate relief.

Costs

[51] Only the first respondent has opposed the application. In the interests of protecting Mrs Sithole's share of the joint estate, no costs order should be made against Mr Sithole's estate.

[52] In the High Court costs were sought against the Minister only if he opposed the application. He did not oppose the application but he was ordered to pay the costs. The applicants have elected to abandon that order as it was sought and granted in error.

[53] In this Court too the Minister has elected to abide by our decision. However, as a member of the Executive responsible for the administration of the legislation in question, he bears the responsibility to detect areas of concern in legislation and take responsibility to rectify them. Had he amended the legislation, this application would not have been brought. In the circumstances a costs order against the Minister in this Court is appropriate. In any event, generally where this Court confirms a declaration of constitutional invalidity, the applicant is entitled to costs against the member of the Executive responsible for the administration of the impugned legislation.

[54] This application was set down for hearing on 17 September 2020. On 16 September 2020 the applicants' attorneys contacted Mr Sithole's attorney, Mr Dlamini to ascertain whether he would be participating in the hearing. They were advised that Mr Dlamini had no knowledge of the matter being set down for hearing on 17 September 2020. Mr Dlamini provided the applicants' attorneys with a different email address to the one previously provided to them as well as the different courts. On the morning of 17 September 2020, Mr Dlamini, through his counsel, alleged that he had not received notification of the set down, and for this reason requested a postponement. Mr Sithole's counsel advised this Court that Mr Dlamini has several email addresses which change very often due to the fact that he has an "inherent phobia of technology". In the interests of fairness, the application was postponed and directions requiring Mr Dlamini to show cause why a punitive costs order should not be made against him were issued.

[55] No affidavit was received by this Court in response to the directions, but during argument, Mr Sithole's counsel stated that she had been briefed that an affidavit had been filed in this regard. Counsel, however, could not explain to this Court why Mr Dlamini did not inform this Court of the several changes in his email addresses. The only explanation proffered was that Mr Dlamini expected that service would be effected physically to his office address because a certain set of pleadings had previously been served in this fashion.

[56] Subsequent to the postponement, and in an attempt to deal with the version of Mr Dlamini suggesting that he was not apprised of the progress of the proceedings, and in response to an insinuation that the applicants deliberately conducted these proceedings secretly, the applicants' attorneys filed an affidavit. The affidavit maps out the several measures taken by the applicants' attorneys to ensure service of all the court processes on Mr Dlamini. What stands out from the affidavit is that from 16 April 2019, when the applicants' attorneys served the High Court application on Mr Dlamini, they had to prompt the latter through several emails and telephone calls before any set of pleadings could be received from Mr Dlamini.

[57] The affidavit highlights that on one occasion, after several attempts to contact Mr Dlamini were unsuccessful, the applicants' attorneys contacted Mr Sithole personally. He undertook to contact his attorney. Subsequently, a full set of pleadings was served on Mr Sithole personally and this prompted Mr Dlamini to file a notice of opposition of the High Court application. However, he did not file an answering affidavit afterwards until two days before the hearing.

[58] The narrative given by the applicants' attorneys shows just how tardily Mr Dlamini has handled this matter. He has litigated with indifference and has not displayed the professionalism expected from an officer of the court. He has also failed to ensure that his client's interests were promptly and efficiently protected. Had it not been for the efforts of the applicants' attorneys prompting him to perform his legal

duties, his client's interests would probably not have been protected. He should not be entitled to charge Mr Sithole or his estate any fees in this matter.

Order

[59] The following order is made:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
5. In terms of section 172(1) (b) of the Constitution, the orders in paragraphs 1 and 2 shall not affect the legal consequences of any act done or omission in relation to a marriage before this order was made.
6. From the date of this order, Chapter 3 of the Matrimonial Property Act will apply in respect of all marriages that have been converted to marriages in

community of property, unless the affected couple has opted out in accordance with the procedure set out in paragraph 3 above.

7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. The second respondent is ordered to pay the costs of this application and such costs to include the costs of two counsel, where so employed.
9. It is ordered that the first respondent's attorney, Mr Dlamini, should forfeit his legal fees in respect of this application.

For the Applicants:	G Budlender SC, S Sephton and MZ Suleman Instructed by Legal Resources Centre
For the First Respondent:	N Badat Instructed by BT Dlamini Attorneys
For the Second Respondent:	M G Mello Instructed by State Attorney

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/20

In the matter between:

JONATHAN DUBULA QWELANE	Applicant
and	
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
and	
SOUTH AFRICAN HOLOCAUST AND GENOCIDE FOUNDATION	First Amicus Curiae
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Third Amicus Curiae
SOUTHERN AFRICAN LITIGATION CENTRE	Fourth Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Fifth Amicus Curiae
NELSON MANDELA FOUNDATION TRUST	Sixth Amicus Curiae
MEDIA MONITORING AFRICA	Seventh Amicus Curiae

Neutral citation: *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22

Coram: Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Majiedt J (unanimous)

Heard on: 22 September 2020

Decided on: 30 July 2021

Summary: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — constitutionality of section 10(1) — section 10(1) is unconstitutional to the extent that it includes "hurtful"

ORDER

On appeal from, and in an application for confirmation of an order of constitutional invalidity granted by, the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg), the following order is made:

1. In respect of the confirmation application:
   (a) The declaration of constitutional invalidity of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) made by the Supreme Court of Appeal is confirmed in the terms set out in paragraph (b).
   (b) It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.
   (c) The declaration of constitutional invalidity referred to in paragraph (b) takes effect from the date of this order, but its operation is suspended for

24 months to afford Parliament an opportunity to remedy the constitutional defect giving rise to constitutional invalidity.

(d) During the period of suspension of the order of constitutional invalidity, section 10 of the Equality Act will read as follows:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

(e) The interim reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.

(f) Should Parliament fail to cure the defect within the period of suspension, the interim reading-in in paragraph (d) will become final.

2. In respect of the appeal against the hate speech complaint:

(a) Leave to appeal is granted.

(b) The appeal by the South African Human Rights Commission is upheld.

(c) The order of the Supreme Court of Appeal is set aside.

(d) The offending statements (made against the LGBT+ community) are declared to be harmful, and to incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.

3. In respect of the constitutionality challenge, the Minister of Justice is ordered to pay half of Mr Jonathan Dubula Qwelane's costs in the High Court, the Supreme Court of Appeal and this Court.

4. Mr Jonathan Dubula Qwelane is ordered to pay the costs of the South African Human Rights Commission in the High Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

MAJIEDT J (Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] It is a truth universally acknowledged that "[t]o be hated, despised, and alone is the ultimate fear of all human beings".[1] Speech is powerful – it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings. This is so because hate speech marginalises and delegitimises individuals based on their membership of a group. This may diminish their social standing in the broader society, outside of the group they identify with. It can ignite exclusion, hostility, discrimination and violence against them. Not only does it wound the individuals who share this group identity, but it seeks to undo the very fabric of our society as envisioned by our Constitution. We are enjoined by our Constitution "to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom".[2]

[1] Matsuda "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320 at 2320.

[2] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 22.

[2] Central to the issue before us is a delicate balancing exercise between the fundamental rights to freedom of expression, dignity and equality. This exercise arises against the backdrop of an article penned by the applicant, the late Mr Jonathan Dubula Qwelane, and published in the Sunday Sun newspaper on 20 July 2008. The article, which was deeply offensive to members of the LGBT+ community,[3] evoked universal umbrage and denunciation and eventuated in proceedings in the Equality Court and the High Court. The latter proceedings culminated in this application for confirmation of the Supreme Court of Appeal's declaration of constitutional invalidity of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act[4] (Equality Act). Mr Qwelane sadly passed away on 24 December 2020.[5]

Background

[3] The impugned article was titled "*Call me names – but gay is not okay*". In relevant part, the article reads:

> "The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their 'lifestyle' and 'sexual preferences'. There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month – you'd better believe this – a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views. . . . Homosexuals and their backers will call me names, printable and not, for stating as I have always done my serious reservations about their

[3] LGBT+ is an acronym that refers to Lesbian, Gay, Bisexual and Transgender individuals. The "+" provides for an open list to include various spectrums of sexuality and gender such as Intersex, Queer and Asexual individuals.

[4] 4 of 2000.

[5] Mr Qwelane was accorded a special provincial official funeral, an indication of the high esteem he was held in during his lifetime.

> 'lifestyle and sexual preferences', but quite frankly I don't give a damn: wrong is wrong. I do pray that someday a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the Constitution of this country, to excise those sections which give licence to men 'marrying' other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to 'marry' an animal, and argues that this Constitution 'allows' it?"

[4] This article was accompanied by a cartoon depicting a man on his knees next to a goat, appearing in front of a priest for their nuptials. A speech bubble linked to the priest contained the text: "I now pronounce you man and goat". The caption above the cartoon read: "[w]hen human rights meet animal rights". It is common cause that Mr Qwelane was not the author of the cartoon, nor was he aware of it before its publication. It is also common cause that the article was an endorsement of the former Zimbabwean President Robert Mugabe's strident remarks reviling homosexuals by comparing them to animals.

[5] At the time of the publication of the article, Mr Qwelane was a weekly columnist for the Sunday Sun, which was the fastest growing newspaper in the country,[6] and a host of a popular talk show on Radio 702. In addition, Mr Qwelane was a well-known and respected anti-apartheid activist of significant stature and was, in his own words, "an experienced journalist". Shortly after the publication of the article, Mr Qwelane received an ambassadorial posting to Uganda.[7]

[6] As a result of this publication, the first respondent, the South African Human Rights Commission (SAHRC), received 350 complaints, the largest number of complaints it had ever received at that time emanating from a single incident.[8] More than 1000 complaints were also lodged with the Press Ombud. The complaints to the

[6] The evidence was that it had the third highest circulation of weekend newspapers and 2.5 million readers, the majority of whom lived in townships and were predominantly black (around 99%).

[7] Mr Qwelane's term as ambassador to Uganda expired in 2013.

[8] The SAHRC is a constitutional entity established to support constitutional democracy. It is tasked by section 184(1) of the Constitution to, amongst other things, promote the protection, development and attainment of human rights.

Press Ombud largely centred around allegations that the article amounted to hate speech. After considering these complaints, the Press Ombud found the Sunday Sun in breach of section 2.1 of the South African Press Code on three counts and ordered it to publish an appropriate apology, which the Sunday Sun did.[9]

[7] Subsequent to the conclusion of the Press Ombud's proceedings, the SAHRC instituted proceedings in the Equality Court in terms of section 20(1)(f) of the Equality Act against Media24 Limited (the owner of the Sunday Sun) and Mr Qwelane.[10]

[8] The SAHRC alleged that the article constituted prohibited hate speech in contravention of section 10(1) of the Equality Act (the impugned section), which reads:

> "Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
>
> (a) be hurtful;
>
> (b) be harmful or to incite harm;
>
> (c) promote or propagate hatred."

[9] Section 2.1 of the Press Code of Ethics and Conduct for South African Print and Online Media provides that:

> "The press should avoid discriminatory or denigratory references to people's race, colour, ethnicity, religion, gender, sexual orientation or preference, physical or mental disability or illness, or age."

[10] Section 20(1)(f) of the Equality Act reads:

> "(1) Proceedings under this Act may be instituted by—
>
> . . .
>
> (f) the South African Human Rights Commission, or the Commission for Gender Equality."

The Equality Act, in section 4, envisages the expeditious and informal processing of cases in order to facilitate participation by the parties to the proceedings; access to justice to all persons and the use of corrective or restorative measures in conjunction with measures of a deterrent nature. The section recognises—

> "the existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy: and . . . the need to take measures at all levels to eliminate such discrimination and inequalities."

These aspects must be taken into account in the adjudication of matters in the Equality Court.

[9] Section 10(2) of the Equality Act is also of some importance. It reads:

> "Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

[10] Section 12 of the Equality Act provides:

> "No person may—
>
> (a) disseminate or broadcast any information;
>
> (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

[11] The "prohibited grounds", referred to in section 10(1), are defined in section 1 of the Act as follows:

> "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
>
> (b) any other ground where discrimination based on that other ground—
>
> (i) causes or perpetuates systemic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

[12] Media24 and Mr Qwelane responded by challenging the constitutionality of section 10(1), read with sections 1, 11 and 12 of the Equality Act in the High Court of South Africa, Gauteng Division, Johannesburg (High Court).[11] The basis for the constitutionality challenge was that these impugned provisions undermine the constitutionality of the sections and the rule of law on account of their overbreadth and vagueness. Before the proceedings in respect of the constitutionality challenge commenced, the SAHRC reached a settlement with Media24, but the Equality Court proceedings against Mr Qwelane continued.

In the High Court

[13] By agreement between the parties, the proceedings before the High Court and the complaint proceedings before the Equality Court were consolidated and adjudicated. In the former proceedings, the second respondent, the Minister of Justice and Correctional Services, was joined and participated as a respondent. Two amici curiae were admitted: the Psychological Society of South Africa (Psychological Society)[12] and the Freedom of Expression Institute (Freedom Institute).[13] The Psychological Society and the Freedom Institute are the second and fifth amici curiae respectively in this Court. The other amici curiae in this Court are: the South African Holocaust and Genocide Foundation (first amicus curiae, Holocaust Foundation); the Women's Legal Centre Trust (third amicus curiae, WLC); the Southern African Litigation Centre (fourth amicus curiae, SALC); the Nelson Mandela Foundation Trust (sixth amicus curiae, Mandela Foundation) and Media Monitoring Africa (seventh amicus curiae, MMA).

[14] Extensive evidence was adduced in support of the SAHRC's hate speech complaint against Mr Qwelane. A brief outline will suffice – a more comprehensive narration will follow when the complaint against Mr Qwelane is discussed. The SAHRC's head of legal services, Mr Gregoriou, testified about the numerous

[11] Section 11 of the Equality Act states that "no person may subject any person to harassment".

[12] The Psychological Society is an association of more than 2000 eminent psychologists.

[13] The Freedom Institute promotes efforts to protect the public's right to receive and impart information, ideas and opinions; to defend freedom of expression; and to oppose all forms of censorship.

complaints received from members of the LGBT+ community, even before the article was published. These complaints related to numerous horrific violent attacks against black lesbians and transgender persons; a lack of policing in the form of the police being seriously remiss in their duties to properly investigate complaints by members of the LGBT+ community and exhibiting an anti-LGBT+ inclination. He testified further that there were complaints from that community about the denial of access to essential services to them.

[15] Ms Mokoena, the executive director of People Opposing Women Abuse (POWA),[14] confirmed parts of Mr Gregoriou's evidence relating to the brutal attacks against lesbians, including the repulsive practice called "corrective rape". Her evidence, too, reflected poorly on the police for their disturbing apathy in respect of these types of complaints. Ms Mokoena alluded to five widely publicised instances of horrific violent attacks against lesbians.

[16] The last witness called by the SAHRC, Ms MN, a 52-year-old who identifies as a lesbian, testified *in camera* (in private) for fear of reprisals. She recounted her personal encounters with homophobia and discrimination on the basis of her sexual orientation. Ms MN broke down in the witness box while narrating the verbal and physical attacks perpetrated against her. She poignantly remarked that she did not bother to report some of these incidents since, in her words, "the law does not protect people like me".

[17] The evidence adduced on behalf of the SAHRC remained largely uncontested. The only witness who testified on behalf of Mr Qwelane was Mr Viljoen, a Production Editor of the Sunday Sun at the time the article was published. He testified about the newspaper's internal processes for the publication of the article and the cartoon; the numerous complaints received after the publication of the article; and the fact that the newspaper had subsequently published an apology. Significantly, Mr Viljoen conceded

[14] POWA provides support and counselling services as well as shelter to female victims of domestic violence in previously disadvantaged communities, particularly to lesbians.

during his evidence-in-chief that the article was "reprehensible" and that it should never have been published.

[18] The Psychological Society led the evidence of its former chairperson, Professor Nel, a research professor at the University of South Africa with a special interest in LGBT+ related work. Apart from recounting his own lived experiences of ill-treatment and discrimination on the basis of his identification as a gay man, and the psychological trauma suffered generally by the LGBT+ community due to their exclusion and rejection, Professor Nel also commented on the severely deleterious psychological impact the article had on that community.

[19] Based on the evidence, the High Court found that the SAHRC had succeeded in proving that the article was hurtful and harmful and had the potential to incite harm and promote hatred against the LGBT+ community.[15] As a result, it held that the article constituted hate speech as contemplated by section 10(1) of the Equality Act and ordered Mr Qwelane to tender a written apology to members of the LGBT+ community.[16]

[20] The High Court considered the correct interpretation of the impugned section. It held that speech ought to be assessed objectively in its factual and social context.[17] It accordingly proposed that the word "hurtful" should be interpreted to mean a type of severe psychological impact, and "harmful" to refer to physical harm.[18] The High Court held that paragraphs (a)-(c) of the impugned section must be read conjunctively to ensure consistency with section 16 of the Constitution.[19]

[15] *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* 2018 (2) SA 149 (GJ) (High Court judgment) at paras 52-3.

[16] Id at para 70.

[17] Id at para 53.

[18] Id at paras 58 and 60.

[19] Id at para 65.

[21] On the overbreadth challenge, the High Court held that the impugned section could be read in conformity with section 16(2)(c) of the Constitution,[20] and, if not, it could not be said to suffer from overbreadth until it was proven that it fails a limitations analysis in terms of section 36 of the Constitution.[21] On that score, it found that the impugned section did not fail the limitations test merely because it prohibits more speech than section 16(2)(c) of the Constitution.[22]

[22] The High Court dismissed the vagueness challenge as well. It reasoned that the operation of the impugned section is contingent on a significant proviso.[23] Therefore, speech falling under section 12 is not prohibited under section 10.[24] As a result, it dismissed the constitutional challenge.[25]

In the Supreme Court of Appeal

[23] Discontented with the outcome and relying on the same argument, Mr Qwelane appealed to the Supreme Court of Appeal.[26] That Court dismissed the overbreadth challenge on the basis that the impugned section includes the ground of sexual orientation as one of the prohibited grounds, beyond the listed prohibited grounds in section 16(2)(c) of the Constitution.[27] It reasoned that the Legislature sought to provide a wider protection, by imposing liability for hate speech based on the extended prohibited grounds, beyond the ones listed in section 16(2).[28]

[20] Id.

[21] Id at para 53.

[22] Id.

[23] Id at para 52.

[24] Id at para 59.

[25] Id.

[26] *Qwelane v South African Human Rights Commission* [2019] ZASCA 167; 2020 (2) SA 124 (SCA) (Supreme Court of Appeal judgment) at para 36.

[27] Id at para 67.

[28] Id.

[24] However, the Supreme Court of Appeal found that the impugned section limits speech beyond what is allowed in terms of section 16(2)(c) of the Constitution. The Court reasoned that by using the words "reasonably construed to demonstrate a clear intention", it introduced a subjective standard of assessment of speech, contrary to the objective standard imposed by section 16(2)(c).[29] It held that the words "reasonably construed" removed the threshold of the objective test and replaced it with the subjective opinion of a reasonable person hearing the words.[30] In this way, it becomes unnecessary for potential or actual harm to be demonstrated.[31]

[25] The Supreme Court of Appeal found that, based on the fact that paragraphs (a)-(c) of the impugned section are not connected by the conjunction "and", but are separated by a semicolon, they should be interpreted disjunctively.[32] It held that the section, as currently formulated, decouples the constitutional requirements of "advocating hatred and incitement to cause harm, so that one or neither of them may lead to a finding of hate speech".[33] It reasoned that a disjunctive reading is supported by the disjunctive placement of the words "publish", "propagate", "advocate" or "communicate".[34]

[26] In addition, the Supreme Court of Appeal noted that the impugned section is vague in that it is difficult to define what "hurtful" means. It found that the harm envisaged in section 16 of the Constitution, and contemplated in the provisions of the impugned section, need not necessarily be physical harm, but can be related to psychological impact. However, the impact has to be more than just hurtful in the dictionary sense.[35]

[29] Id at pars 62 and 64.

[30] Id at para 66.

[31] Id at para 64.

[32] Id.

[33] Id.

[34] Id at para 65.

[35] Id at para 70.

[27] The Supreme Court of Appeal held that section 12 of the Equality Act merely excludes from the limitation any of the stipulated activities, but does not narrow the limitation of freedom of expression caused by the impugned section.[36] However, it found that section 12 is difficult to understand, in particular if one has regard to the concluding part of the provision: "publication of information, advertisement or notice in accordance with section 16 of the Constitution".[37]

[28] For all these reasons, the Supreme Court of Appeal found that the impugned section in its present form is inconsistent with the provisions of section 16 of the Constitution, and is therefore invalid. It also dismissed the complaint against Mr Qwelane. Ultimately, it proposed the following reading-in to section 10, which forms the subject of these proceedings:

> "(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.
>
> (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."[38]

In this Court

[29] This matter comes before us as confirmation proceedings in terms of section 167(5), read with section 172(2), of the Constitution. This Court has exclusive jurisdiction to confirm the Supreme Court of Appeal's declaration of constitutional

[36] Id at para 75.

[37] Id at para 76.

[38] Id at para 96.

invalidity of the impugned section.[39] This matter engages the supervisory jurisdiction of this Court in respect of the declaration of invalidity made by the High Court and the Supreme Court of Appeal.[40] Accordingly, there is no need for a further enquiry into jurisdiction.

[30] It is, however, necessary to note that the order granted by the Supreme Court of Appeal has been cross-appealed by SAHRC, including the order in respect of the complaint against Mr Qwelane. This cross-appeal plainly engages this Court's jurisdiction, for it is linked to the confirmation proceedings.

[31] The issues for determination are:

(a) whether the impugned provision entails a subjective or objective test;

(b) whether section 10(1)(a)-(c) must be read disjunctively or conjunctively;

(c) whether the impugned provision is impermissibly vague;

(d) whether the impugned provision leads to an unjustifiable limitation of section 16 of the Constitution;[41]

(e) if the constitutional challenge is successful, the appropriate remedy;

(f) the complaint against Mr Qwelane in terms of the Equality Act; and

[39] Section 167(5) provides that:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

In terms of section 172(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."

[40] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 27.

[41] I use the term "unjustifiable limitation" throughout this judgment when discussing the challenge levelled at section 10(1). While the parties have largely preferred "overbreadth", I am cognizant of the potential confusion that may arise from the concept of the overbreadth of a provision. That was recognised by this Court in *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC) 1999 (6) BCLR 615 (CC) (*SANDU*) at para 18, where it alluded to the fact that it may be used either at the first or second stage of the limitations analysis. I therefore avoid using the term.

(g) costs.

[32] Before discussing these issues, a broad overview of the Equality Act in its constitutional setting and the correct approach to section 10 of that Act will be considered. Hate speech in general and in its international and South African context will also bear consideration. This will provide the basis for a discussion of the two challenges facing section 10 – one concerning the suggestion of an unjustified limitation of section 16, and the other concerning the suggestion that the section is inconsistent with the rule of law. The conclusions reached in respect of these two enquiries will lead to the particular remedies that are granted in this case.

The applicant's submissions

[33] Mr Qwelane did not challenge the Supreme Court of Appeal's finding that the inclusion of sexual orientation as a prohibited ground is reasonable and justifiable. He contended that, while the article evinces a strident view on homosexuality, it does not advocate hatred against the LGBT+ community, nor does it incite others to cause harm to them as there is no instigation of others to take action, let alone harmful action, against them. He justified the article by virtue of his right to freedom of expression.

[34] Mr Qwelane broadly contended further that the impugned section extends beyond section 16(2)(c) and therefore infringes section 16(1), in the following ways:

(a) It sets a lower threshold for assessing hate speech than the Constitution.

(b) On a proper interpretation, subsections (a)-(c) must be read disjunctively, giving rise to a far broader category of prohibited hate speech than the category prohibited in the Constitution, although even a conjunctive reading unjustifiably limits section 16(1) of the Constitution.

(c) It includes more prohibited grounds than those listed in section 16(2)(c), (although the inclusion of sexual orientation is not challenged by the applicant).

(d) The proviso in section 12 is not capable of an interpretation that renders the impugned section constitutional.

[35] In amplifying his contentions, Mr Qwelane pointed out that a disjunctive reading of the elements in the impugned section significantly limits freedom of expression, considering that the comparable elements of section 16 are expressly conjunctive.[42] He contended that even a conjunctive reading results in a limitation of free expression, given the difference in standards between section 16(2) and the impugned section. Whereas section 16(2) envisages an objective standard in which the expression is assessed against the requirements that it be "advocacy of hatred", based on a listed ground and which "constitutes incitement to cause harm", the impugned section differs in two material respects. First, it does not require an objective standard, but a subjective test as to whether the expression "could reasonably be construed to demonstrate a clear intention". And, second, the expression need not amount to "advocacy", but could rather fall under an expanded list of prohibited expression via publishing, propagating, advocating or communicating words based on the prohibited grounds.

[36] Mr Qwelane supported the Supreme Court of Appeal's finding that section 12 does not save the impugned section from being unconstitutional, but instead exacerbates its vagueness. He cited as an example the challenge of ascertaining what is meant by the mala fide publication of information envisaged in that section.

[37] In respect of a proportionality enquiry, Mr Qwelane alluded to the reasons why freedom of expression is so important in our constitutional landscape. He pointed out that the Equality Act's laudable objectives do not justify the impugned provision, or render it constitutional.[43] The overbreadth of the impugned section does not strike an appropriate balance between the rights to freedom of expression on the one hand and the right to equality on the other, and thereby unduly infringes the right to freedom of expression. It was emphasised that the limitation is clearly overbroad. The result of

[42] In this regard reliance is placed on the views espoused by Cheadle et al *South African Constitutional Law: The Bill of Rights* 2 ed (Lexis Nexis, Cape Town 2017) at 11-2 to 11-4.1.

[43] Reliance is placed on this Court's dictum in *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 55.

such overbroad and vague language would be a chilling effect on expression, as ordinary citizens will be unable to determine in advance with a reasonable degree of certainty whether their expression will fall foul of the impugned section. While this limitation clearly seeks to promote equality, the limitation on free expression goes far beyond what the promotion of equality requires.

[38] Mr Qwelane submitted that the threshold of protection against hate speech is set at an appropriate level in section 16(2)(c). The promotion of equality can be achieved by identifying further groups of vulnerable persons that could justifiably be afforded protection from speech of that nature. This overbroad restriction does not properly promote equality, nor adequately balance equality with freedom of expression. It therefore fails to be justifiable in relation to the purposes it seeks to achieve. In its order, the Supreme Court of Appeal found less restrictive means by maintaining the threshold set by section 16(2)(c), but incrementally expanding the list of grounds (and therefore the groups of vulnerable persons protected from hate speech). In sum, Mr Qwelane supported that Court's broad reasoning and its proposed remedy.

The respondents' submissions

[39] The SAHRC emphasised that equality is the bedrock of our Constitution and that the Equality Act fulfils the injunction in section 9(2) of the Constitution, which allows the State to provide for legislative and other measures to promote and protect the achievement of equality.[44] It asserted that the objective of the impugned section is to ensure that human dignity and equality are not limited in the name of freedom of speech. Where speech infringes equality and dignity, the impugned section reasonably and justifiably limits the right to freedom of expression.

[44] Section 9(2) reads:

> "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."

[40] The SAHRC advanced a wide-ranging attack on the Supreme Court of Appeal's findings. It argued that that Court lost sight of the fact that the first duty in an interpretative exercise is to comply with section 39(2) of the Constitution – when interpreting any legislation, it "must promote the spirit, purport and objects of the Bill of Rights". The Court also failed to interpret the impugned section consistently with the Constitution as far as possible, to the extent that the text is reasonably capable of bearing that meaning.

[41] The SAHRC contended that the phrase "that could reasonably be construed to demonstrate a clear intention to" is clear, and that the Supreme Court of Appeal was wrong in its finding that this introduces a subjective test, whereas section 16 postulates an objective test. The requirement in the impugned section is an objective test, as the speech must objectively demonstrate the requisite intention. The impugned section not only requires demonstrable intention (thus excluding negligent or inadvertent speech), but the intention must also be "clear". The requirement of reasonableness also indicates an objective test. Intention also encompasses the secondary meaning and innuendo of words. The requirement of reasonableness indicates an objective test.

[42] In respect of "hurtful", the SAHRC submitted that dignity is the threshold by which the impugned words must be assessed. "Harmful or to incite harm" extends beyond mere physical harm and includes psychological, emotional and social harm that adversely affects the right to dignity, as long as the harm is serious enough to pass the hate speech threshold. With regard to "promote or propagate hatred", it emphasised that the dictionary meanings are clear and should be applied. The proviso in section 12 is intended to be a carve-out of the exclusions to hate speech and it refers not to section 16(2), but to section 16(1).

[43] The SAHRC accepted that the impugned section infringes the right to freedom of expression, but submitted that the limitation is reasonable and justifiable in terms of section 36(1). It emphasised the fact that the Equality Act creates civil remedies, as opposed to criminalising hate speech. This is achieved by creating a civil law

prohibition against hate speech and preventing speech that may impinge on a person's dignity. The impugned section also promotes the right to equality, as required by section 9(2).

[44] The SAHRC also contended that the Supreme Court of Appeal was wrong in suggesting that less restrictive means would mirror the provisions of section 16(2). This is because first, speech under section 16(2) is unprotected and there is no limitation analysis involved. Second, if one were to mirror the provisions of section 16(2), one would then exclude the grounds of prohibition set out in section 1 of the Equality Act, which reflects the grounds in section 9(3) of the Constitution.[45] Third, it would remove the protection afforded to journalists and artists in section 12. Lastly, the SAHRC submitted that costs should not have been ordered against it, given its special constitutional obligations.

[45] The Minister restricted his submissions to the question of the constitutionality of the impugned section. He accepted that the impugned section limits the right to freedom of expression, but submitted that the limitation is reasonable and justifiable. His contention was that the impugned section prohibits expression that falls beyond that outlined in section 16(2)(c) in three ways. First, it enumerates the forms of expression which are prohibited (no person may publish, propagate, advocate or communicate words). This is not dealt with in the Constitution. Second, it prohibits hate speech on "prohibited grounds" as defined in the Equality Act. These prohibited grounds reflect the grounds of discrimination enumerated in section 9(3) of the Constitution. Section 16(2)(c), on the other hand, lists only four prohibited grounds, namely race, ethnicity, gender and religion. Third, the impugned section is broader than section 16(2)(c) in the following ways: (a) it includes words clearly intended to be "hurtful" or "harmful"; and (b) it introduces a different standard, namely that of

[45] Section 9(3) provides:

> "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."

"reasonably construed to demonstrate a clear intention to", whereas section 16(2)(c) speaks of "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

[46] The Minister emphasised the constitutional obligation on the State to, for present purposes, respect, protect, promote and fulfil the rights to equality and human dignity. These two rights are connected. He supported most of the arguments advanced by the SAHRC in criticising the approach adopted by the Supreme Court of Appeal in its interpretation of the impugned section. The Minister submitted that, ultimately, in balancing the competing rights, it is clear that the section 16(1) right must yield to the rights to equality and dignity as encapsulated in the impugned section.

[47] The amici made very helpful, wide-ranging and insightful submissions. Most of the amici confined their submissions to the issue of whether the impugned section passes constitutional muster, and did not venture into a discussion of the merits of the complaint against Mr Qwelane. All of them, save for the Freedom Institute and MMA, adopted the position that the Supreme Court of Appeal erred in its decision on the constitutionality of the impugned section.[46] Reference will be made to these submissions in the course of this judgment. A useful starting point is to place the Equality Act within an appropriate constitutional context. This will allow us to interpret section 10(1) of the Equality Act in line with section 39(2) of the Constitution, setting out the basis for the consideration of the challenges to the provision.[47]

[46] It must be said, though, that MMA adopted a more neutral approach to the question of the constitutionality of the impugned section. It disclaimed an absolutist position and propounded a balanced approach. Ultimately, it contended that the impugned section does not pass constitutional muster.

[47] This interpretive stage is similar, although not identical, to the two-stage process followed to determine whether there has been a limitation of a right, as established in *Ex parte Minister of Safety and Security: In Re: S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 26. In that matter, this Court stated that that process "entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)".

The Equality Act in a proper constitutional setting

[48] The Equality Act has three main objectives: First, it seeks to prevent and prohibit unfair discrimination from thriving in our society by giving effect to section 9(4) of the Constitution. Second, it aims to protect and advance categories of persons disadvantaged by unfair discrimination as envisaged in section 9(2) of the Constitution. Finally, it facilitates the State's compliance with its international law obligations.

[49] The preamble to the Equality Act explicates that its overarching goal is to steer our journey to an equal and democratic society by, amongst other things, eradicating inequality, transforming our society and embracing our diversity. It is thus clear that the Equality Act aspires to heal the wounds of the past and guide us to a better future. This commitment was fulfilled by Parliament, pursuant to section 9(2) of the Constitution. One of the ways in which the Equality Act realises this commitment is through prohibiting hate speech in section 10. The Legislature was alive to the reality that unfair discrimination can be perpetuated by both conduct and the dissemination of words (or more broadly, through expression). Through this prism, section 10 is located at the confluence of three fundamental rights: equality, dignity and freedom of expression, and we ought to navigate an interpretation of that section within this terrain.

[50] The Holocaust Foundation contended that section 9(4) of the Constitution requires legislation to be enacted to prevent or prohibit unfair discrimination. Thus, so it contended, all that is required for purposes of testing the constitutionality of section 10 is an investigation into whether section 10 fulfils that constitutional injunction. That argument is fallacious, because it effectively pits the rights to human dignity and equality against the right to free speech by attributing more weight to the constitutional injunction at the expense of the fundamental right to free speech. The injunction cannot be considered in isolation, but must rather be considered in harmony with other constitutional provisions. We are required to go further and consider section 10 in light of sections 9, 10 and 16 of the Constitution, as opposed to setting these rights against one another.

[51] The Equality Act in general, and the impugned section in particular, must be understood in the context of the obligation imposed on the State in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This is an obligation that emanates from the transformative objective of our Constitution.[48] The ambit of this obligation is both positive and negative.[49] It requires of the State not only to refrain from infringing on fundamental rights, but also to take positive steps to ensure that these rights are realised.[50] We must be cognizant of the requirement that measures taken in terms of section 7(2) must be "reasonable and effective".[51]

Section 39(2) of the Constitution

[52] The appropriate point of departure in interpreting the impugned section is section 39(2) of the Constitution, which enjoins courts when interpreting legislation to "promote the spirit, purport and objects of the Bill of Rights". Along this interpretative journey, we must be guided by the jurisprudence of this Court. In *Cool Ideas* this Court expounded that:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and

[48] In *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 74, this Court explicated:

> "The Preamble to the Constitution, its founding values and this Court's jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-racial, just and united nation."

[49] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 46-50.

[50] *Brink v Kitshoff N.O.* [1996] ZACC 9;1996 (4) SA 197 (CC);1996 (6) BCLR 752 (CC) at para 42.

[51] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 189, confirmed recently in *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) at paras 42-3.

> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[52]

[53] Moreover, when interpreting legislation that implicates a fundamental right entrenched in the Bill of Rights, a court must read the particular statute "through this prism of the Constitution".[53] In *Hyundai* this Court stressed that a purposive approach is essential and that:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[54]

[54] Turning to interpretation, the correct approach is to interpret the impugned provision in light of these rights congruently. This approach is undergirded by an array of reasons. First, freedom of expression is "constitutive of the dignity and autonomy of human beings"[55] and it constitutes "a web of mutually supporting rights" in the Constitution.[56] Second, section 39(2) cannot be invoked in a partisan way. If various rights are implicated, this Court must give effect to the normative force of the spirit,

[52] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. This was recently affirmed in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC) at para 34.

[53] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 87.

[54] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22.

[55] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

[56] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 27.

purport and objects of the Bill of Rights.[57] Third, this concatenation of inextricably linked rights is evident in the various objects of the Equality Act.[58]

[55] Before considering the proper interpretation of section 10, it is necessary to analyse these fundamental rights, with due regard to this Court's jurisprudence.

Equality and dignity

[56] Our constitutional commitment to equality lies at the heart of our new constitutional order and is crucial to our transformation.[59] It has been said that "it permeates and defines the very ethos upon which the Constitution is premised".[60] In *Van Heerden*, this Court held:

> "The achievement of equality goes to the bedrock of our constitutional architecture . . . . [T]he achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."[61]

[57] 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.

[57] *Phumelela Gaming and Leisure Limited v Grundlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 35.

[58] See section 2 of the Equality Act, in particular subsections (iv) and (v).

[59] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 12 BCLR 1696 (CC) at para 8.

[60] *Fraser v Children's Court Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20 and fn 11.

[61] *Van Heerden* above n 2 at para 22.

> (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."

[58] Our jurisprudence is resolute that the type of equality underpinning our constitutional framework is not mere formal equality, but in order to give meaning to the right to dignity, also substantive equality.[62] Substantive inequality "is often more deeply rooted in social and economic cleavages between groups in society", and so it aims to tackle systemic patterns where the structures, context and impact underpinning the discrimination matters.[63]

[59] There is also the principle of intersectionality, which interrogates how aspects of identity are mutually constitutive.[64] Recently, in *Mahlangu*,[65] this Court expressly endorsed this principle. It said:

[62] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition I*) at para 62.

In Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 at 249, it is postulated that the transformative nature of our Constitution—

> "require[s] a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."

[63] Albertyn and Goldblatt "Equality" in Woolman et al *Constitutional Law of South Africa* Service 5 (2013) at 6. They observe further at 8 that "the idea of inequality as systemic – deeply embedded within society, and manifest in group disadvantage through social stigma and stereotypes, material inequality or social and economic forms of exclusion".

[64] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1993) 43 *Stanford Law Review* 1241 at 1244.

[65] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR (CC).

> "There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination."[66]

[60] Intersectionality is particularly relevant in our grossly unequal society, in which people occupy vastly different positions in society in terms of wealth and resources.

[61] Based on this, unfair discrimination is the linchpin of inequality. It is for this reason that section 9(3) of the Constitution expressly proscribes unfair discrimination on specified grounds.[67] Section 9(4) of the Constitution envisages the need to enact, amongst other things, legislative measures to protect categories of persons disadvantaged by unfair discrimination. To this end, this Court in *National Coalition II* remarked that:

> "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."[68]

[62] This Court emphasised in *Harksen* that the prohibition of unfair discrimination in the Constitution is instrumental in that it provides a bulwark against invasions of the

[66] Id at para 76.

[67] It is worth noting that our Constitution was the first in the world to entrench LGBT+ equality through prohibiting unfair discrimination on the grounds of sexual orientation. See Williams and Judge "Happy (N)ever After? Public Interest Litigation for LGBTI Equality" in Brickhill (ed) *Public Interest Law in South Africa* (Juta & Co Ltd, Cape Town 2018) at 239. Also see *Fourie v Minister of Home Affairs* [2004] ZASCA 132; 2005 (4) SA 429 (SCA) at para 6.

[68] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition II*) at para 60.

right to human dignity.[69] While equality and dignity are self-standing rights and values,[70] axiomatically, equality is inextricably linked to dignity.[71] As *Hugo* expounds:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[72]

[63] In *Freedom of Religion*, this Court underscored the importance of the right to human dignity:

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights".[73]

[69] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 50.

[70] Section 10 of the Constitution provides:

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

See further *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 35-7 and Moseneke J in *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[71] In particular, dignity and unfair discrimination are linked. This Court's jurisprudence on unfair discrimination shows that treating people differently, in a way that impairs their fundamental dignity as human beings, essentially renders human dignity the basis for the test for unfair discrimination. See further Ackermann *Human Dignity: Lodestar for Equality in South Africa* (Juta & Co Ltd, Cape Town 2012) at 179 and 251. Kant also links dignity to equality, see *Groundwork of the Metaphysics of Morals* (Cambridge University Press, Cambridge 1997) at 56-7.

[72] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41. The Court quoted the Canadian case of *Egan v Canada* [1995] 2 SCR 513, which analysed the purpose of section 15 of the Canadian Charter and held that equality dictates zero tolerance for legislative distinctions that treat certain people as second-class citizens, that demean them without valid reason, or that otherwise offends fundamental human dignity. See also: *National Coalition I* above n 62 at para 30.

[73] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) (*Freedom of Religion*) at para 45.

[64] And, in *Makwanyane*, this Court stressed that the protection of dignity is a cornerstone of our democratic project:

> "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. . . . Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[74]

[65] Chaskalson, writing extra-curially, explained that:

> "[I]n a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner."[75]

[66] It has been acknowledged that the concept of dignity is not easy to define in exact terms. However, in *National Coalition I*, this Court said that "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".[76]

Freedom of expression

[67] It is not only the rights to equality and dignity that our Constitution seeks to protect. The right to free speech is equally protected. The right to freedom of expression, as enshrined in section 16(1) of the Constitution, is the benchmark for a

[74] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at paras 328-9.

[75] Chaskalson "The Third Bram Fisher Lecture: Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *SAJHR* 193 at 203.

[76] *National Coalition I* above n 62 at para 28.

vibrant and animated constitutional democracy like ours. Section 16 of the Constitution provides:

> "(1) Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to—
>
> (a) propaganda for war
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[68] Freedom of expression "is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm".[77] This is because it "is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability".[78]

[69] According to Emerson, there are four particular values that undergird the right to freedom of expression.[79] These, as I understand them, include: (a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfillment; and (d) the encouragement of tolerance.

[77] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at para 37.

[78] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 1.

[79] Emerson *The System of Freedom of Expression* (Random House, New York 1970) at 6-7. See further the helpful analyses in Davis "Freedom of Expression" in Cheadle above n 42 at 11-2 to 11-4(1) and Milo et al "Freedom of Expression" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) at 15-30.

[70] Dworkin suggests that these values can be reduced to two overarching justifications: the instrumental conception and the constitutive conception.[80] The former refers to the notion that the quality of government is improved when criticism is free and unfettered, "a collective bet that free speech will do us more good than harm over the long run".[81] The latter refers to the idea that freedom of expression "is an essential and constitutive feature of a just, political society the government of which treats all its adult members, except those who are deemed legally incompetent, as responsible moral agents".[82]

[71] As has been acknowledged, "[t]he right to freedom of expression lies at the heart of our constitutional democracy, not only because it is an 'essential and constitutive feature' of our open democratic society, but also for its transformative potential".[83] Both the instrumental and constitutive value of freedom of expression, as articulated by Dworkin, bear emphasis.

[72] This was largely echoed by the majority of this Court in *Democratic Alliance*:

> "This Court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For

[80] Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge 1996) at 200. First, free speech has instrumental value "not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us". Second, free speech has the constitutive value because expression is an important part of what it means to be a human and "[w]e retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it".

Currie and de Waal in *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd Pty, Cape Town 2018) at 340 note that Dworkin's instrumental conception "is important because it contributes to the Constitution's project of overturning an authoritarian polity and establishing a democracy in place" however "this conception of the right should not be focused on the extent that the intrinsic and dignity-reinforcing value of free expression is obscured".

[81] Dworkin id.

[82] Id at 57. Davis observes that:

> "[T]he value of free speech articulated by both Emerson and Dworkin cannot be underestimated in our constitutional state. The ability of citizens to speak their minds, to receive information and opinions allows each individual to develop as a human being."

While I firmly acknowledge the differences in freedom of expression in the context of the United States of America when juxtaposed with South Africa, their philosophical underpinnings and understanding of the rationales for freedom of expression are relevant and helpful when unpacking the content of the right.

[83] *Economic Freedom Fighters* above n 78 at para 95 with reference to Dworkin above n 80 at 200.

> freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values. What is more, being able to speak freely recognises and protects 'the moral agency of individuals in our society'. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human."[84]

[73] In addition, this Court has highlighted that "[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."[85] In *Islamic Unity*, Langa DCJ elucidated:

> "Freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."[86]

[74] These dictates of pluralism, tolerance and open-mindedness require that our democracy fosters an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be.[87] However, as stated by this Court in *Mamabolo*, this does not mean that freedom of

[84] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras 122-3.

[85] *SANDU* above n 41 at para 8. See further *Moyo v Minister of Justice and Constitutional Development; Sonti v Minister of Justice and Correctional Services* [2018] ZASCA 100; 2018 (2) SACR 313 (SCA) at para 42.

[86] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) (*Islamic Unity*) at para 26 endorsed *Handyside v the United Kingdom*, no 5493/72, § 49, ECHR, 1976.

[87] *Handyside* above n 86 at para 49.

expression enjoys superior status in our law.[88] Similarly, a unanimous Court in *Khumalo v Holomisa* stated that, although freedom of expression is fundamental to our democratic society, it is not a paramount value.[89] That being said, as this Court observed in *Laugh it Off*, "we are obliged to delineate the bounds of the constitutional guarantee of free expression generously".[90]

[75] Furthermore, the historical stains of our colonial and apartheid past reinforce the point that freedom of expression has a particularly important role to play in our constitutional democracy, as Mogoeng CJ lamented:

> "Expression of thought or belief and own worldview or ideology was for many years extensively and severely circumscribed in this country. It was visited, institutionally and otherwise, with the worst conceivable punishment or dehumanising consequences. The tragic and untimely death of Steve Biko as a result of his bold decision to talk frankly and write as he liked, about the unjust system and its laws, underscores the point. This right thus has to be treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents in a genuine constitutional democracy, considering our highly intolerant and suppressive past."[91]

[76] Turning to how section 16 ought to be interpreted, it is well accepted that *Islamic Unity* is the lodestar for the interpretation and application of section 16. In that case, this Court outlined the contours of the right enshrined in section 16 of the Constitution. Section 16(1) entrenches the right to freedom of expression and demarcates the scope of the right. Section 16(2) is definitional in that it sketches what does not form part of the scope of the right in section 16(1) and is expressly excluded from constitutional protection.[92] In consequence, regulation of expression that falls

[88] *Mamabolo* above n 77 at para 41.

[89] *Khumalo v Holomisa* above n 55 at para 25.

[90] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (*Laugh It Off*) at para 47.

[91] *Economic Freedom Fighters* above n 78 at para 2. See also: *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at paras 23-4.

[92] *Islamic Unity* above n 86 at paras 30-2.

within section 16(2) would not be a limitation of the right in section 16(1).[93] However, "where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution".[94]

[77] I accept that, on a plain reading of section 10 of the Equality Act, juxtaposed with section 16(2)(c) of the Constitution, the former is broader than the latter in various respects. In true fidelity to the reasoning in *Islamic Unity*, the key consideration then is whether, on a proper interpretation, section 10 limits the right to freedom of expression protected in section 16(1) of the Constitution. As stated, only once we have established the existence of a limitation of a right, will it be necessary to proceed to a full section 36 limitations analysis. With these general principles as a backdrop, what follows is a close consideration of hate speech.

Hate speech

[78] Hate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy.[95] As the Holocaust Foundation submitted, section 10 of the Equality Act is the primary mechanism to prevent or prohibit unfair discrimination caused by expression.

[79] It bears emphasis that the expression of unpopular or even offensive beliefs does not constitute hate speech.[96] This is because, as noted above, a healthy democracy requires a degree of tolerance towards expression or speech that shocks or offends. This

[93] Id at para 31.

[94] Id at para 34.

[95] *Vejdeland v Sweden*, no 1813/07, ECHR, 2012, concurring opinion of Spielmann J joined by Nussberger J at para 5. *Handyside* above n 86 at para 49.

[96] *Handyside* above n 86. In *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA) at para 68, Wallis JA observed that:

> "A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity."

begs the question then: what constitutes hate speech? There is no universally accepted definition of the term "hate speech".[97]

[80] In their submissions, the Psychological Society drew this Court's attention to *Whatcott*, where the Supreme Court of Canada held:

> "Restricting expression because it may offend or *hurt feelings* does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which 'ridicules, belittles or otherwise affronts the dignity of' protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the *extreme detestation and vilification which risks provoking discriminatory activities against that group*. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way."[98] (Emphasis added.)

And that:

> "Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimise them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims."[99]

[81] Thus, it would appear that hate speech travels beyond mere offensive expression and can be understood as "extreme detestation and vilification which risks provoking discriminatory activities against that group".[100] Expression will constitute hate speech

[97] Benesch "Defining and Diminishing Hate Speech" in Minority Rights Group International (2014) *State of the World's Minorities and Indigenous Peoples* (Minority Rights Group International, London 2014) at 18 at 20.

[98] *Saskatchewan (Human Rights Commission) v Whatcott* 2012 SCC 11; [2013] 1 SCR 467 (*Whatcott*) at para 109.

[99] Id at para 41.

[100] This definition is the culmination of a trilogy of hate speech cases emanating from the Supreme Court of Canada. In *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 (*Taylor*) at 895, "hatred" was

when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons. As was recently noted, "[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced".[101]

[82] Our case law accords with Canadian jurisprudence. There is a string of jurisprudence emanating from this Court in the context of racism in the workplace. In *Rustenburg Platinum Mine*,[102] this Court was confronted with the question whether referring to a fellow employee as a "swart man" (black man), within the context of that case, was racist and derogatory. This Court observed that:

> "Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by strife, conflict, untold suffering and injustice. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regard to race but it can also be seen with reference to gender discrimination."[103]

defined at 928 as "strong and deep-felt emotions of detestation, calumny and vilification". In *R v Andrews* [1990] 3 SCR 870, the Court found that:

> "Hatred is not a word of causal connection. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. . . . When expression does instil detestation it does incalculable damage to the Canadian community and lays the founds for the mistreatment of the victimised groups."

Then, in *R v Keegstra* [1990] 3 SCR 697 at 700, it was said that hatred is "the most severe and deeply felt form of opprobrium", and at 777 that—

> "[h]atred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."

[101] *Economic Freedom Fighters* above n 78 at para 155.

[102] *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC); 2018 (8) BCLR 951 (CC).

[103] Id at para 52.

[83] *Rustenburg Platinum Mine* demonstrates how the effect of even facially innocuous words must be understood based on the different structural positions occupied by white people in relation to black people in contemporary South African society. This approach takes cognisance of how words or, more broadly, expression contribute towards creating or exacerbating systemic disadvantage and subordination.

[84] In *South African Revenue Service*,[104] this Court had to consider the use of the repulsive term "kaffir" in the workplace and an insinuation that African people are inherently foolish and incapable of providing any leadership worthy of submitting to. This Court reminded us:

> "South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us".[105]

[85] With reference to our jurisprudence, this Court pointed out that in essence:

> "[R]acist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred, the lowest form of contempt for African people, or whether the

[104] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC).

[105] Id at para 2.

> outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack."[106]

[86] These two cases demonstrate the presence of deeply rooted structural subordination in relation to race. While these cases focused on race,[107] the facts in the case before us vividly demonstrate the continuing structural subordination and vulnerability relating to sexual orientation and gender identity. In these cases, the Court underscored how facially innocuous words or notorious words have to be understood based on the different structural positions in post-apartheid South African society. This is an approach which takes cognisance of how words perpetuate and contribute towards systemic disadvantage and inequalities. In essence, this is the corollary of our substantive equality demands that flow from the Constitution. The purpose of hate speech regulation in South Africa is inextricably linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society. This is done by curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa.

Regulating hate speech: international law perspectives

[87] I turn now to consider how free speech, and hate speech, are regulated. Section 233 of the Constitution mandates us to, when interpreting legislation, prefer reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it.[108] Having regard to international law,

[106] Id at para 14.

[107] Id at paras 2 and 14 and *Rustenburg Platinum Mine* above n 102 at para 52.

[108] Section 233 of the Constitution must of course be read with section 39(1) of the Constitution, which provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

The fourth amicus, SALC, provides useful insight in this sphere in its written and oral submissions. These sources include those identified in Article 38(1) of the Statute of the International Court of Justice; international and regional treaties; United Nations resolutions; decisions of international and regional courts and tribunals; decisions

numerous instruments are in place to limit hate speech. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[109] entrenches the right to freedom of expression, but restricts that right when necessary.[110] Article 20 limits expression if it is hate speech, by providing that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". The ICCPR calls upon state parties to adopt legislation to enforce these provisions.[111] In addition, the Equality Act expressly seeks to implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[112] From a regional perspective, the African Charter on Human and Peoples' Rights (Banjul Charter) also entrenches the right to freedom of expression,[113] coupled with obligations "to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance".[114]

[88] The right to freedom of expression in international law contains two parts – the first imposes on states the obligation to protect the right to free speech, the second makes it equally mandatory for States to prohibit hate speech.[115] The judgment of the Supreme Court of Appeal, while making cryptic reference to international law,[116] did not address at all the provisions of the ICERD, despite its central role. That central role

of UN human rights treaty bodies; and reports of UN mandate-holders. See further Brownlie *Principles of Public International Law* 6 ed (OUP, Oxford 2003) at 6.

[109] International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR). The ICCPR was signed and ratified by South Africa in 1994 and 1998, respectively.

[110] Article 19(3) of the ICCPR reads:

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary."

[111] Article 2(2) of the ICCPR.

[112] Sections 2(h) and 3(2)(b) of the Equality Act. International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (ICERD). South Africa signed and ratified this Convention in 1994 and1998, respectively.

[113] Article 9 of the African Charter on Human and People's Rights (Banjul Charter), 21 October 1986. South Africa signed and ratified the Banjul Charter on 9 July 1996.

[114] Id at Article 28.

[115] Articles 19 and 20 of the Universal Declaration of Human Rights, 10 December 1948 (UDHR), and Article 19 of the ICCPR.

[116] It referenced the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

emanates from Article 4(a), which obliges South Africa to proscribe (as "an offence punishable by law") not only "incitement to racial discrimination [or violence]" but "all dissemination of ideas based on racial superiority or hatred".

[89] Various factors have been identified in international law that justify the curtailment of freedom of expression. These include: (i) the prevailing social and political context; (ii) the status of the speaker in relation to the audience; (iii) the existence of a clear intent to incite; (iv) the content and form of the speech; (v) the extent and reach of the speech; and (vi) the real likelihood and imminence of harm.[117]

[90] Section 3 of the Equality Act encourages a comparative foreign law analysis.[118] In its judgment, the Supreme Court of Appeal limited its analysis to the United States, Canada and Germany. It failed to acknowledge that in Canada and Germany, hate speech is criminalised,[119] whereas here hate speech is regulated through civil remedies in the Equality Act.[120] Our approach accords with that of the United Nations Rabat Plan of Action where it is recommended that:

> "Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply."[121]

[91] That is not to say that helpful guidance cannot be gained from these jurisdictions – Canadian jurisprudence in particular provides useful insight into some of the aspects under consideration, particularly in respect of the definition of hate

[117] Principle 23 of the African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 10 November 2019.

[118] See section 3(a)-(c) of the Equality Act.

[119] Section 319(1) of the Canadian Criminal Code and section 130(1) of the German Criminal Code.

[120] Section 10(2) pertinently provides that the Equality Court may refer a case relating to hate speech to the Director of Public Prosecutions to institute criminal proceedings. Criminal sanctions play no role here and the Equality Act is plainly a civil statute.

[121] Annual Report of the United Nations High Commissioner for Human Rights, 11 January 2013 A/HRC/22/17/Add 4 at para 34.

speech. The only caveat is that we must be ever mindful that in Canada, hate speech is criminalised.[122] A more extensive conspectus is required to illustrate the scope of developments under foreign law in relation to hate speech as it is applied to the LGBT+ community. An analysis of comparative foreign law must take into account that:

> "[T]he international standard for hate speech regulation becomes less consistent in the absence of equalising circumstances. Depending on the country and its history and culture, the standard vacillates between more or less speech-protection."[123]

[92] The emphasis a society places on freedom of expression and its approach to hate speech regulation is largely a product of that society's culture, history, values and norms. This is an important insight when considering how each jurisdiction aims to reconcile the tension between freedom of expression and hate speech. We are able, however, to discern general features in broad strokes that are common across various jurisdictions.

[93] On 5 October 2020, this Court, as it has on previous occasions, submitted a request to the World Conference on Constitutional Justice (Venice Commission) regarding other jurisdictions' positions on freedom of expression and hate speech prohibitions. Various jurisdictions provided useful submissions on this score and in summary, free speech is generally constrained by prohibitions on hate speech and various forms of hurtful and harmful speech.[124] Useful guidance can be gained from these jurisdictions and others with well-developed hate speech legislation.[125] What bears consideration next is how section 10(1) ought to be interpreted.

[122] Id.

[123] Chandramouli "Protecting Both Sides of the Conversation: Towards a Clear International Standard for Hate Speech Regulation" (2013) 34 *University of Pennsylvania Journal of International Law* 831 at 848.

[124] Submissions were received from Germany, Sweden, the Netherlands, Brazil and Mexico.

[125] In Belgium, the Belgian Holocaust denial law, passed on 23 March 1995, bans public Holocaust denial. Specifically, the law makes it illegal to publicly "deny, play down, justify or approve of the genocide committed by the Nazi German regime during the Second World War". Prosecution is led by the Belgian Centre for Equal Opportunities. The offense is punishable by imprisonment of up to one year and fines of up to €2 500. In France, France's penal code and press laws prohibit public and private communication that is defamatory or insulting, or that incites discrimination, hatred, or violence against a person or group on account of place of origin, ethnicity

Interpretation of section 10(1)

[94] Having identified the relevant constitutional background to the Equality Act, and section 10 more particularly, we can proceed to answer some of the interpretive questions that were discussed before us.

The remedial character of section 10(1)

[95] In essence, section 10(1) can be described as a statutory delict that innovatively offers, unlike any crime or other delict in our law, specific remedies concerning the right to equality, as the Mandela Foundation argued.[126] I agree with the submissions that Parliament sought to protect victims from infringements of their right to equality, not only in the form of unfair discrimination, but also through hate speech and harassment, by forging new statutory delicts bearing those names, actionable in the Equality Court.

or lack thereof, nationality, race, specific religion, sex, sexual orientation, or handicap. The law prohibits declarations that justify or deny crimes against humanity – for example, the Holocaust (Gayssot Act). In Luxembourg, the law "provides custodial sentences of between 9 days and 2 years and or a fine of €251 to €25 000 for the verbal, written or graphic communication or materials that are made available in public places or meetings which incite discrimination, hate or violence against a natural or legal person or a group or community of persons. Sexual orientation is considered a protected characteristic." In Chile, Article 31 of the "Ley sobre Libertades de Opinión e Información y Ejercicio del Periodismo" (Statute on Freedom of Opinion and Information and the Performance of Journalism) punishes with a large fine those who "through any means of social communication make publications or transmissions intended to promote hatred or hostility towards persons or a group of persons due to their race, sex, religion or nationality". Finally, in Denmark, section 266b of the Danish Criminal Code states that:

> "(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
>
> (2) In determining the punishment it shall be considered a particularly aggravating circumstance if the conduct is of a propagandistic nature."

[126] Some of the amici drew analogies between the impugned section and common law defamation and delict. It is indeed so that, while defamation regulates speech that damages reputation and dignity, the impugned section seeks to regulate speech by protecting the rights to equality and dignity of vulnerable people. In a successful defamation claim the victim receives monetary compensation as damages, or an apology or a retraction of the defamatory statements may be ordered. Under the Equality Act, the victim may, apart from a claim for damages, seek an unconditional apology, or ask for the perpetrator to undertake counselling or to make a contribution to an organisation that promotes the rights of the vulnerable.

"That could reasonably be construed to demonstrate a clear intention"

[96] Before this Court, the parties debated whether the phrase "that could reasonably be construed to demonstrate a clear intention" postulates a subjective or objective test. In my view, it is plainly an objective standard that requires a reasonable person test. This is based on the gloss "reasonably be construed" and "to demonstrate a clear intention", implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.[127]

[97] This approach accords with the interpretation advanced in *SAHRC v Khumalo* that "[t]he objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construe the words. Because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed."[128] I endorse this approach. It is consistent with our jurisprudence concerning similar issues. An objective normative reasonable person test was accepted by this Court, albeit in a different context, in *Mamabolo*.[129] This is also consistent with our common law delict of *inuria*, which evaluates these claims by the reasonableness standard of wrongfulness. In *Le Roux*, this Court held that, in order to determine whether expression was defamatory—

[127] In his written submissions the Minister cites Marais and Pretorius "A Contextual Analysis of the Hate Speech Provisions of the Equality Act" (2015) 18 *Potchefstroom Electronic Law Journal* 902 at 912:

> "The requirement of a 'clear' intention points to an element of deference to the speaker, as well as caution not to prohibit seemingly discriminatory expression that may in fact serve to promote rather than jeopardise equality."

[128] *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) (*SAHRC v Khumalo*) at para 89. See also at para 88:

> "The standard of the reasonable person, applied to section 10(1), means, therefore, whether a reasonable person could conclude (not inevitably should conclude) that the words mean the author had a clear intention to bring about the prohibited consequences. Words obviously mean what they imply."

In addition, in *Whatcott* above n 98, the Canadian Supreme Court stated at para 95:

> "[I]n view of the reasonable person aware of the context and circumstances, the representation exposes or tends to expose any person or class of persons to detestation and vilification on the basis of a prohibited ground of discrimination."

[129] *Mamabolo* above n 77 at para 43.

> "[t]he test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that [they] would have had regard not only to what is expressly stated but also to what is implied."[130]

[98] In *Rustenburg Platinum Mine*, this Court held that context is axiomatically important as the words in themselves were not racist, and accepted that "the test to determine whether the use of the words is racist is objective".[131] This further buttresses an objective approach.

[99] Importantly, an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights.[132] On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on "a multiplicity of trivial actions by hypersensitive persons".[133] On the other hand, if it were based on the subjective intention of the speaker, the threshold for civil liability would be considerably higher than usual.[134]

[100] An objective approach, accounting for the general circumstances and context, as well as other factors elucidated by the Special Rapporteur, is appropriate for what hate speech laws aim to prohibit. In *Whatcott*, the Supreme Court of Canada underscored the *effects* of hate speech, not the intent, and notes that *systemic* discrimination tends to

[130] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 89.

[131] *Rustenburg Platinum Mine* above n 102 para 38. This Court drew an analogy with the test for whether a statement is defamatory, as enunciated in *Sindani v Van der Merwe* [2001] ZASCA 130; 2002 (2) SA 32 (SCA) at para 11.

[132] *SATAWU v Moloto N.N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 117 (CC) at para 72.

[133] *Delange v Costa* 1989 (2) SA 857 (A) at 862A-B, cited in *Dendy v University of the Witwatersrand* [2007] ZASCA 30; [2007] 3 All SA 1 (SCA) at para 6.

[134] For instance, as was stated in the Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (A/HRC/22/17/Add.4):

> "Article 20 of [the ICCPR] anticipates intent. Negligence and recklessness are not sufficient for an act to be an *offence* under article 20 of the Covenant, as this article provides for 'advocacy' and 'incitement' rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience."

be more widespread than intentional discrimination.[135] This Court has acknowledged that "systemic motifs of discrimination" are part of the fabric of our society.[136] This analysis is apt when considering the philosophical underpinnings of hate speech prohibitions that attach civil liability, coupled with the role of hate speech and systemic discrimination in this country. However, when plugging in an abstract reasonable person test in order to construe the meaning of alleged hate speech, courts ought to be mindful of our diverse and dynamic society and not inadvertently reify prejudices.[137]

[101] For all these reasons, I conclude that the test is an objective reasonable person test and the Supreme Court of Appeal erred in concluding that the test imposed by the impugned section is a subjective one. I therefore endorse those decisions of the Equality Court that have reached a finding that the test is objective.[138]

The correct reading and interpretation of "hurtful"; "harmful or to incite harm"; "promote or propagate hatred"

[102] I am of the view that the Supreme Court of Appeal erred in finding that paragraphs (a)-(c) of section 10(1) must be read disjunctively. The absence of the conjunction "and" between the paragraphs, accentuated by the Supreme Court of Appeal in its reasoning, is countered by the absence of the disjunction "or". This is therefore a neutral factor. On a disjunctive reading, section 10 would prohibit mere private communication which could reasonably be construed to demonstrate a clear intention to be hurtful – this is an overly extensive and impermissible infringement of freedom of expression.

[135] *Whatcott* above n 98 at para 126, affirming *Taylor* above n 100 at 931-2:

> "The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of the anti-discrimination statute."

[136] *Brink* above n 50 at para 41.

[137] Modiri "Race, Realism and Critique: The Politics of Race and Afriforum v Malema in the (In)Equality Court" (2013) *SALJ* 274 at 274.

[138] *Afriforum v Malema* 2011 (6) SA 240 (EqC) at para 109 and *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) at para 11.

[103] Expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well established that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression.[139] This point is eloquently articulated in *Whatcott*, where it was noted that merely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature's choice of a provision predicated on *hatred*.[140] As mentioned above, the Supreme Court of Canada persuasively defined, in the context of hate speech, the legislative term "hatred" as—

> "being restricted to manifestations of emotion described by the words 'detestation' and 'vilification'. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects."[141]

[104] In striving to interpret the section in a constitutionally compliant manner, as we are required to do, provided that such interpretation can be reasonably ascribed to the provision,[142] the impugned section is reasonably capable of a conjunctive reading. That reading is thus called for. This approach also advances a contextual and purposive interpretation. It is buttressed by the fact that: prohibiting hurtful expression would

[139] See *Handyside* above n 86 at para 49 and *Keegstra* above n 100 at 828. Waldron *The Harm in Hate Speech* (Harvard University Press, London 2012) at 105-6 observes that "[p]rotecting people's feelings against offense is not an appropriate objective for the law" but—

> "[d]ignity on the other hand, is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honour or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to being regarded as a member of society in good standing."

[140] *Whatcott* above n 98 at para 46. In that case, the Canadian Supreme Court upheld the regulation of speech that refers to LGBT+ persons as "dirty", "filthy", "degenerate" and as "paedophiles".

[141] Id at 471. It is important to note that the impugned provision in *Whatcott* only prohibits public communication of hate speech; it does not restrict hateful expression in private communications between individuals. In this regard, one can also consider the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the General Assembly on "Hate Speech and Incitement of Hatred" (2012), which states that hatred is "a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group".

[142] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 49-59.

undermine the ability to "offend, shock and disturb"; a disjunctive reading is not required by international law;[143] and the impugned provision's title makes it clear that it deals with the prohibition of *hate* speech. Furthermore, and critically, a disjunctive reading would render the impugned section unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could for example constitute prohibited hate speech. This would be an impermissible infringement of freedom of expression as it would bar speech that disturbs, offends and shocks.[144] Therefore, for all the reasons canvassed above, a conjunctive interpretation is warranted.[145]

[105] In endorsing a conjunctive approach, a truly reasonable interpretation is subject to whether such meanings can be ascribed to the various terms. I turn next to the key question: what are the precise meanings of the terms "hurtful", "harmful" and "to incite harm"? The parties and the amici proffered an array of interpretations.

[106] SAHRC contended that there is a distinction between "hurtful" and "harmful" in that harmful is a more permanent and severe type of harm. On the one hand, "hurtful" refers to expression that causes emotional pain to a person's dignity, but the concept "harmful" connotes deep psychological and emotional effects. In oral argument, however, the SAHRC conceded that there is considerable overlap. The Minister, on the other hand, submitted that "hurtful" refers to when distress is caused to someone's feelings and "harmful" refers to psychological or emotional harm.

[107] Considering next the phrase "to incite harm", it is imperative to point out at the outset that there is no requirement of an established causal link between the expression and actual harm committed. According to international treaties, this form of incitement is not restricted to physical violence, as it also refers to the incitement of discrimination and hatred. Article 20(2) of the ICCPR provides that "[a]ny advocacy of national, racial

[143] Article 20(b) of the ICCPR above n 109 and Article 4 of the ICERD above n 112.

[144] *Whatcott* above n 98 at para 109.

[145] This approach was endorsed in *Khumalo v Holomisa* above n 55 at para 82 and echoed in *Gordhan v Malema* 2020 (1) SA 587 (GJ) at para 6.

or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". In addition, Article 4(a) of the ICERD prohibits "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts".

[108] It is accepted by the European Court of Human Rights (ECHR) that "inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts" and speech that does not "directly recommend individuals to commit hateful acts may still reach the threshold of hate speech".[146]

[109] In *Whatcott*, the Supreme Court of Canada also questioned the requirement of a causal link in the context of hate speech prohibitions – "both the difficulty of establishing a causal link between an expressive statement and the resulting hatred, and the seriousness of the harm to which vulnerable groups are exposed by hate speech, justify the imposition of preventive measures that do not require proof of actual harm".[147] That Court went on to find that "a reasonable apprehension of societal harm as a result of hate speech" is sufficient.[148]

[110] The Supreme Court of Appeal erred when it concluded that "no evidence was presented to show a link between the article and any subsequent physical or verbal attacks on members of the LGBT+ community".[149] This is misplaced. Our Constitution

[146] In *Vejdeland* above n 95 at para 55 the Court reiterated:

> "[I]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. . . . In this regard, the Court stressed that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'."

Vejdeland is apposite as that case entailed speech where it was claimed that homosexuality was one of the main reasons why HIV/AIDS came into existence and that the "homosexual lobby" tried to play down paedophilia.

[147] *Whatcott* above n 98 at para 129, referring to *Keegstra* above n 100 at 776.

[148] Id at paras 132-135. The Supreme Court of Canada stated that "[t]his approach recognises that a precise causal link for certain societal harms ought not to be required. A Court is entitled to use common sense and experience in recognising that certain activities, hate speech among them, inflict societal harms."

[149] Supreme Court of Appeal judgment above n 26 at para 33.

requires that we not only be reactive to incidences or systems of unfair discrimination, but also pre-emptive. We need to act after the damage has occurred where so required, but, importantly, we are also required to act to ensure that it does not occur.

[111] Our law does not require a causal link. In addition, that finding also disregards the compelling, uncontested evidence in the Equality Court that graphically demonstrated the pervasive past violence and general enmity against members of the LGBT+ community. That, in turn, demonstrates the potential harm contained in the article. The difficulty in determining actual harm against the LGBT+ community is indicative of the hideous nature of hate speech committed against this target group. That there is no requirement for a causal connection is clear from the Equality Act itself. To require a causal link would in and of itself undermine the very same objectives of the Equality Act to prohibit unfair discrimination, in that not every instance of harmful and/or hurtful speech will result in imminent violence. There may be expression which certain groups find hurtful and/or harmful which does not actually result in violence, but that does not take away from the fact that such expression would have been hate speech.

[112] Lastly, it is of some significance that the impugned section distinguishes between "harmful" or "to incite harm" in clear disjunctive terms. This reveals that, even on an overall conjunctive reading, it may be sufficient to demonstrate harm, absent incitement of harm. Thus, the section postulates prohibiting expression that either harms or evokes a reasonable apprehension of harm to the target group.

"Words"

[113] The approach in *Nelson Mandela Foundation Trust,*[150] that "speech" must be interpreted broadly, so as to encompass the ideas behind the words themselves and both verbal and non-verbal expressions, commends itself to me.[151] This wide meaning

[150] *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 (6) SA 327 (GJ).

[151] Id at para 47.

accords not only with our Constitution, but also with the provisions of the Equality Act. And it is consonant with international law and comparative foreign law.

[114] The use of the terms "advocate" and "propagate" in section 10 of the Equality Act is indicative of ideas rather than words, if they are to be accorded their full meaning. Attaching a literal interpretation to these words would not achieve the objects of the provision. The inclusion of these two concepts suggests that the intention is to give effect to article 4 of the ICERD and section 16(2)(c) of the Constitution respectively, which are specifically concerned with racist "propaganda" and the "advocacy" of hatred.[152]

"Communicate"

[115] Words have meaning and effect should be given to them. To communicate assumes the conveyance of ideas. Words in and of themselves are otherwise meaningless. As it was described in *Nelson Mandela Foundation Trust*, "[w]hat the section targets is thus the meaning behind the words, and not simply the words".[153] I am also in agreement with that Court's view that an interpretation of the term "words" to include speech, ideas, ideologies, belief, meaning, instructions and so forth, affords this term a sensible and reasonable interpretation that is constitutionally compliant. A purposive interpretation of this sort is undoubtedly required.

[116] In contradistinction to the other verbs in the impugned provision – such as "publish"; "propagate" or "advocate" that all inherently require some form of public dissemination[154] – "communicate" is capable of both being public and private. But, "communicate" in terms of section 10(1) plainly requires that the speaker transmits words to a third party – there must be communication, the transmission of information.

[152] As set out in sections 2(b)(v) and 2(h) of the Equality Act.

[153] *Nelson Mandela Foundation Trust* above n 150 at para 132.

[154] According to *Lexico*, the definitions of these terms are as follows: "publish" refers to "prepare and issue (a book, journal, piece of music, etc.) for public sale, distribution or readership"; "advocate" means to "publicly recommend or support"; and "propagate" means "to spread and promote (an idea, theory etc.) widely".

And the conjunctive reading required here entails that "communicate" must be read in light of what appears in section 10(a)-(c). The concepts "promote" and "propagate" in (c) connote the dissemination of information and do not fit the notion of communicating in private. And on a reading that accords with section 39(2), one would – in any event – have to read "communicate" to mean communication that excludes private conversations.

[117] Our most private communications – and being able to freely communicate in one's private and personal sphere – form part and parcel of the "inner sanctum of the person" and are in the "the truly personal realm".[155] This approach resonates with Canadian jurisprudence. I hasten to acknowledge that their jurisprudence must be understood in view of the fact that section 319 of the Canadian Criminal Code extends to private conversations. It is nonetheless useful to consider it with that caveat in mind.[156]

[118] Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech – that *public* hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is "to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. *It is improbable that most private conversations will have this effect*."[157]

[119] Ultimately, hate speech prohibitions are concerned with the *impact* and *effect* of the hate speech and protecting the public good; this is inevitably limited when

[155] *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 67.

[156] See, amongst others: *R v Ahenakew* 2006 SKQB 27 at para 15; *Keegstra* above n 100 at 772-3.

[157] Botha and Govindjee "Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform" *Potchefstroom Electronic Law Journal* (2017) 2 at 13.

communicated in the private sphere. Therefore, true hate speech presupposes a public dissemination of some sort, [158] or at the very least it cannot be conveyed in mere private communications. Indeed, "the regulation of hate speech which occurs publicly sets a normative benchmark and has the potential to shape future behaviour".[159]

[120] This approach accords with the requirement of a constitutionally compliant interpretation in terms of section 39(2) of the Constitution. And this restrictive interpretation is justified on the basis of the *eusdem generis* canon of construction (of the same kind, class, or nature): when general words follow specific words in a statute in which several items have been enumerated, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words of the statute.[160]

"Against any person"

[121] The main criticism is that hate speech prohibitions focus on the negative impact on the targeted group and the greater societal harm as opposed to the specific impact on an individual (it is not based on their individual characteristics).[161] Put differently, the focus ought to be on group or societal harm not solely individual harm. It is contended that "against any person" may diminish the critical role of the wider targeted group.

[122] It is quite conceivable, though, that hate speech may be directed at an individual but impact not just that individual, but the group to which that individual belongs. The offensive language used by Mr Qwelane might have been directed by an individual at one homosexual person – something like, "I do not understand your sexuality. Just how can you be sexually attracted to another man? One of these days you are going to want to marry an animal." Although purportedly directed at one homosexual person, that

[158] See Article 4(a) of ICERD, which states that it shall "declare an offence punishable by law *all dissemination* of ideas based on racial superiority or hatred, or incitement".

[159] Id.

[160] *Road Traffic Management Corporation v Waymark (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at para 48.

[161] Botha and Govindjee above n 157 at 16.

will definitely cause untold harm, insult and injury to the LGBT+ community, not just the individual to whom the words were directed. Analogously, the same is bound to happen with the black community if a person uses the vile word "kaffir" against one black person. In my view, there is nothing objectionable in the inclusion of the words "against any person". This interpretation makes sense in the context of the wide – and not individualised – dissemination that the section requires. Indeed, the words are a necessary component of section 10, if it is to cover what is required by section 16(2) of the Constitution.

The proviso in section 12

[123] Section 12 of the Equality Act is not part of these confirmation proceedings. However, the High Court reasoned that because it is inextricably linked to section 10 through the proviso, a case may be made that it bears consideration. In view of the conclusion that I reach below in respect of section 10(1)(a), however, I do not deem it necessary to decide this point.

Challenges to section 10

[124] Having discussed the interpretive background against which section 10 must be understood, we can now turn to the challenges it faces in this Court. Since the constitutional challenge is based on two overarching attacks, I will consider the issues in terms of whether the impugned provision violates the Bill of Rights, and whether it is vague.

Bill of Rights challenges: limitation of section 16

[125] The main complaint by Mr Qwelane is that the impugned provision's limitation of freedom of expression is overbroad, by which he means that it is unjustified and therefore unconstitutional. He founds this claim on a number of words and phrases, which he submits make section 10(1) impermissibly overbroad. In considering this Bill of Rights challenge, there must first be a determination of whether they go beyond what

is envisioned in section 16 of the Constitution, thereby limiting the right.[162] If they do, we are enjoined to conduct a justification analysis in terms of section 36 of the Constitution.[163]

The prohibited grounds

Sexual orientation

[126] The Supreme Court of Appeal provided for an interim reading-in that merely adds "sexual orientation" to the other grounds already listed in section 16(2)(c), namely race, ethnicity, gender or religion. This means that the prohibited ground of sexual orientation is enough to found a case of hate speech based on section 10(1) of the Equality Act, but it goes beyond the limitations of free speech that are constitutionally allowed in section 16(2). Therefore, it is clear that the inclusion of this ground is a limitation of section 16(1) beyond what is permitted in section 16(2). This requires a justification analysis on this ground.

The conundrum: no evidence and no reasoning on the other "prohibited grounds"

[127] The Supreme Court of Appeal observed that, other than the added ground of sexual orientation, "the other prohibited grounds provided for in section 1 of [the Equality Act] beyond those set out in section 16(2) of the Constitution, were not in issue before us and no evidence was directed to them". In the High Court this issue was not considered in any detail. That Court noted the broadness of the prohibited grounds, but undertook no further analysis. Instead, it focused on the evidence regarding hate speech against the LGBT+ community. This presents a potential conundrum, inasmuch as no evidence was led concerning the other grounds, nor has there been any reasoned decision in respect of them in either the High Court or the Supreme Court of Appeal.

[162] *Walters* above n 47 at para 26.

[163] Id at para 27.

[128] Through a recent amendment to section 1(a) of the Equality Act, discrimination on the ground of HIV/AIDS status was included as a prohibited ground.[164] The remaining potentially vexed inclusions are those that are wide-ranging and that may elicit apprehension about interference by the draconian "thought police", like the concepts "conscience" and "belief". There are well-grounded fears that their inclusion may impermissibly encroach upon the right to freedom of expression. Some of the amici make insightful submissions in this regard.[165] However, since this is not an issue that is before this Court for confirmation and, particularly in view of the absence of judgments on this point by the High Court and the Supreme Court of Appeal, it is not in the interests of justice to engage with this issue.[166] It is best left to Parliament to deal with.

Adding analogous grounds

[129] What bears consideration next is the inclusion of analogous grounds. It must be emphasised that various thresholds must be cleared in order for grounds to constitute analogous grounds for the purposes of section 1 of the Equality Act. These thresholds resonate with the very purpose of combating hate speech through legislative regulation. As was articulated in *Whatcott*:

> "Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to

[164] In 2017, section 1(a) of the Equality Act was amended to include a prohibition of discrimination on the grounds of HIV/AIDS status. For purposes of the Equality Act, HIV/AIDS status "includes actual or perceived presence in a person's body of the Human Immunodeficiency Virus (HIV) or symptoms or Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status".

[165] Thus, the Holocaust Foundation contends that repeating the section 9(3) prohibited grounds and adding HIV/AIDS status is appropriate, since the Equality Act, through the constitutional injunction of section 9(4) of the Constitution, is obliged to prevent unfair discrimination. Therefore, so the argument goes, section 10(1) is mandated and required by the Constitution itself. The Freedom Institute, on the other hand raises concerns in respect of overbreadth. Its difficulty lies with the expansion of the wide-ranging acts that may constitute hate speech, as opposed to the broadness of the grounds the hate speech is based on. A restrictive interpretation of the additional prohibited grounds is advocated by MMA. It cited as an example that "belief" should not be understood to include political ideology. MMA also contends for a causal link between the speech and the prohibited ground – to be "based on" one of the prohibited grounds, the prohibited grounds must be the "reason for the speech".

[166] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) at paras 18-24.

> delegitimise group members in the eye of the majority, reducing their social standing and acceptance within society."[167]

[130] It bears emphasis that the prohibition of hate speech seeks to protect against the dissemination of hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society. Provisions prohibiting hate speech can be contrasted with our law around unfair discrimination. In that context, listed grounds are grounds where the "dignity assessment" is presumed to have already been done – our jurisprudence tells us that discrimination on the basis of a listed ground is presumed to be unfair. This is based on past experiences, historic suffering or systemic disadvantage. As a result, in the unfair discrimination scenario, the onus shifts onto the respondent to show that discrimination on a listed ground is not unfair. In this regard, listed grounds differ from analogous grounds, where unfairness must be shown.

[131] In this way. section 1(b) of the Equality Act plays a similar role to that of the unfairness requirement as espoused in *Harksen*. It is necessary to reiterate the provisions of section 1(b):

> "(b) any other ground where discrimination based on that other ground—
>
> (i) causes or perpetuates systemic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

[132] One must guard against a narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, to demean persons by denying them their inherent humanity

[167] *Whatcott* above n 98 at para 71.

and dignity. There is often a complex relationship between these grounds. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.[168]

[133] While it is essential that targeted groups are not overly broad, it is equally clear that, since section 10(1)(b) does encapsulate and require certain elements that underscore the importance of membership, systemic discrimination and the undermining of dignity, this does not leave the door open for the addition of analogous grounds that allow for an unjustifiable limitation of the right to freedom of expression.

[134] For these reasons, the expansion of the listed grounds to include analogous grounds, does not render the definition of prohibited grounds unconstitutional. The extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition. Accordingly, I conclude that the limitation is proportionate in an open and democratic society. The challenge based on a limitation of section 16 of the Constitution must therefore fail.

"Hurtful"

[135] The potential vagueness of the term "hurtful" will be discussed below, but a separate question is whether it limits section 16 of the Constitution. Section 10(1)(c) of the Equality Act prohibits words that "promote or propagate hatred", and this may be interpreted to accord with the prohibition of the "advocacy of hatred" in section 16(2). Similarly, the classification in section 10 of hate speech as speech that is "harmful or incite[s] harm" may be read to align with the prohibition against the "advocacy of hatred" in section 16(2)(c) of the Constitution. However, there is no similar exercise that can be conducted to read "hurtful" constitutionally, as section 16 has no similar

[168] *Harksen* above n 69 at para 47.

wording. Furthermore, the term is clearly broader than what is envisioned in section 16, which focuses on war, violence and hatred, and not merely speech that hurts. Therefore, on this count, section 10 limits section 16 of the Constitution, and a justification analysis is required.

Justification analysis

[136] The term "hurtful" and the inclusion of "sexual orientation" in the Equality Act extend the regulation of expression beyond expression envisaged in section 16(2) of the Constitution. *Islamic Unity* holds that "[w]here the State extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution".[169] Similarly, here the Equality Act is certainly past what is envisaged in section 16(2), so that there is a limitation of the section 16(1) right. Therefore, that takes us directly to the justification analysis.

[137] Section 36(1) provides:

> "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."

[138] It is necessary to apply the various factors in section 36 to each limitation caused by section 10(1). These are the limitations brought about firstly through the inclusion

[169] *Islamic Unity* above n 86 at para 32.

of the term "hurtful", and secondly through the inclusion of the prohibited ground of "sexual orientation".

Can the inclusion of the term "hurtful" be justified?

[139] With respect to the term "hurtful", much of what is relevant to the justification analysis has already been discussed. The importance of the right to freedom of expression on the one hand and the importance of the purpose of the limitation of that right, namely to protect the equally important rights to equality and dignity by way of prohibiting hate speech, have been expounded. So too, the nature and extent of the limitation and the relation between the limitation and its purpose. However, it is here that the usefulness of the term "hurtful" becomes less clear. If speech that is merely hurtful is considered hate speech, this sets the bar rather low. It is an extensive limitation. The prohibition of hurtful speech would certainly serve to protect the rights to dignity and equality of hate speech victims. However, hurtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group, and it is that which is being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose is not proportionate.

[140] This finding on proportionality suggests that section 10(1) leads to an unjustifiable limitation of section 16 of the Constitution, and that there might be less restrictive means to achieve the purpose of limiting hate speech. Most obviously, the term "hurtful" – which is the source of the limitation – can merely be excised from the provision.

[141] The existence of less restrictive means to achieve the purpose is a strong indication that the limitation occasioned by the term "hurtful" in section 10 cannot be justified. However, as this Court held in *Economic Freedom Fighters*:

> "While less restrictive means is where most limitations analyses may 'stand or fall', one must not conflate this leg with the broader balancing proportionality enquiry as envisaged by section 36(1)."[170]

[142] Further in *Mamabolo* this Court explicated:

> "Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."[171]

[143] Rather, as this Court explained in *Economic Freedom Fighters*:

> "All relevant factors must be taken into account to measure what is reasonable and justifiable, and the factors listed in section 36(1)(a)-(e) are not exhaustive. What is required is for a court to 'engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'."[172]

[144] Following this approach, we must consider the important constitutional purpose of limiting freedom of expression in the case of hate speech. We must also consider the fact that the limitation of "hurtful" speech goes beyond the justified limitation of hate speech, and that it is possible to avoid this by merely excising "hurtful". In the circumstances, the term "hurtful" leads to an unjustifiable limitation on freedom of speech, and is therefore unconstitutional.

[170] *Economic Freedom Fighters* above n 78 at para 146.

[171] *Mamabolo* above n 77 above n 80 at para 49. See also *Case* above n 56 at para 49:

> "To determine whether a law is overbroad, a court must consider the means used (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad."

[172] *Economic Freedom Fighters* above n 78 at para 91.

Can the inclusion of "sexual orientation" as a prohibited ground be justified?

[145] The inclusion of "sexual orientation" as a prohibited ground in section 10(1) read with section 1 of the Equality Act stands on an entirely different footing. The justification analysis must begin in the same way: the importance of the right to freedom of expression – as explored above – must be considered, and the limitation of this right in the case of hate speech remains central to the protection of the rights to dignity and equality. However, the prohibition of hate speech based on sexual orientation is entirely proportional to its purpose. It would not be possible to protect the rights of the LGBT+ community without prohibiting hate speech based on sexual orientation. Less restrictive means of achieving this purpose have not been suggested, and are in fact inconceivable.

[146] All of the section 36 factors therefore point towards justifiability, and so the inclusion of the prohibited ground of "sexual orientation" in section 10(1) of the Equality Act, read with section 1, is a justified limitation of section 16(1).

Rule of law challenge

[147] Section 10 of the Equality Act has also been challenged on the ground that it is vague. If it is, it would be contrary to the rule of law, and would therefore violate section 1(c) of the Constitution. More specifically, what we must consider is whether in section 10 the terms "hurtful", "harmful" and "to incite harm" are vague.

General principles

[148] The rule of law requires, amongst other things, that laws be coherent, clear, stable and practicable.[173] This Court has noted that "[i]t is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be

[173] Fuller *The Morality of Law* (Yale University Press, New Haven and London 1964) at 63-5.

articulated clearly and in a manner accessible to those governed by the rules".[174] In *Affordable Medicines Trust*, this Court held:

> "The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."[175]

[149] This Court expounded that the "ultimate question is whether, so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them".[176] In *Hyundai* it was explained that "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".[177] And in *Opperman*, this Court observed that "[l]aws must of course be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law, a founding value of our Constitution. For the 'law' to 'rule', it must be reasonably clear and certain."[178] This Court continued:

> "Before constitutional compliance can be evaluated, a court must attribute a meaning to a provision. If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen. But if the interpretation that emerges from the wording and context results in constitutional invalidity a court has to make a finding of unconstitutionality. The fact that a constitutionally compliant interpretation cannot reasonably be given to it, does not necessarily lead to vagueness. A finding of vagueness based on a perceived inability to interpret the provision would in any event

[174] *Dawood* above n 70 at para 47 and *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 22.

[175] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

[176] Id at para 109.

[177] *Hyundai* above n 54 at para 24, citing *Dawood* above n 70 at paras 47-8.

[178] *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 46, citing *Affordable Medicines Trust* above n 175 at para 108; *Bertie Van Zyl* above n 174 at para 100; and *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 27.

> also result in constitutional invalidity. And an interpretation that renders the provision meaningless would lead nowhere. It would be futile."[179]

[150] In international law, a previous United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated that,[180] amongst other things, domestic laws prohibiting hate speech ought to be "[p]rovided by law, which is clear, unambiguous, precisely worded and accessible to everyone".

[151] Mere shoddy draftsmanship, impreciseness and opacity are, however, not in themselves conclusive. In order to reach a point of "a constitutionally fatal level of vagueness . . . the provision [must be] utterly meaningless and unworkable".[181] If, applying the ordinary rules of construction, there are words or phrases in an impugned section or other related sections that allow for a constitutionally viable meaning, effect should be given to that interpretation.[182] The lack of reasonable certainty has serious concomitant effects. It erodes the ability of ordinary citizens to exercise their agency and autonomy when they express themselves. It undermines the norm-changing impact of the law; and undermines the deterrent goal of hate speech prohibitions. What bears consideration next are the specific challenges presented by the impugned provision in respect of vagueness.

[179] *Opperman* id at para 42.

[180] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression "Hate Speech and Incitement of Hatred" (7 September 2012) A/67/357 at para 41(a) and para 41 which states that:

> "The Special Rapporteur wishes to underscore that any restriction imposed on the right to freedom of expression, on the basis of any of the above-mentioned instruments, must comply with the three-part test of limitations to the right, as stipulated in Article 19 (3) of the Covenant. This means that any restriction must be:
>
> '(a) Provided by law, which is clear, unambiguous, precisely worded and accessible to everyone;
>
> (b) Proven by the State as necessary and legitimate to protect the rights or reputation of others, national security or public order, public health or morals;
>
> (c) Proven by the State as the least restrictive and proportionate means to achieve the purported aim.'''

[181] *Opperman* above n 178 at para 51, citing *South African Liquor Traders Association* above n 189 at para 26.

[182] Id at paras 52-5.

Does the impugned provision suffer from vagueness?

[152] Various interpretations for "harmful" and "hurtful" were suggested above. However, they all present problems. In particular, it is not clear whether there is any difference in their meaning or whether one is a component of the other. If one accepts that "hurtful" only refers to emotional or psychological harm and "harmful" refers to physical harm, the immediate difficulty is that expression cannot in and of itself "be harmful" in the physical sense. Put differently, words cannot intrinsically cause physical harm. The SAHRC's proposed definition of these concepts does not appear to me to create any distinction between them. Substantively they appear to mean the same thing. Intricate semantic contortions are required to reach separate meanings in them, and even then, the attainment of separate meanings seems to be a bridge too far. This tortuous interpretative odyssey usurps the Legislature's legislative functions and offends the principle of separation of powers, which I have expanded on above. It falls foul of the caution expressed in *Islamic Unity*:

> "It is obvious that the interpretation contended for would entail a complicated exercise of interpreting the very wide language of the relevant part of clause 2(a) in the light of the very concise and specific provisions of section 16(2)(c). Whilst this process might assist in determining whether particular expression can be regarded as hate speech, I fail to see how its meaning can coincide with that of the impugned clause on any reasonable interpretation, without being unduly strained."[183]

[153] In addition, if one were to accept the interpretations advanced by the SAHRC and the Minister, they clearly set an unacceptably low standard, so that hate speech prohibitions may unduly encroach on freedom of expression. On a conjunctive reading the threshold will naturally be elevated by the requirements in the other paragraphs, but the paragraphs will then suffer from superfluity. It is a well-established principle of statutory interpretation that "effect is given to every word or phrase in it . . . 'a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall

[183] *Islamic Unity* above n 86 at para 41.

be superfluous, void or insignificant'".[184] Furthermore, while some of the parties contended that "hurtful", considered in the context of section 10 as a whole, would elevate what is required, the problem with this line of reasoning is that it naively expects the other components of the already convoluted and torturous provision to alleviate the difficulties. The section cannot, as it were, be expected to pull itself up by its bootstraps.

[154] In contradistinction to the insuperable difficulties with "hurtful", the term "harmful" does not suffer the same fate. On a plain reading, "harmful" can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group.[185] In *Keegstra*, the Supreme Court of Canada eloquently summed up two types of interconnected harms that resonate with the ethos of our diverse constitutional democracy, namely "harm done to the members of the target group" and harm done to "society at large".[186] Similarly, in *SAHRC v Khumalo,* three types of harm were illustrated.[187] First, "the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group". Second, the type of harm experienced by the target group which includes "demoralisation and physiological hurt" and "the harm caused from responding in kind thereby creating a spiral of invective back and forth". And third, "harm to the social cohesion in South African society" which can undermine our nation building project.

[155] In conclusion: it seems to me that the use of "hurtful" on a conjunctive reading appears to be redundant and that contributes to the lack of clarity of the impugned section. This is because "harmful" can be understood as emotional and psychological

[184] *S v Weinberg* 1979 (3) SA 89 (A) at 98 quoted in De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants Limited, 2000) at 167 fns 18-9. This principle was reiterated by this Court in *Case* above n 56 at para 57 citing *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436. More recently this principle was affirmed in *Opperman* above n 178 at para 99.

[185] See Meyerson *Rights Limited, Freedom of Expression, Religion and the South African Constitution* (Juta & Co Ltd, Cape Town 1997) at 130. Meyerson opines that, "[I]t would not be constitutionally legitimate to punish someone for inciting someone else to cause harm if the harmful act thus incited were not itself an offence – or, at the very least, a civil wrong."

[186] *Keegstra* above n 100 at 746-7.

[187] *SAHRC v Khumalo* above n 128 at paras 95-7.

harm that severely undermines the dignity of the targeted group as well as physical harm. "Hurtful" could reasonably mean the same as "harmful", that is including both emotional and psychological harm. There is no need to have both. A possible solution would be for "hurtful" to mean something other than emotional harm, something less perhaps. However, due to the conjunctive reading,[188] a claimant would have to show that in addition to being emotionally harmed, she was also hurt. It may be so that harmful communication is always hurtful. If it is, the removal of the word "hurtful" due to its vagueness avoids any redundancy that can lead to a lack of clarity.

[156] Despite our best endeavours to fashion a constitutionally compliant and reasonably understandable meaning of the impugned section, there is no saving grace for its problematic parts. Given the troubling meaning of "hurtful" in the context of section 10(1), it is difficult for ordinary citizens to know whether their conduct will be "hurtful" or "harmful" and thus whether it meets the threshold required by section 10. Consequently, for all the reasons cited, the term "hurtful" in section 10(1)(a) is vague and so breaches the rule of law. For that reason, its inclusion in section 10(1) results in the section suffering from vagueness and it is thus unconstitutional.

[157] Section 10(1)(a) is irredeemably vague and undermines the rule of law, as enshrined in section 1(c) of the Constitution. It thus does not pass constitutional muster. However, this does not render the entire provision unconstitutional. It is possible to excise the constitutionally offensive part from the rest of the provision.

Remedy on the constitutional challenge

[158] Section 172(1) of the Constitution is clear that a court may go further than just declaring certain conduct or laws unconstitutional. There is a further obligation to grant

[188] As mentioned above, it would also be fatal on the disjunctive approach, since it would prohibit merely hurtful speech.

effective remedies.[189] In terms of this provision this Court may supplement a declarator with an order that it considers just and equitable.

[159] Having concluded that a part of the impugned section is not constitutionally compliant, the question is what to do with the bad part of the impugned provision and how to salvage the good. To recap: the troublesome concept "hurtful" is irreparably vague and also constitutes an unjustifiable limitation of section 16 of the Constitution. The possible severance of this invalid part of the provision bears consideration.

[160] In *Coetzee*, this Court said:

> "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 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?"[190]

[161] Having concluded that it was not possible to sever the offending provisions from the relevant legislation without intruding into the legislative sphere, the Court in *Coetzee* opted to excise the provisions that dealt with the imprisonment of civil debtors. The Court was satisfied that, "in severing such provisions, the object of the statute will nevertheless remain to be carried out".[191] Here, severing the word "hurtful" from the impugned provision would still enable the objects of the Equality Act to be fulfilled.

[189] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) at para 68 and *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19.

[190] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

[191] Id at para 17.

[162] As stated, Parliament is obliged by section 9(4) of the Constitution to enact legislation to prohibit hate speech. The order of invalidity will be suspended for 24 months for Parliament to do the necessary. In the interim, section 10(1) must read:

> "Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."

[163] How does this affect the complaint against Mr Qwelane? That is the next aspect for consideration.

The complaint against Mr Qwelane

[164] The second issue to be determined by this Court is whether Mr Qwelane's statements constituted hate speech. In doing so, we need to consider this issue in light of the finding that paragraph (a) of section 10(1) of the Equality Act has been rendered unconstitutional. The unfortunate passing of Mr Qwelane does not render this aspect moot. The complaint in terms of the Equality Act, that the rights of the LGBT+ community had been infringed by the impugned statement, is live and must still be adjudicated.

[165] It cannot be gainsaid that members of the LGBT+ community were impacted negatively by Mr Qwelane's article. In unequivocally aligning himself with former President Mugabe's abominable comments, Mr Qwelane vilified the LGBT+ community as "animals", as less than human beings. Their sexual preferences and relations were degraded to bestiality. Mr Qwelane's article unabashedly exuded his loathing and revulsion. This can be discerned from:

(a) its accusation that members of the LGBT+ community are responsible for the rapid decay of societal values;

(b) the insinuation that their sexual choices are against the natural order of things and akin to bestiality;

(c) the claim that the LGBT+ community should be denied the right to marry; and

(d) its insinuation that they are not worthy of the protection of the law.

[166] An added aggravation is Mr Qwelane's deplorable subversion of the Constitution. He said:

> "I do pray that someday a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the Constitution of this country, to excise those sections which give licence to men 'marrying' other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to 'marry' an animal, and argues that this Constitution 'allows' it?"

[167] Mr Qwelane was also unflinchingly unapologetic in the article, saying "[a]nd by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views. I will write no letters to the commission either, explaining my thoughts." This intransigence was perpetuated in his papers in which he contended that the article is "merely an expression of belief and opinion".

[168] It is critical to note that unfair discrimination against the LGBT+ community is not a new phenomenon. It has been prevalent since time immemorial. As Cameron opined extra-curially: "Apartheid South Africa was viciously homophobic – like most of the rest of Africa still is. Gays and lesbians, transgender people and gender non-conforming persons were persecuted, assaulted, sidelined and jailed."[192] In this sense, ensuring the LGBT+ community has equal social standing and public assurance against exclusion, hostility, discrimination and violence is part of the greater transformative constitutional project. In the present matter, homophobic speech is part and parcel of the broader system of homophobia and transphobia in South African society which includes both hate speech and violent crimes perpetrated against members of the LGBT+ community. Homophobic speech is not only problematic because it

[192] Cameron "How We Internalise Stigma and Shame" *GroundUp* (4 December 2019) available at https://www.groundup.org.za/article/how-we-internalise-stigma-and-shame/.

injures the dignity of members of the LGBT+ community, but also because it contributes to an environment that serves to delegitimise their very existence and their right to be treated as equals. Hate speech regulation in our country ought in my view to be grounded in the express anti-racist and anti-sexist tenets of our Constitution. In this respect, our jurisprudence is unique because of its strong pronouncements on the transformative nature of the Constitution and its aim of eradicating the remnants of our colonial and apartheid past.

[169] It is appropriate to consider how, on previous occasions, our courts (and those around the world) have confronted the grotesque nature of unfair discrimination against the LGBT+ community. In *National Coalition II*, this Court observed:

> "Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays."[193]

[170] In the Supreme Court of Appeal, Cameron JA explained:

> "Gays and lesbians are a permanent minority in society which in the past has suffered from patterns of disadvantage. . . . The impact of discrimination on them has been

[193] *National Coalition II* above n 68 at para 42.

> severe, affecting their dignity, personhood and identity at many levels. The sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely that, viewed as individuals or in their same sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be."[194]

[171] We were reminded in *Prinsloo* that:

> "Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin, one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[195]

[172] Jurisprudence emanating from the ECHR acknowledges hate speech committed against the LGBT+ community. *Vejdeland* concerned the applicants' conviction for distributing in a secondary school approximately 100 leaflets containing homophobic statements.[196] The ECHR found that the statements constituted serious and prejudicial allegations. It accepted that the applicants' right to freedom of expression was infringed by the conviction and so the key issues were whether the infringement was prescribed by law and whether it was necessary in a democratic society. The ECHR found that it met these two requirements: it pursued a legitimate aim, namely protecting the rights and reputation of others, and it was not disproportionate.[197] Therefore, there was no

[194] *Fourie* above n 67 at para 13.

[195] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31.

[196] *Vejdeland* above n 95 at para 8. The statements in the leaflets were, in particular, allegations that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS.

[197] Id at paras 49 and 59. This was pursuant to Article 8 of the Swedish Penal Code, which pursued a legitimate aim of protecting the reputation and rights of others.

violation of Article 10 (the right to freedom of expression). Critically, the ECHR found that:

> "[I]nciting hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'."[198]

[173] More recently, in *Beizaras and Levickas*, two young men in a relationship posted a photograph on Facebook of them kissing, which prompted hundreds of online hate comments.[199] Notably, the ECHR found the prevalence of hate speech on the internet against the LGBT+ community to be widespread. The ECHR reiterated that "pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."[200] The ECHR also noted that when it comes to hate speech, "this equally applies to hate speech against persons' sexual orientation and sexual life. The [ECHR] observe[d] that the instant case concerned undisguised calls to attack the applicants' physical and mental integrity."[201] In sum, the ECHR required the state to investigate online homophobic comments promoting violence against the LGBT+ community.

[174] In *Lilliendahl*,[202] the applicant had been convicted of having made hateful comments against the LGBT+ community. The ECHR found that hate speech against the LGBT+ community falls outside the scope of the right to freedom of expression, which is provided for in Article 10 of the Convention. Interestingly, the ECHR

[198] Id at para 55.

[199] *Beizaras and Levickas v Lithuania* no 41288/15, ECHR, 2020 at paras 9-10.

[200] Id at para 107.

[201] Id at para 128.

[202] *Lilliendahl v Iceland*, no 29297/18, ECHR, 2020.

provided guidance on infringements in terms of Article 17 (prohibition of the abuse of rights), read with Article 10.[203] Ultimately, the ECHR found that the comments constituted hate speech. It further found that, because of this, there had been a reasonable and justifiable limitation of the right to freedom of expression. Importantly, the case reveals the ECHR's continued condemnation of hate speech against the LGBT+ community.

[175] The Supreme Court of Canada expounded the type of harm inflicted by discrimination in respect of sexual orientation:

> "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 perpetuates 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."[204]

[203] Id, where the ECHR observed at para 33-6 that:

> "'Hate speech', as this concept has been construed in the Court's case-law, falls into two categories. . . . The first category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10. As explained above, the Court does not consider the applicant's comments to fall into this category. The second category is comprised of 'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict. . . . Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression. In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery."

[204] *Vriend v Alberta* [1998] 1 SCR 493 at para 102. See also: *Norris v Republic of Ireland*, no 10581/83, ECHR, 1998 at para 21.

[176] In the context of hate speech, what must objectively be determined is whether Mr Qwelane's article could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred. Important considerations in making that determination include: who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred. These are the considerations I discuss next.

Identity and status of the speaker

[177] As alluded to, Mr Qwelane enjoyed significant stature as a seasoned journalist, commentator of note and a veteran of the liberation struggle. He wrote to a predominantly Black township audience which took his views seriously. In his oral evidence before the Equality Court, Mr Viljoen tellingly observed that at that time it was "damn hard to be gay and stay in a township". There was a clear intent on the part of Mr Qwelane to instigate hatred towards the LGBT+ community amongst his audience.

Context

[178] Mr Qwelane's article was written against the backdrop of the vile remarks of former President Mugabe,[205] which were approvingly referred to, as well as extraordinarily high levels of violent attacks against members of the LGBT+ community. This Court cannot ignore this backdrop.

The impact of the speech

[179] The speech comprised unadulterated vilification and debasement of the LGBT+ community. Its reach and impact were undeniably extensive and devastating. Apart from the flood of complaints to both the SAHRC and the Press Ombud, there is the deeply touching testimony of the witnesses, in particular Ms MN and Professor Nel.

[205] He called gays and lesbians "animals", said that they were "sub-human" and likened them to pigs and dogs. Former President Mugabe also called on Zimbabweans to hand gays and lesbians over to the police if they saw them in the street.

In this regard, Ms MN during her testimony lamented that she prays that courts come to their rescue and punish those who harass and unfairly discriminate against members of the LGBT+ community. Her poignant complaint that the law does not care about people like her has been alluded to. Ms MN testified that the physical attacks on her were accompanied by hateful slurs, while onlookers merely stood around and said that she must defend herself because she acts like a man. She testified that the unrelenting victimisation that she had experienced in her life made her feel that she had died inside, that she had "*passed on*".

[180] Professor Nel's evidence graphically demonstrated the strong correlation between the prevalence and tolerance of hate speech in a society and the prevalence of hate crimes perpetrated against vulnerable groups. He highlighted the severe effects of hate speech on the dignity and self-esteem of vulnerable groups, particularly LGBT+ communities, culminating in increased incidences of depression and suicide. Professor Nel explained that hate speech results in its victims internalising the notions of inferiority engendered by hate speech, suffering from self-doubt and self-loathing and often experiencing suicidal ideation. It prevents them from becoming fully functioning members of society.

The likelihood of inflicting harm and propagating hatred

[181] The likelihood of the infliction of harm and the propagation of hatred is beyond doubt. It is difficult to conceive of a more egregious assault on the dignity of LGBT+ persons. Their dignity as human beings, deserving of equal treatment, was catastrophically denigrated by a respected journalist in a widely read article. The harm to not only the already vulnerable targeted LGBT+ community, but also to our constitutional project, which seeks to create an inclusive society based on the values of equality, dignity and acceptance, is indubitable.

[182] There can be no question then that Mr Qwelane's statements constitute hate speech. Mr Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds of sexual orientation. He was publicly

advocating for law reform in favour of the removal of legal protection for same sex marriages. In doing so, he was undermining the protection of the law, the dignity of the LGBT+ community and the public assurance of their decent treatment in society as human beings of equal worth, deserving of human dignity and the protection and enjoyment of the full panoply of rights under the Constitution. In the context of hate speech prohibitions as civil remedies, a proven causal link between the hateful expression and actual harm is not required. But should Mr Qwelane have incurred liability for this hate speech?

Mr Qwelane's liability in terms of the recrafted section 10(1)

[183] The Supreme Court of Appeal invoked the criminal law maxim *nullum crimen nulla poena sine lege* (no crime, no punishment without law), based on the principle of legality, for its finding that Mr Qwelane cannot be held liable on the SAHRC's complaint based on the new section crafted by it. It found that the only solution for the hate speech complaint was that Mr Qwelane should consider seeking rapprochement.

[184] In this matter, there is no impingement of the rule of law and the principle of legality and the typical concerns regarding retrospectivity are not triggered. This is simply because the recrafted provision does not take away or deprive Mr Qwelane of any existing rights that he had. Before the amendment of section 10, the elements of hate speech that were clear and constitutional were those in section 10(1)(b) and (c), and it is these provisions that Mr Qwelane fell foul of. Therefore, he could not have claimed that he was prejudiced by not knowing the law beforehand and that the hate speech prohibition did not exist at the time the article was published. The Holocaust Foundation correctly contended that "Mr Qwelane cannot be heard to say that he could not have been expected to know that he was susceptible to a hate speech complaint" and that "it is accordingly in no way analogous to a situation where a harsher punishment is imposed retrospectively for a crime committed, contrary to the reasoning of the [Supreme Court of Appeal]". During oral argument Mr Qwelane's counsel offered very little resistance to this proposition regarding the complaint.

[185] It would not be just and equitable to allow a person to escape liability in these circumstances. To do so would be to deny an effective remedy to vindicate the rights of the LGBT+ community. Other concerns are attenuated, since the Supreme Court of Appeal did not interfere with the evidence and factual findings of the High Court, except in one respect – the causal link between the article and physical or verbal attacks. As explained, a causal link is not a requirement for hate speech. In the premises, there are no cogent reasons for this Court not to accept the factual findings of the Equality Court.

[186] Based on both the old provision and the recrafted one, therefore, the article indubitably constitutes hate speech.

[187] As the preceding discussion shows, in the context of hate speech prohibitions as civil remedies, a proven causal link between the hateful expression and actual harm is not required. In any event, while a causal link between the article and specific incidents of violence against the LGBT+ community could not be demonstrated by the evidence, it cannot be gainsaid that the article penned by Mr Qwelane undeniably constituted vilification and detestation. The detailed narration of that evidence clearly illustrates the point.

[188] There is a reasonable apprehension that Mr Qwelane's article fueled the already burning anti-LGBT+ fire (alluded to by the witnesses) and galvanised further discrimination, hostility and violence against the LGBT+ community. This is particularly pertinent when, as contended by the Psychological Society, one considers the context when the article was published in 2008, which in turn fortifies a reasonable apprehension of harm. The Psychological Society points out that that period was characterised by an "extraordinarily high level of violence against the LGBT+ community in South Africa".

[189] The question of a causal link has an additional layer when considering hate speech against vulnerable targeted groups and their lived experiences. We must be mindful that there is reluctance in reporting incidences of violence perpetuated against

members of the LGBT+ community, owing to concerns regarding secondary victimisation, the fear of future targets and the lack of trust in the criminal justice system.[206] Therefore, the lack of clear evidence of subsequent linked violent or hostile acts should not negate the harsh reality of vilification, enmity and outright hatred that members of the LGBT+ community continue to experience as a result of the article and similar types of hateful expressions.

[190] In the circumstances, just and equitable considerations demand that a person in the position of Mr Qwelane should not evade liability on the basis that a causal link between their article and incitement of harm cannot be established. Our law does not require such proof. It would adversely affect the rights of the LGBT+ community where there was a full-frontal attack on their dignity as a targeted group and the chipping away of the assurance of their place in society and protection against hostility, discrimination and violence. And, as explicated, none of Mr Qwelane's prevailing rights are being taken away. The Equality Court was correct in upholding the complaint against Mr Qwelane.

[191] A consequence of Mr Qwelane's unfortunate passing is that the personal apology ordered by the Equality Court can no longer be realised. The High Court ordered that:

> "The applicant (Mr Qwelane) is ordered to tender to the LGBTI community (in particular the homosexuals) an unconditional written apology within thirty (30) days of this order, or within such other period as the parties may agree pursuant to negotiation and settlement of the contents of such apology. The apology shall be published in one edition of a national Sunday newspaper of the same or equal circulation as the Sunday Sun newspaper, in order to receive the same publicity as the

[206] This was noted by Professor Nel as summarised by the Supreme Court of Appeal at para 30 of its judgment. In addition, see Brodie *Femicide in South Africa* (Kwela Books, Cape Town 2020) at 140-8, which draws up a timeline of media reporting of violence and hate crimes committed against black lesbians. The author notes at 137: "This may have been one of the factors which had inhibited, or which continued to inhibit, reporting of hate crimes and violence against lesbians – because of the very real fear that identifying the victim in one crime would implicate other women, and that this might make them targets in turn." Brodie proceeds to note at 139 that the reported cases in the news "did not represent the extent of such killings in real life. But, as above, there were a number of real deterrents to reporting these types of crimes (the risk of others becoming targets, the poor treatment of lesbian complainants by the police)."

> offending statements. Thereafter proof of the publication of such written apology shall be furnished to this Court immediately."

[192] That personal remedy against the late Mr Qwelane falls away and it cannot be enforced against third parties. So too, the order of the High Court that the Registrar refer the matter to the Commissioner of the South African Police Service for investigation in terms of section 21(4) of the Equality Act.[207] But, for the reasons set out, the declaratory order of the High Court stands on a completely different footing. It reads:

> "The offending statements (made against the LGBTI community) are declared to be hurtful; harmful, incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000."

[193] The test whether the article amounts to hate speech is objective. And the declaratory order will not only ameliorate the severe harm caused to the LGBT+ community, but will also convey a strong message of deterrence in respect of hate speech directed against members of that community. That harm is ongoing. The impugned article continues to contribute to an environment of intolerance that may further normalise discrimination and violence against members of the LGBT+ community. Without unequivocal disapprobation from this Court, the contents of the article will continue to haunt those who were – and are – the targets of its hatred.

[194] A declaratory order will meet the key objectives of the Equality Act, namely not to punish the wrongdoer, but to provide remedies for victims of hate speech and to vindicate their constitutional rights. Mr Qwelane's passing did not remove the harm caused by the article he penned. Relief under the Equality Act goes beyond holding

[207] The relevant order was at para 70.4 of the High Court judgment, and read as follows:

> "The Registrar of this Court is ordered to have the proceedings of this matter transcribed immediately and forwarded, with a copy of the revised judgment, to the Commissioner of the South African Police Service for further investigation as envisaged in section 21(4) of the Promotion of Equality and Prevention of Unfair Promotion Act 4 of 2000 (the Equality Act)."

perpetrators accountable – it feeds into our constitutional project of building a more tolerant society. Mr Qwelane's passing does not nullify this project. Furthermore, that order will ensure that South Africa complies with its obligations under international law to prohibit hate speech. Section 38 of the Constitution and section 21 of the Equality Act empower this Court to order any appropriate relief. The two sections do not envisage that a declaratory order is parochial or personal to the immediate parties – it does not require the parties to do anything and may therefore still be granted. Consequently, we must make a declaratory order. Of course, because of the excision of section 10(1)(a), it must differ from that of the High Court.

Costs

[195] The Equality Court ordered costs against Mr Qwelane and held that the *Biowatch*[208] principle did not persuade it to the contrary. The SAHRC supported this costs order and its underlying motivation. It seeks a similar order before us in respect of the costs here and in the preceding Courts. The reasons for the adverse costs order, as explicated by the Equality Court are:

(a) the manner in which Mr Qwelane litigated in that Court by electing not to come to Court and then failing to produce medical certificates in respect of his alleged ill-health, which he advanced as a reason for his absence from Court;

(b) his lack of remorse and grievous undermining of the Constitution; and

(c) the egregious nature and extent of his abuse of free speech.

[196] The Equality Court and the Supreme Court of Appeal erred in not applying *Biowatch*.[209] This misdirection by the Equality Court and the Supreme Court of Appeal warrants interference with the costs orders. I am of the view that, in properly applying

[208] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[209] Id.

Biowatch,[210] the costs order ought to reflect that Mr Qwelane is partially successful in his constitutional challenge of the impugned provision in this Court. But it bears consideration that this partial success emanates from Mr Qwelane's egregious violation of the rights of others that resulted in the Equality Court complaint, ultimately leading to him going to Court to vindicate his own rights. Mr Qwelane is consequently entitled to half of his costs. The State, represented here by the Minister, should pay those costs.

[197] As far as the SAHRC is concerned, it is a Chapter 9 institution constitutionally enjoined to strengthen democracy, and is bound to litigate where necessary to vindicate the rights of victims and survivors. As stated, the SAHRC received the largest number of complaints it has ever received in respect of a single incident. Given the circumstances, a costs order against the SAHRC is not appropriate and the Supreme Court of Appeal's adverse order against it should be set aside. The High Court's costs order in favour of the SAHRC must be confirmed and that should also be the outcome in respect of its costs in this Court and in the Supreme Court of Appeal.

Conclusion

[198] Section 10(1)(a) of the Equality Act is declared unconstitutional for vagueness and unjustifiably limiting section 16 of the Constitution. The Supreme Court of Appeal's declaration of invalidity is confirmed only to that limited extent. The complaint against Mr Qwelane is sustained, as section 10(b) and (c) of the Equality Act are constitutional, and it is in terms of these provisions that Mr Qwelane's abhorrent article constitutes hate speech.

Order

The following order is made:

1. In respect of the confirmation application:

[210] Id at para 43. The Court noted that "the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the State, and if unsuccessful, each party should pay its own costs."

(a) The declaration of constitutional invalidity of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) made by the Supreme Court of Appeal is confirmed in the terms set out in paragraph (b).

(b) It is declared that section 10(1) of the Equality Act is inconsistent with section 1(c) of the Constitution and section 16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word "hurtful" in the prohibition against hate speech.

(c) The declaration of constitutional invalidity referred to in paragraph (b) takes effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the constitutional defect giving rise to constitutional invalidity.

(d) During the period of suspension of the order of constitutional invalidity, section 10 of the Equality Act will read as follows:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

(e) The interim reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.

(f) Should Parliament fail to cure the defect within the period of suspension, the interim reading-in in paragraph (d) will become final.

2. In respect of the appeal against the hate speech complaint:

(a) Leave to appeal is granted.

(b) The appeal by the South African Human Rights Commission is upheld.

(c) The order of the Supreme Court of Appeal is set aside.

(d) The offending statements (made against the LGBT+ community) are declared to be harmful, and to incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.

3. In respect of the constitutionality challenge, the Minister of Justice is ordered to pay half of Mr Jonathan Dubula Qwelane's costs in the High Court, the Supreme Court of Appeal and this Court.

4. Mr Jonathan Dubula Qwelane is ordered to pay the costs of the South African Human Rights Commission in the High Court, the Supreme Court of Appeal and in this Court.

For the Applicant:	M Oppenheimer and DC Ainslie instructed by Jurgens Bekker Attorneys
For the First Respondent:	T Ngcukaitobi SC, M Moropa, O Mokgotho and T Ramogale instructed by Bowman Gilfillan Incorporated
For the Second Respondent:	K Pillay SC and N Nyembe instructed by State Attorney, Pretoria
For the First Amicus Curiae:	W Trengove SC, C Steinberg, I Cloete and M Salukazana instructed by Edward Nathan Sonnenbergs Incorporated
For the Second Amicus Curiae:	K Hofmeyr, D Smit, H Cassim and L Buchler instructed by Webber Wentzel
For the Third Amicus Curiae:	F Hobden and B Pithey instructed by Women's Legal Centre Trust
For the Fourth Amicus Curiae:	B Meyersfeld instructed by Lawyers for Human Rights
For the Fifth Amicus Curiae:	SL Shangisa SC and MM Ka-Siboto instructed by Freedom of Expression Institute
For the Sixth Amicus Curiae:	AA Gabriel SC, B Winks and K Raganya instructed by Rupert Candy Incorporated
For the Seventh Amicus Curiae:	G Marcus SC, S Budlender SC and M Mbikiwa instructed by Webber Wentzel

Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters *Appellants*

v.

Her Majesty The Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Alberta Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALE), the Women's Legal Education and Action Fund (LEAF), the Foundation for Equal Families, the Canadian Human Rights Commission, the Canadian Labour Congress, the Canadian Bar Association — Alberta Branch, the Canadian Association of Statutory Human Rights Agencies (CASHRA), the Canadian AIDS Society, the Alberta and Northwest Conference of the United Church of Canada, the Canadian Jewish Congress, the Christian Legal Fellowship, the Alberta Federation of Women United for Families, the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association *Interveners*

INDEXED AS: VRIEND *v.* ALBERTA

File No.: 25285.

1997: November 4; 1998: April 2.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

* Sopinka J. took no part in the judgment.

Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, le Gay and Lesbian Community Centre of Edmonton Society et Dignity Canada Dignité for Gay Catholics and Supporters *Appelants*

c.

Sa Majesté la Reine du chef de l'Alberta et le procureur général de la province de l'Alberta *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario, l'Alberta Civil Liberties Association, Égalité pour les gais et les lesbiennes (EGALE), le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ), la Foundation for Equal Families, la Commission canadienne des droits de la personne, le Congrès du travail du Canada, l'Association du Barreau canadien — Division de l'Alberta, l'Association canadienne des commissions et conseils des droits de la personne (ACCDP), la Société canadienne du SIDA, l'Alberta and Northwest Conference of the United Church of Canada, le Congrès juif canadien, le Christian Legal Fellowship, l'Alberta Federation of Women United for Families, l'Evangelical Fellowship of Canada et la Focus on the Family (Canada) Association *Intervenants*

RÉPERTORIÉ: VRIEND *c.* ALBERTA

N° du greffe: 25285.

1997: 4 novembre; 1998: 2 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci, Major et Bastarache.

* Le juge Sopinka n'a pas pris part au jugement.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Practice — Standing — Charter challenge — Teacher's employment at college terminated because of his homosexuality — Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination — Whether appellants have standing to challenge legislative provisions other than those relating to employment — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Constitutional law — Charter of Rights — Application — Legislative omission — Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination — Whether Charter applies to legislation — Canadian Charter of Rights and Freedoms, s. 32(1) — Individual's Rights Protection Act, R.S.A. 1980, c. I-2.

Constitutional law — Charter of Rights — Equality rights — Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination — Whether non-inclusion of sexual orientation infringes right to equality — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Constitutional law — Charter of Rights — Remedies — Reading in — Non-inclusion of sexual orientation in provincial human rights legislation infringing right to equality — Whether sexual orientation should be read into legislation — Constitution Act, 1982, s. 52 — Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

The appellant V was employed as a laboratory coordinator by a college in Alberta, and was given a permanent, full-time position in 1988. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. In 1990, in response to an inquiry by the president of the college, V disclosed that he was homosexual. In early 1991, the college's board of governors adopted a position statement on homosexuality, and shortly thereafter, the president of the college requested V's resignation. V declined to resign, and his employment was terminated by the college. The sole reason given was his non-compliance with the college's policy on homosexual prac-

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Pratique — Qualité pour agir — Contestation fondée sur la Charte — Professeur congédié par un collège en raison de son homosexualité — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — Les appelants ont-ils la qualité pour contester les dispositions législatives ne portant pas sur l'emploi? — Charte canadienne des droits et libertés, art. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Droit constitutionnel — Charte des droits — Application — Omission du législateur — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — La Charte s'applique-t-elle à la législation? — Charte canadienne des droits et libertés, art. 32(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — La non-inclusion de l'orientation sexuelle porte-t-elle atteinte au droit à l'égalité? — Dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Droit constitutionnel — Charte des droits — Réparation — Interprétation large — La non-inclusion de l'orientation sexuelle dans la législation provinciale sur les droits de la personne porte atteinte au droit à l'égalité — L'orientation sexuelle devrait-elle être tenue pour incluse dans la législation? — Loi constitutionnelle de 1982, art. 52 — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

L'appelant V a été engagé comme coordonnateur de laboratoire par un collège albertain, et il a obtenu un poste permanent à temps plein en 1988. Pendant toute la durée de son emploi, son travail a été évalué favorablement, et son rendement lui a valu des augmentations de salaire et de l'avancement. En 1990, en réponse à une demande formulée par le président de l'établissement, V a révélé qu'il était homosexuel. Au début de 1991, le conseil des gouverneurs du collège a adopté un énoncé de principe sur l'homosexualité et, peu après, le président de l'établissement a demandé à V de démissionner. Ce dernier a refusé, et il a été congédié par le collège. Le seul motif donné pour justifier le congédiement était

tice. V appealed the termination and applied for reinstatement, but was refused. He attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation, but the Commission advised V that he could not make a complaint under the *Individual's Rights Protection Act* (*IRPA*), because it did not include sexual orientation as a protected ground. V and the other appellants filed a motion in the Court of Queen's Bench for declaratory relief. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Canadian Charter of Rights and Freedoms*. She ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as a prohibited ground of discrimination. The majority of the Court of Appeal allowed the Alberta government's appeal.

Held (Major J. dissenting in part on the appeal): The appeal should be allowed and the cross-appeal dismissed. The preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* infringe s. 15(1) of the *Charter* and the infringement is not justifiable under s. 1. As a remedy, the words "sexual orientation" should be read into the prohibited grounds of discrimination in these provisions.

Per Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.: The appellants have standing to challenge the validity of the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*. A serious issue as to constitutional validity is raised with respect to all these provisions. V and the other appellants also have a direct interest in the exclusion of sexual orientation from all forms of discrimination. Finally, the only other way the issue could be brought before the Court with respect to the sections of the Act other than those relating to employment would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. Since the provisions are all very similar and do not depend on any particular factual context in order

le non-respect de la politique du collège en matière d'homosexualité. V en a appelé du congédiement et a demandé sa réintégration, ce qui lui a été refusé. Il a tenté de saisir l'Alberta Human Rights Commission d'une plainte dans laquelle il soutenait que son employeur avait fait preuve de discrimination à son égard en raison de son orientation sexuelle mais la commission a informé V qu'il ne pouvait formuler une plainte en application de l'*Individual's Rights Protection Act* (l'*IRPA*) parce que l'orientation sexuelle ne figurait pas au nombre des motifs de distinction illicites. V et les autres appelants ont présenté une requête à la Cour du Banc de la Reine de l'Alberta en vue d'obtenir un jugement déclaratoire. Le juge de première instance a conclu que l'omission de protéger les citoyens contre la discrimination fondée sur l'orientation sexuelle constituait une violation injustifiée de l'art. 15 de la *Charte canadienne des droits et libertés*. Elle a ordonné que «l'orientation sexuelle» soit tenue pour un motif de distinction illicite pour l'application des art. 2(1), 3, 4, 7(1), 8(1) et 10 de l'*IRPA*. L'appel du gouvernement a été accueilli par la majorité des juges de la Cour d'appel de l'Alberta.

Arrêt (le juge Major est dissident en partie quant au pourvoi principal): Le pourvoi principal est accueilli et le pourvoi incident est rejeté. Le préambule et les art. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) de l'*IRPA* portent atteinte au par. 15(1) de la *Charte* et cette violation n'est pas justifiable en vertu de l'article premier. À titre de mesure corrective, les mots «orientation sexuelle» sont tenus pour inclus dans les motifs de distinction interdits par ces dispositions.

Le juge en chef Lamer et les juges Gonthier, Cory, McLachlin, Iacobucci et Bastarache: Les appelants ont qualité pour contester la validité du préambule et des art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*IRPA*. Une question sérieuse est soulevée quant à la validité constitutionnelle de chacune de ces dispositions. V et les autres appelants ont également un intérêt direct à l'égard de l'exclusion de l'orientation sexuelle de l'ensemble des formes de discrimination. Enfin, la seule autre façon dont notre Cour pourrait être saisie de la question relativement aux autres dispositions de la Loi qui ne concernent pas l'emploi serait d'attendre qu'une personne soit victime de discrimination fondée sur l'orientation sexuelle en matière d'habitation, de consommation et de services, etc. et qu'elle conteste la validité de la disposition pertinente. Ce serait non seulement peu rentable sur le plan des ressources judiciaires, mais également injuste pour les personnes en cause, parce qu'elles auraient à surmonter les obstacles que sont les délais, les frais et la vulnérabilité personnelle face à la discrimina-

to resolve their constitutional status, there is really no need to adduce additional evidence regarding the provisions concerned with discrimination in areas other than employment.

The respondents' argument on their cross-appeal that because this case concerns a legislative omission, s. 15 of the *Charter* should not apply pursuant to s. 32 cannot be accepted. The threshold test that there be some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis has been met. The fact that it is the underinclusiveness of the *IRPA* which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive excercise of authority. Where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. Since the constitutional challenge here concerns the *IRPA*, it deals with laws that regulate private activity, and not the acts of a private entity.

While this Court has not adopted a uniform approach to s. 15(1), in this case any differences in approach would not affect the result. The essential requirements of a s. 15(1) analysis will be satisfied by inquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground. The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction that is simultaneously drawn along two different lines. The first is the distinction between homosexuals and other disadvantaged groups which are protected under the Act. Gays and lesbians do not have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not. The second, more fundamental, distinction is between homosexuals and heterosexuals. The exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. The *IRPA* in its underinclusive state therefore denies substantive equality to the former group. By reason of its underinclusive-

Dans le cadre de leur pourvoi incident, les intimés font valoir que, parce qu'il s'agit en l'espèce d'une omission du législateur, l'art. 15 de la *Charte* ne devrait pas s'appliquer en vertu de l'art. 32. Cet argument ne saurait être accepté. Il a été satisfait au critère préliminaire selon lequel il doit s'agir d'un «domaine relevant de [la] législature» lequel est le véritable sujet de l'analyse fondée sur la *Charte*. Que la portée trop limitative de l'*IRPA* soit en cause ne change rien au fait qu'en l'espèce, l'examen fondé sur la *Charte* porte sur l'acte législatif. En outre, le libellé de l'art. 32 n'a pas pour effet de limiter l'application de la *Charte* aux actions positives qui empiètent sur des droits ou à l'exercice abusif d'un pouvoir. Lorsque, comme en l'espèce, la contestation vise une loi adoptée par la législature qui est trop limitative en raison d'une omission, l'art. 32 ne devrait pas être interprété comme faisant obstacle à l'application de la *Charte*. Appliquer la *Charte* à l'*IRPA* ce n'est pas appliquer la *Charte* à une activité privée. Comme la présente contestation constitutionnelle porte sur l'*IRPA*, elle porte sur une loi qui régit l'activité privée et non sur les actes d'une entité privée.

Bien que la Cour n'ait pas adopté une approche uniforme à l'égard du par. 15(1), dans la présence espèce, toute différence pouvant exister quant à la méthode à employer relativement à cette disposition ne modifie en rien le résultat. Les exigences essentielles d'une analyse fondée sur le par. 15(1) sont respectées si l'on se demande premièrement s'il y a une distinction entraînant la négation du droit à l'égalité devant la loi ou dans la loi ou la négation du droit à la même protection ou au même bénéfice de la loi et, deuxièmement, si cette négation constitue une discrimination fondée sur un motif énuméré au par. 15(1) ou sur un motif analogue. L'omission de l'orientation sexuelle dans les motifs de distinction interdits par l'*IRPA* établit une distinction et ce, sous deux rapports différents simultanément. Premièrement, une distinction est créée entre les homosexuels, d'une part, et les autres groupes défavorisés qui bénéficient de la protection de l'*IRPA*, d'autre part. Les homosexuels ne jouissent pas d'une égalité formelle par rapport aux autres groupes protégés puisque ceux-ci sont explicitement inclus alors que les homosexuels ne le sont pas. Deuxièmement, une distinction encore plus fondamentale est créée entre homosexuels et hétérosexuels. Compte tenu de la réalité sociale de la discrimi-

ness, the *IRPA* creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which is analogous to those enumerated in s. 15(1). This, in itself, is sufficient to conclude that discrimination is present and that there is a violation of s. 15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. The distinction has the effect of imposing a burden or disadvantage not imposed on others and of withholding benefits or advantages which are available to others. The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal complaint of discrimination and seek a legal remedy. The dire and demeaning effect of denial of access to remedial procedures is exacerbated by the fact that the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status. Furthermore, the exclusion from the *IRPA*'s protection sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. Perhaps most important is the psychological harm which may ensue from this state of affairs. In excluding sexual orientation from the *IRPA*'s protection, the government has, in effect, stated that "all persons are equal in dignity and rights" except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1).

The exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly cannot be saved under s. 1 of the *Charter*. Where a law has been found to violate the *Charter* owing to underinclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered in determining whether the legislative objective is pressing and substantial. In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission at issue here, the respondents have failed to discharge their evidennation exercée contre les homosexuels, l'exclusion de l'orientation sexuelle a de toute évidence un effet disproportionné sur ces derniers par comparaison avec les hétérosexuels. En raison de sa portée trop limitative, l'*IRPA* nie donc aux homosexuels le droit à l'égalité réelle. De par sa portée trop limitative, l'*IRPA* crée une distinction qui conduit à la négation du droit au même bénéfice et à la même protection de la loi sur le fondement de l'orientation sexuelle reconnue comme étant une caractéristique personnelle analogue à celles énumérées au par. 15(1). En soi, cela suffit pour conclure qu'il y a discrimination et, partant, violation de l'art. 15. Les effets discriminatoires graves de l'exclusion de l'orientation sexuelle de la Loi renforcent cette conclusion. La distinction a pour effet d'imposer un fardeau ou un désavantage non imposé à d'autres et d'empêcher l'accès aux avantages offerts à d'autres. Le premier effet, et le plus évident, de l'exclusion de l'orientation sexuelle est que les homosexuels victimes de discrimination fondée sur leur orientation sexuelle n'ont pas accès à la procédure établie par l'*IRPA* pour le dépôt d'une plainte officielle et l'obtention d'une réparation. Les conséquences tragiques et infamantes du non-accès aux recours prévus par la Loi sont exacerbées tant par l'exclusion de tout recours au civil que par le peu de succès qu'ont eu les homosexuels qui ont tenté d'obtenir réparation pour une discrimination fondée sur l'orientation sexuelle en invoquant d'autres motifs comme le sexe ou l'état matrimonial. Au surplus, l'exclusion de la protection de l'*IRPA* envoie à tous les Albertains le message qu'il est permis et, peut-être même, acceptable d'exercer une discrimination à l'égard d'une personne sur le fondement de son orientation sexuelle. La souffrance psychologique est peut-être le préjudice le plus important dans de telles circonstances. En soustrayant à l'application de l'*IRPA* la discrimination fondée sur l'orientation sexuelle, le gouvernement a, dans les faits, affirmé que «chacun joui[t] de la même dignité et des mêmes droits», sauf les homosexuels. Un tel message, même s'il n'est que tacite, ne peut que violer le par. 15(1).

L'exclusion de l'orientation sexuelle de l'*IRPA* ne satisfait pas aux exigences du critère énoncé dans l'arrêt *Oakes* et elle ne peut, en conséquence, être sauvegardée en vertu de l'article premier de la *Charte*. Lorsqu'une loi est jugée contraire à la *Charte* en raison de sa portée trop limitative, c'est tout à la fois la loi considérée dans son ensemble, les dispositions contestées ainsi que l'omission elle-même qu'il y a lieu de prendre en compte pour déterminer si l'objectif législatif est urgent et réel. Vu l'absence d'observations quant à la nature urgente et réelle de l'objectif de l'omission en cause, les

tiary burden and their case must thus fail at this first stage of the s. 1 analysis. Even if the evidentiary burden were to be put aside in an attempt to discover an objective for the omission from the provisions of the *IRPA*, the result would be the same. Where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights.

Far from being rationally connected to the objective of the impugned provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. With respect to minimal impairment, the Alberta government has failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the *IRPA*. Gay men and lesbians do not have any, much less equal, protection against discrimination on the basis of sexual orientation under the *IRPA*. The exclusion constitutes total, not minimal, impairment of the *Charter* guarantee of equality. Finally, since the Alberta government has failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, there is no proportionality between the attainment of the legislative goal and the infringement of the appellants' equality rights.

Reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. When determining whether reading in is appropriate, courts must have regard to the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Charter*. The purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Reading sexual orientation into the offending sections would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the legislature. It is reasonable to assume that, if the legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen.

intimés ne se sont pas déchargés de leur fardeau de preuve et partant, n'ont pas réussi à franchir cette première étape de l'analyse fondée sur l'article premier. Même si la question du fardeau de la preuve était écartée en vue de discerner l'objectif de l'omission dans les dispositions de l'*IRPA*, le résultat serait le même. Lorsque, comme en l'espèce, une omission du législateur est à première vue l'antithèse des principes qu'incarne le texte dans son ensemble, on ne peut dire que l'omission correspond à un objectif qui ressort de la Loi elle-même et qui serait urgent et réel, de telle sorte que soit justifiée une dérogation à des droits constitutionnellement protégés.

Loin d'être rationnellement liée à l'objectif des dispositions contestées, l'exclusion de l'orientation sexuelle en est l'antithèse. En ce qui concerne l'atteinte minimale, le gouvernement de l'Alberta n'a pas démontré qu'il avait un motif raisonnable d'exclure l'orientation sexuelle de l'*IRPA*. Cette loi ne confère aux homosexuels aucune protection contre la discrimination fondée sur l'orientation sexuelle, et encore moins une protection égale. Une telle exclusion constitue une atteinte intégrale, et non minimale, à la garantie d'égalité énoncée par la *Charte*. Enfin, comme le gouvernement de l'Alberta n'a pas établi quels bienfaits cette exclusion apportait à la promotion et à la protection des droits de la personne, il n'y a aucune proportionnalité entre l'atteinte de l'objectif législatif et la violation des droits à l'égalité des appelants.

L'inclusion de l'orientation sexuelle dans les dispositions contestées de l'*IRPA* par le recours à l'interprétation large est la meilleure façon de corriger la portée trop limitative de ce texte de loi. Lorsqu'ils examinent s'il convient d'adopter une interprétation large, les tribunaux doivent tenir compte de deux principes directeurs, savoir le respect du rôle du législateur et le respect des objets de la *Charte*. L'*IRPA* a pour objet de reconnaître et de protéger la dignité inhérente et les droits inaliénables des Albertains au moyen de l'élimination des pratiques discriminatoires. Le recours à l'interprétation large en vue d'inclure l'orientation sexuelle dans les dispositions fautives réduirait l'empiétement sur cet objet manifestement légitime et éviterait ainsi une ingérence excessive dans le domaine législatif, alors que l'annulation de l'*IRPA* priverait tous les Albertains de la protection des droits de la personne, ce qui modifierait indûment l'économie de la loi adoptée par le législateur. Il est raisonnable de supposer que si le législateur avait eu le choix entre renoncer à faire passer une loi relative aux droits de la personne ou en adopter une qui interdit la discrimination fondée sur l'orientation sexuelle, il aurait opté pour la deuxième solution.

Per L'Heureux-Dubé J.: There is general agreement with the results reached by the majority. While the approach to s. 1 is agreed with, the proper approach to s. 15(1) of the *Charter* is reiterated. Section 15(1) is first and foremost an equality provision. Its primary mission is the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. A s. 15(1) analysis should focus on uncovering and understanding the negative impacts of a legislative distinction (including, as in this case, a legislative omission) on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. Integral to an inquiry into whether a legislative distinction is discriminatory within the meaning of s. 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and the nature of the interest which is affected in terms of its importance to human dignity and personhood. Section 15(1) is engaged when the impact of a legislative distinction deprives an individual or group who has been found to be disadvantaged in our society of the law's protection or benefit in a way which negatively affects their human dignity and personhood. Although the presence of enumerated and analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined.

Le juge L'Heureux-Dubé: Il y a accord pour l'essentiel avec les résultats auxquels parviennent les juges majoritaires. Bien que l'approche retenue à l'égard de l'article premier de la *Charte* recueille l'adhésion, la façon dont il convient d'aborder le par. 15(1) est exposée à nouveau. Cette disposition porte d'abord et avant tout sur l'égalité. Son objet principal est de favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération. L'analyse fondée sur le par. 15(1) devrait principalement viser à détecter et à comprendre les incidences négatives d'une distinction législative (et notamment, comme en l'espèce, d'une omission du législateur) sur la personne ou le groupe concerné plutôt qu'à déterminer si la distinction en cause a été établie sur le fondement d'un motif énuméré ou d'un motif analogue. L'un des éléments essentiels de l'examen permettant de déterminer si une distinction législative est, de fait, discriminatoire au sens du par. 15(1) est la prise en compte tant de la vulnérabilité sociale de l'individu ou du groupe concerné que de la nature du droit auquel il est porté atteinte quant à son importance pour la dignité humaine et la personnalité. Le paragraphe 15(1) entre en jeu lorsque l'impact négatif d'une distinction législative prive une personne ou un groupe considéré comme défavorisé dans notre société de la protection et du bénéfice de la loi en portant atteinte à leur dignité humaine et à leur personnalité. Quoique les motifs énumérés et les motifs analogues puissent être des indices de discrimination ou puissent même donner naissance à une présomption de discrimination, c'est à l'étape de l'appréciation de la nature de la personne ou du groupe lésé qu'ils doivent être examinés.

Per Major J. (dissenting in part on the appeal): The Alberta legislature, having enacted comprehensive human rights legislation that applies to everyone in the province, has then selectively denied the protection of the Act to people with a different sexual orientation. No explanation was given for the exclusion of sexual orientation from the prohibited grounds of discrimination in the *IRPA*, and none is apparent from the evidence filed by the province. The inescapable conclusion is that there is no reason to exclude that group from s. 7 of the *Charter* and to do so is discriminatory and offends their constitutional rights. The words "sexual orientation" should not be read into the Act, however. While reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group, that assumption cannot be made in this appeal. It may be that the legislature would

Le juge Major (dissident en partie quant au pourvoi principal): La législature de l'Alberta, après avoir adopté une loi d'ensemble sur les droits de la personne qui s'applique à toutes les personnes dans la province, a ensuite sélectivement privé de la protection de la Loi les personnes ayant une orientation sexuelle différente. Aucune explication n'a été fournie pour expliquer l'exclusion de l'orientation sexuelle des motifs de distinction interdits par l'*IRPA* et aucune ne ressort de la preuve déposée par la province. On doit inévitablement conclure qu'il n'existe aucune raison d'exclure le groupe visé de l'art. 7 de la *Charte*, et une telle exclusion est discriminatoire et porte atteinte aux droits constitutionnels des personnes faisant partie de ce groupe. Toutefois, il n'y a pas lieu de recourir à l'interprétation large pour inclure les mots «orientation sexuelle» dans la Loi. Bien que l'interprétation large puisse être appropriée lorsque l'on peut supposer sans risque d'erreur que

prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination. As well, there are numerous ways in which the legislation could be amended to address the underinclusiveness. As an alternative, given the legislature's persistent refusal to protect against discrimination on the basis of sexual orientation, it may be that it would choose to override the *Charter* breach by invoking the notwithstanding clause in s. 33 of the *Charter*. In any event it should lie with the elected legislature to determine this issue. The offending sections should be declared invalid and the legislature provided with an opportunity to rectify them. The declaration of invalidity should be restricted to the employment-related provisions of the *IRPA*, namely ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, *Charter* cases should not be considered in a factual vacuum. The declaration of invalidity should be suspended for one year to allow the legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

Cases Cited

By Cory and Iacobucci JJ.

Referred to: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Haig v. Canada* (1992), 9 O.R. (3d) 495; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, leave to appeal refused, [1986] 1 S.C.R. xii; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Andrews v. Law Society of*

la législature elle-même aurait remédié à la nature trop limitative de la Loi en étendant le bénéfice ou la protection en question au groupe antérieurement exclu, une telle supposition ne peut être faite dans le présent pourvoi. Il se peut que la législature préfère ne pas adopter de loi sur les droits de la personne plutôt que d'en adopter une qui comprenne l'orientation sexuelle comme motif de distinction illicite. De même, il existe de nombreuses façons de modifier la Loi afin de remédier à sa nature trop limitative. Par ailleurs, vu qu'elle persiste dans son refus d'accorder une protection contre la discrimination fondée sur l'orientation sexuelle, la législature pourrait décider d'invoquer l'art. 33 de la *Charte* pour protéger les dispositions qui portent atteinte à la *Charte*. De toute façon, il incombe à la législature, dont les membres ont été élus, de trancher cette question. Il est préférable de déclarer invalides les dispositions fautives et de permettre à la législature de les rectifier. La déclaration d'invalidité devrait être limitée aux dispositions de l'*IRPA* relatives à l'emploi, soit les art. 7(1), 8(1) et 10. Bien que les mêmes conclusions puissent s'appliquer aux autres dispositions de l'*IRPA*, les causes fondées sur la *Charte* ne doivent pas être examinées dans un vide factuel. La déclaration d'invalidité devrait être suspendue pour une période d'un an afin de permettre à la législature de modifier les dispositions contestées de façon à les rendre conformes à ses obligations constitutionnelles.

Jurisprudence

Citée par les juges Cory et Iacobucci

Arrêts mentionnés: *Egan c. Canada*, [1995] 2 R.C.S. 513; *Haig c. Canada* (1992), 9 O.R. (3d) 495; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, autorisation de pourvoi refusée, [1986] 1 R.C.S. xii; *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236; *Mahe c. Alberta*, [1990] 1 R.C.S. 342; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839; *Haig c. Canada*, [1993] 2 R.C.S. 995; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Tremblay c. Daigle*,

British Columbia, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Romer v. Evans*, 116 S.Ct. 1620 (1996); *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

By L'Heureux-Dubé J.

Referred to: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

By Major J. (dissenting in part)

Schachter v. Canada, [1992] 2 S.C.R. 679; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1), 32(1), 33.
Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 3(1).
Constitution Act, 1867, s. 92.
Constitution Act, 1982, s. 52(1).
Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(*a*)(i) [ad. 1995, c. 22, s. 6].
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, c. H-11.7, preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, R.S.A. 1980, c. I-2 [am. 1985, c. 33; am. 1990, c. 23], preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, S.A. 1972 [am. 1980, c. 27], c. 2, ss. 2, 3, 4, 6, 7, 9.
Individual's Rights Protection Amendment Act, 1996, S.A. 1996, c. 25.

[1989] 2 R.C.S. 530; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358; *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241; *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219; *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Romer c. Evans*, 116 S.Ct. 1620 (1996); *R. c. Oakes*, [1986] 1 R.C.S. 103; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Newfoundland (Human Rights Commission) c. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

Citée par le juge L'Heureux-Dubé

Arrêts mentionnés: *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Miron c. Trudel*, [1995] 2 R.C.S. 418.

Citée par le juge Major (dissident en partie)

Schachter c. Canada, [1992] 2 R.C.S. 679; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *MacKay c. Manitoba*, [1989] 2 R.C.S. 357.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 15(1), 24(1), 32(1), 33.
Code criminel, L.R.C. (1985), ch. C-46, art. 718.2*a*)(i) [aj. 1995, ch. 22, art. 6].
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, ch. H-11.7, préambule, art. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, R.S.A. 1980, ch. I-2 [mod. 1985, ch. 33; mod. 1990, ch. 23], préambule, art. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, S.A. 1972 [mod. 1990, ch. 27], ch. 2, art. 2, 3, 4, 6, 7, 9.
Individual's Rights Protection Amendment Act, 1996, S.A. 1996, ch. 25.
Loi canadienne sur les droits de la personne, L.R.C. (1985), ch. H-6, art. 3(1).
Loi constitutionnelle de 1867, art. 92.
Loi constitutionnelle de 1982, art. 52(1).

Authors Cited

Ackerman, Bruce. "The Rise of World Constitutionalism" (1997), 83 *Va. L. Rev.* 771.

Alberta. *Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*. Edmonton: Alberta Community Development, 1995.

Alberta Hansard, November 22, 1972, at p. 80-63.

Alberta Human Rights Review Panel. *Equal in Dignity and Rights: A Review of Human Rights in Alberta*. Edmonton: The Panel, 1994.

Beatty, David M. *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press, 1995.

Beatty, David M. "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131.

Beatty, David M., ed. *Human Rights and Judicial Review: A Comparative Perspective*. Dordrecht, The Netherlands: Martinus Nijhoff, 1994.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. New Haven: Yale University Press, 1986.

Black, William. "*Vriend*, Rights and Democracy" (1996), 7 *Constitutional Forum* 126.

Dickson, R. G. B. "Keynote Address", in *The Cambridge Lectures 1985*. Montréal: Yvon Blais, 1985.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.

Hogg, Peter W., and Allison A. Bushell. "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75.

Jackman, Martha. "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661.

Khullar, Ritu. "*Vriend*: Remedial Issues for Unremedied Discrimination" (1998), 7 *N.J.C.L.* 221.

Knopff, Rainer, and F. L. Morton. *Charter Politics*. Scarborough, Ont.: Nelson Canada, 1992.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Wall & Thompson, 1994.

Monahan, Patrick. "A Theory of Judicial Review Under the Charter", in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Toronto: Carswell, 1987, 97.

O'Byrne, Shannon K., and James F. McGinnis. "Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996), 34 *Alta. L. Rev.* 892.

Peacock, Anthony A., ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform,*

Doctrine citée

Ackerman, Bruce. «The Rise of World Constitutionalism» (1997), 83 *Va. L. Rev.* 771.

Alberta. *Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*. Edmonton: Alberta Community Development, 1995.

Alberta Hansard, November 22, 1972, at p. 80-63.

Alberta Human Rights Review Panel. *Equal in Dignity and Rights: A Review of Human Rights in Alberta*. Edmonton: The Panel, 1994.

Beatty, David M. *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press, 1995.

Beatty, David M. «Law and Politics» (1996), 44 *Am. J. Comp. L.* 131.

Beatty, David M., ed. *Human Rights and Judicial Review: A Comparative Perspective*. Dordrecht, The Netherlands: Martinus Nijhoff, 1994.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. New Haven: Yale University Press, 1986.

Black, William. «*Vriend*, Rights and Democracy» (1996), 7 *Forum constitutionnel* 126.

Dickson, R. G. B. «Keynote Address», in *The Cambridge Lectures 1985*. Montréal: Yvon Blais, 1985.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.

Hogg, Peter W., and Allison A. Bushell. «The *Charter* Dialogue Between Courts and Legislatures» (1997), 35 *Osgoode Hall L.J.* 75.

Jackman, Martha. «Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*» (1996), 34 *Osgoode Hall L.J.* 661.

Khullar, Ritu. «*Vriend*: Remedial Issues for Unremedied Discrimination» (1998), 7 *N.J.C.L.* 221.

Knopff, Rainer, and F. L. Morton. *Charter Politics*. Scarborough, Ont.: Nelson Canada, 1992.

Mandel, Michael. *La Charte des droits et libertés et la judiciarisation du politique au Canada*. Traduit de l'anglais par Hervé Juste. Québec: Boréal, 1996.

Monahan, Patrick. «A Theory of Judicial Review Under the Charter», in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Toronto: Carswell, 1987, 97.

O'Byrne, Shannon K., and James F. McGinnis. «Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta» (1996), 34 *Alta. L. Rev.* 892.

Peacock, Anthony A., ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform,*

Interpretation, and Theory. Don Mills, Ont.: Oxford University Press, 1996.

Pothier, Dianne. "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113.

Renke, Wayne N. "Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1997, release 4).

Rogerson, Carol. "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness". In Robert J. Sharpe, ed. *Charter Litigation*. Toronto: Butterworths, 1987, 233.

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1996), 181 A.R. 16, 116 W.A.C. 16, 37 Alta. L.R. (3d) 364, [1996] 5 W.W.R. 617, 132 D.L.R. (4th) 595, 18 C.C.E.L. (2d) 1, 96 C.L.L.C. ¶230-013, 25 C.H.R.R. D/1, 34 C.R.R. (2d) 243, [1996] A.J. No. 182 (QL), reversing a decision of the Court of Queen's Bench (1994), 152 A.R. 1, 18 Alta. L.R. (3d) 286, [1994] 6 W.W.R. 414, 94 C.L.L.C. ¶17,025, 20 C.H.R.R. D/358, [1994] A.J. No. 272 (QL), finding that the omission of protection against discrimination on the basis of sexual orientation from the Alberta *Individual's Rights Protection Act* was an unjustified violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Appeal allowed, Major J. dissenting in part. Cross-appeal dismissed.

Sheila J. Greckol, *Douglas R. Stollery, Q.C.*, *June Ross* and *Jo-Ann R. Kolmes*, for the appellants.

John T. McCarthy, Q.C., and *Donna Grainger*, for the respondents.

Brian Saunders and *James Hendry*, for the intervener the Attorney General of Canada.

Robert E. Charney, for the intervener the Attorney General for Ontario.

Shirish P. Chotalia and *Brian A. F. Edy*, for the intervener the Alberta Civil Liberties Association.

Interpretation, and Theory. Don Mills, Ont.: Oxford University Press, 1996.

Pothier, Dianne. «The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak» (1996), 7 *Forum constitutionnel* 113.

Renke, Wayne N. «Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice» (1996), 34 *Alta. L. Rev.* 925.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1997, release 4).

Rogerson, Carol. «The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness». In Robert J. Sharpe, ed. *Charter Litigation*. Toronto: Butterworths, 1987, 233.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (1996), 181 A.R. 16, 116 W.A.C. 16, 37 Alta. L.R. (3d) 364, [1996] 5 W.W.R. 617, 132 D.L.R. (4th) 595, 18 C.C.E.L. (2d) 1, 96 C.L.L.C. ¶230-013, 25 C.H.R.R. D/1, 34 C.R.R. (2d) 243, [1996] A.J. No. 182 (QL), qui a infirmé une décision de la Cour du Banc de la Reine (1994), 152 A.R. 1, 18 Alta. L.R. (3d) 286, [1994] 6 W.W.R. 414, 94 C.L.L.C. ¶17,025, 20 C.H.R.R. D/358, [1994] A.J. No. 272 (QL), portant que l'omission d'une protection contre la discrimination fondée sur l'orientation sexuelle dans l'*Individual's Rights Protection Act* constitue une violation injustifiée du par. 15(1) de la *Charte canadienne des droits et libertés*. Pourvoi principal accueilli, le juge Major est dissident en partie. Pourvoi incident rejeté.

Sheila J. Greckol, *Douglas R. Stollery, c.r.*, *June Ross* et *Jo-Ann R. Kolmes*, pour les appelants.

John T. McCarthy, c.r., et *Donna Grainger*, pour les intimés.

Brian Saunders et *James Hendry*, pour l'intervenant le procureur général du Canada.

Robert E. Charney, pour l'intervenant le procureur général de l'Ontario.

Shirish P. Chotalia et *Brian A. F. Edy*, pour l'intervenante l'Alberta Civil Liberties Association.

Cynthia Petersen, for the intervener Equality for Gays and Lesbians Everywhere (EGALE).

Gwen Brodsky and *Claire Klassen*, for the intervener Women's Legal Education and Action Fund (LEAF).

Raj Anand and *Andrew M. Pinto*, for the intervener the Foundation for Equal Families.

William F. Pentney and *Patricia Lawrence*, for the intervener the Canadian Human Rights Commission.

Steven M. Barrett and *Vanessa Payne*, for the intervener the Canadian Labour Congress.

James L. Lebo, Q.C., *James F. McGinnis* and *Julia C. Lloyd*, for the intervener the Canadian Bar Association — Alberta Branch.

Thomas S. Kuttner and *Rebecca Johnson*, for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA).

R. Douglas Elliott and *Patricia A. LeFebour*, for the intervener the Canadian AIDS Society.

Dale Gibson, for the intervener the Alberta and Northwest Conference of the United Church of Canada.

Lyle S. R. Kanee, for the intervener the Canadian Jewish Congress.

Barbara B. Johnston, for the intervener Christian Legal Fellowship.

Dallas K. Miller, for the intervener the Alberta Federation of Women United for Families.

Gerald D. Chipeur and *Cindy Silver*, for the interveners the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association.

The judgment of Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci and Bastarache was delivered by

Cynthia Petersen, pour l'intervenante Égalité pour les gais et les lesbiennes (EGALE).

Gwen Brodsky et *Claire Klassen*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ).

Raj Anand et *Andrew M. Pinto*, pour l'intervenante la Foundation for Equal Families.

William F. Pentney et *Patricia Lawrence*, pour l'intervenante la Commission canadienne des droits de la personne.

Steven M. Barrett et *Vanessa Payne*, pour l'intervenant le Congrès du travail du Canada.

James L. Lebo, c.r., *James F. McGinnis* et *Julia C. Lloyd*, pour l'intervenante l'Association du Barreau canadien — Division de l'Alberta.

Thomas S. Kuttner et *Rebecca Johnson*, pour l'intervenante l'Association canadienne des commissions et conseils des droits de la personne (ACCDP).

R. Douglas Elliott et *Patricia A. LeFebour*, pour l'intervenante la Société canadienne du SIDA.

Dale Gibson, pour l'intervenante l'Alberta and Northwest Conference of the United Church of Canada.

Lyle S. R. Kanee, pour l'intervenant le Congrès juif canadien.

Barbara B. Johnston, pour l'intervenant le Christian Legal Fellowship.

Dallas K. Miller, pour l'intervenante l'Alberta Federation of Women United for Families.

Gerald D. Chipeur et *Cindy Silver*, pour les intervenants l'Evangelical Fellowship of Canada et la Focus on the Family (Canada) Association.

Version française du jugement du juge en chef Lamer et des juges Gonthier, Cory, McLachlin, Iacobucci et Bastarache rendu par

CORY AND IACOBUCCI JJ. — In these joint reasons Cory J. has dealt with the issues pertaining to standing, the application of the *Canadian Charter of Rights and Freedoms*, and the breach of s. 15(1) of the *Charter*. Iacobucci J. has discussed s. 1 of the *Charter*, the appropriate remedy, and the disposition.

CORY J.

The *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 ("*IRPA*" or the "Act"), was first enacted in 1973. When the legislation was introduced in 1972, the Minister responsible commented upon and emphasized the nature and importance of the Act, stating: "it is . . . the commitment of this legislature that we regard The Individual's Rights Protection Act in primacy to any other legislative enactment. . . . [W]e have committed ourselves to suggest that Alberta is not the place for partial rights or half freedoms, but that Alberta hopefully will become the place where each and every man and woman will be able to stand on his own two feet and be recognized as an individual and not as a member of a particular class" (*Alberta Hansard*, November 22, 1972, at p. 80-63). These are courageous words that give hope and comfort to members of every group that has suffered the wounds and indignities of discrimination. Has this laudable commitment been met?

I. Factual Background

A. *History of the IRPA*

The *IRPA* prohibits discrimination in a number of areas of public life, and establishes the Human Rights Commission to deal with complaints of discrimination. The *IRPA* as first enacted (S.A. 1972, c. 2) prohibited discrimination in public notices (s. 2), public accommodation, services or facilities (s. 3), tenancy (s. 4), employment practices (s. 6), employment advertising (s. 7) or trade union membership (s. 9) on the basis of race, religious beliefs, colour, sex, marital status (in ss. 6 and 9), age (except in ss. 3 and 4), ancestry or place of origin. The Act has since been expanded to include other

LES JUGES CORY ET IACOBUCCI — Dans les présents motifs conjoints, le juge Cory examine les questions relatives à la qualité pour agir, à l'application de la *Charte canadienne des droits et libertés* et à la violation de son par. 15(1). Pour sa part, le juge Iacobucci se penche sur l'article premier de la *Charte* et sur la réparation appropriée; il est en outre l'auteur du dispositif. 1

LE JUGE CORY

L'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2 («l'*IRPA*» ou la «Loi»), a initialement été adoptée en 1973. En présentant le projet de loi en 1972, le ministre responsable a formulé certaines observations et a insisté sur la nature et l'importance de la Loi: [TRADUCTION] «. . . notre législature s'engage à reconnaître la primauté de l'Individual's Rights Protection Act sur tout autre texte législatif [. . .] [N]ous nous sommes engagés à montrer que l'Alberta n'est pas un territoire où des droits partiels ou des demi-libertés sont accordés, mais un lieu où, nous l'espérons, chacun, homme ou femme, pourra affirmer son autonomie et être reconnu en tant qu'individu et non en tant que membre d'une catégorie particulière» (*Alberta Hansard*, 22 novembre 1972, à la p. 80-63). Il s'agit de propos courageux qui suscitent l'espoir et apportent du réconfort aux membres de tous les groupes qui ont subi les blessures et les outrages de la discrimination. Ce noble engagement a-t-il été respecté? 2

I. Les faits

A. *L'historique de l'IRPA*

L'*IRPA* interdit la discrimination dans un certain nombre de domaines de la vie publique et elle prévoit la création de la Human Rights Commission pour l'examen des plaintes relatives à la discrimination. Dans sa version initiale (S.A. 1972, ch. 2), elle interdisait la discrimination dans les avis publics (art. 2), l'hébergement, les services et les équipements offerts au public (art. 3), la location (art. 4), les pratiques d'embauchage (art. 6), la publicité en matière d'emploi (art. 7) et l'activité syndicale (art. 9), sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de 3

grounds, in a series of amendments (S.A. 1980, c. 27; S.A. 1985, c. 33; S.A. 1990, c. 23; S.A. 1996, c. 25). These additions were apparently, at least in part, made in response to the enactment of the *Charter* and its judicial interpretation. In the most recent amendments the name of the Act was changed to the *Human Rights, Citizenship and Multiculturalism Act*. In 1990, the Act included the following list of prohibited grounds of discrimination: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry and place of origin. At the present time it also includes marital status, source of income and family status.

l'état matrimonial (art. 6 et 9), de l'âge (sauf les art. 3 et 4), de l'ascendance ou du lieu d'origine. Depuis, une série de modifications (S.A. 1980, ch. 27; S.A. 1985, ch. 33; S.A. 1990, ch. 23; S.A. 1996, ch. 25) a eu pour effet d'ajouter d'autres motifs à ceux déjà prévus. Ces ajouts faisaient apparemment suite, du moins en partie, à l'adoption de la *Charte* et à la jurisprudence s'y rapportant. Lors des plus récentes modifications, le titre de la Loi est devenu *Human Rights, Citizenship and Multiculturalism Act*. En 1990, la Loi énumérait les motifs de distinction illicites suivants: la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance et le lieu d'origine. Depuis, l'état matrimonial, la source de revenu et la situation familiale ont été ajoutés.

4 Despite repeated calls for its inclusion sexual orientation has never been included in the list of those groups protected from discrimination. In 1984 and again in 1992, the Alberta Human Rights Commission recommended amending the *IRPA* to include sexual orientation as a prohibited ground of discrimination. In an attempt to effect such an amendment, the opposition introduced several bills; however, none went beyond first reading. Although at least one Minister responsible for the administration of the *IRPA* supported the amendment, the correspondence with a number of cabinet members and members of the Legislature makes it clear that the omission of sexual orientation from the *IRPA* was deliberate and not the result of an oversight. The reasons given for declining to take this action include the assertions that sexual orientation is a "marginal" ground; that human rights legislation is powerless to change public attitudes; and that there have only been a few cases of sexual orientation discrimination in employment brought to the attention of the Minister.

Malgré des demandes répétées en ce sens, l'orientation sexuelle n'a jamais figuré au nombre des motifs de distinction illicites. En 1984, et à nouveau en 1992, l'Alberta Human Rights Commission a recommandé de modifier l'*IRPA* pour y ajouter l'orientation sexuelle comme motif de distinction illicite. En vue d'obtenir une telle modification, l'opposition a présenté plusieurs projets de loi; cependant, aucun n'a franchi une étape ultérieure à la première lecture. Même si au moins un ministre responsable de l'administration de l'*IRPA* a appuyé la modification, la correspondance avec un certain nombre de membres du Cabinet et de députés établit clairement que l'omission de l'orientation sexuelle était délibérée, et non le résultat d'un oubli. Les raisons invoquées pour ne pas donner suite à la recommandation comprennent les suivantes: l'orientation sexuelle est un motif «marginal», la législation sur les droits de la personne ne peut modifier les mentalités et seulement un petit nombre de cas de discrimination dans l'emploi fondée sur l'orientation sexuelle ont été portés à l'attention du ministre.

5 In 1992, the Human Rights Commission decided to investigate complaints of discrimination on the basis of sexual orientation. This decision was immediately vetoed by the Government and the Minister directed the Commission not to investigate the complaints.

En 1992, la Human Rights Commission a décidé de faire enquête sur les plaintes de discrimination fondée sur l'orientation sexuelle. Le gouvernement s'y est immédiatement opposé, et le ministre a interdit à la commission de mettre son projet à exécution.

In 1993, the Government appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Human Rights Commission. When it had completed an extensive review, the Panel issued its report, entitled *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (1994) (the "Dignity Report"). The report contained a number of recommendations, one of which was that sexual orientation should be included as a prohibited ground of discrimination in the Act. In its response to the Dignity Report (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (1995)), the Government stated that the recommendation regarding sexual orientation would be dealt with through this case.

B. *Vriend's Dismissal From King's College and Complaint to the Alberta Human Rights Commission*

In December 1987 the appellant Delwin Vriend was employed as a laboratory coordinator by King's College in Edmonton, Alberta. He was given a permanent, full-time position in 1988. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. On February 20, 1990, in response to an inquiry by the President of the College, Vriend disclosed that he was homosexual. In early January 1991, the Board of Governors of the College adopted a position statement on homosexuality, and shortly thereafter, the President of the College requested Vriend's resignation. He declined to resign, and on January 28, 1991, Vriend's employment was terminated by the College. The sole reason given for his termination was his non-compliance with the policy of the College on homosexual practice. Vriend appealed the termination and applied for reinstatement, but was refused.

On June 11, 1991, Vriend attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer discriminated against him because of his sexual orientation. On July 10, 1991, the Commission advised

En 1993, le gouvernement a confié à l'Alberta Human Rights Review Panel le mandat de procéder à un examen public de l'*IRPA* et de la Human Rights Commission. Après un examen approfondi, le comité a présenté son rapport intitulé *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (1994) (le «rapport sur la dignité»). Celui-ci renfermait un certain nombre de recommandations, l'une d'entre elles étant l'inclusion dans la Loi de l'orientation sexuelle comme motif de distinction illicite. Dans sa réponse au rapport sur la dignité (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (1995)), le gouvernement a indiqué que le sort de la recommandation relative à l'orientation sexuelle dépendait de l'issue de la présente affaire. 6

B. *Le congédiement de M. Vriend du King's College et la plainte à l'Alberta Human Rights Commission*

En décembre 1987, l'appelant Delwin Vriend a été engagé comme coordonnateur de laboratoire au King's College d'Edmonton (Alberta). En 1988, il a obtenu un poste permanent à temps plein. Pendant toute la durée de son emploi, son travail a été évalué favorablement, et son rendement lui a valu des augmentations de salaire et de l'avancement. Le 20 février 1990, en réponse à une demande formulée par le président de l'établissement, M. Vriend a révélé qu'il était homosexuel. Au début de janvier 1991, le conseil des gouverneurs du King's College a adopté un énoncé de principe sur l'homosexualité et, peu après, le président de l'établissement a demandé à M. Vriend de démissionner. Ce dernier refusant de le faire, il a été congédié le 28 janvier 1991. Le seul motif donné pour justifier le congédiement était le non-respect de la politique du King's College en matière d'homosexualité. Monsieur Vriend en a appelé du congédiement et a demandé sa réintégration, ce qui lui a été refusé. 7

Le 11 juin 1991, M. Vriend a tenté de saisir l'Alberta Human Rights Commission d'une plainte dans laquelle il soutenait que son employeur avait fait preuve de discrimination à son égard en raison de son orientation sexuelle. Le 10 juillet suivant, la 8

Vriend that he could not make a complaint under the *IRPA*, because the Act did not include sexual orientation as a protected ground.

commission a informé M. Vriend qu'il ne pouvait formuler une plainte en application de l'*IRPA*, l'orientation sexuelle ne figurant pas au nombre des motifs de distinction illicites.

9 Vriend, the Gay and Lesbian Awareness Society of Edmonton (GALA), the Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters (collectively the "appellants") applied by originating notice of motion to the Court of Queen's Bench of Alberta for declaratory relief. The appellants challenged the constitutionality of ss. 2(1), 3, 4, 7(1) and 8(1) of the *IRPA* on the grounds that these sections contravene s. 15(1) of the *Charter* because they do not include sexual orientation as a prohibited ground of discrimination. The standing of the appellants to bring the application was not challenged. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Charter*. She ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as a prohibited ground of discrimination. The majority of the Court of Appeal of Alberta granted the Government's appeal. The appellants were granted leave to appeal to this Court and the respondents were granted leave to cross-appeal. An order of the Chief Justice stating constitutional questions was issued on February 10, 1997.

Monsieur Vriend, la Gay and Lesbian Awareness Society of Edmonton (GALA), le Gay and Lesbian Community Centre of Edmonton Society et Dignity Canada Dignité for Gay Catholics and Supporters (collectivement appelés les «appelants») ont demandé à la Cour du Banc de la Reine de l'Alberta, par voie d'avis de requête introductive d'instance, de rendre un jugement déclaratoire. Les appelants contestaient la constitutionnalité des par. 2(1), 7(1) et 8(1) ainsi que des art. 3 et 4 de l'*IRPA*, pour le motif que ceux-ci étaient contraires au par. 15(1) de la *Charte* en raison de l'omission de l'orientation sexuelle comme motif de distinction illicite. La qualité pour agir des appelants n'a pas été contestée. Le juge de première instance a conclu que l'omission de protéger les citoyens contre la discrimination fondée sur l'orientation sexuelle constituait une violation injustifiée de l'art. 15 de la *Charte*. Elle a ordonné que l'«orientation sexuelle» soit tenue pour un motif de distinction illicite pour l'application des art. 3, 4 et 10 ainsi que des par. 2(1), 7(1) et 8(1) de l'*IRPA*. L'appel du gouvernement a été accueilli par la majorité des juges de la Cour d'appel de l'Alberta. Les appelants ont obtenu l'autorisation d'en appeler devant notre Cour, et les intimés ont été autorisés à interjeter un pourvoi incident. Une ordonnance du juge en chef énonçant les questions constitutionnelles soulevées en l'espèce a été rendue le 10 février 1997.

II. Relevant Statutory Provisions

II. Les dispositions législatives pertinentes

10 Since the time the appellant made his claim in 1992, the relevant statute was amended (*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, c. 25). The Act is now known as the *Human Rights, Citizenship and Multiculturalism Act*. In these reasons, however, we refer to the statute, as amended, as the *Individual's Rights Protection Act* or *IRPA*, since that is how the legislation was most often referred to by the parties on this appeal. For the sake of convenience, the provisions are set out

La loi applicable a été modifiée (*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, ch. 25) depuis que l'appelant a présenté sa demande en 1992. Aujourd'hui le titre de la loi est *Human Rights, Citizenship and Multiculturalism Act*. Dans les présents motifs, toutefois, nous employons le titre *Individual's Rights Protection Act* ou l'abréviation *IRPA* pour la désigner puisque c'est le plus souvent ainsi que les parties y ont fait référence dans le présent pourvoi. Par souci de

below first as they existed at the time the action commenced, and then as they currently stand.

commodité, nous reproduisons les dispositions applicables d'abord dans la version qui était en vigueur à l'époque où l'action a été intentée, puis dans la version actuelle.

Individual's Rights Protection Act, R.S.A. 1980, c. I-2, am. S.A. 1985, c. 33, S.A. 1990, c. 23

Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, mod. S.A. 1985, ch. 33, S.A. 1990, ch. 23

Preamble

[TRADUCTION] Préambule

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin; and

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

2(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.

2(1) Nul ne doit publier, faire publier, exposer ni faire exposer un avis, un panneau, un symbole, un emblème ou une autre représentation marquant une discrimination ou l'intention d'exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes, à quelque fin que ce soit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance ou du lieu d'origine de cette personne ou de cette catégorie de personnes.

3 No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

3 Nul ne doit, directement ou indirectement, seul ou avec un tiers, personnellement ou par l'entremise d'un tiers, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance ou du lieu d'origine d'une personne ou d'une catégorie de personnes:

(a) deny to any person or class of persons any accommodation, services or facilities customarily available to the public, or

a) soit refuser à une personne ou à une catégorie de personnes l'hébergement, les services ou les équipements habituellement offerts au public;

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities customarily available to the public,

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement à l'hébergement, aux services ou aux équipements habituellement offerts au public.

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry or place

of origin of that person or class of persons or of any other person or class of persons.

4 No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

(a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling units,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry or place of origin of that person or class of persons or of any other person or class of persons.

7(1) No employer or person acting on behalf of an employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

4 Nul ne doit, directement ou indirectement, seul ou avec un tiers, personnellement ou par l'entremise d'un tiers, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance ou du lieu d'origine d'une personne ou d'une catégorie de personnes:

a) soit refuser de louer à une personne ou à une catégorie de personnes un local commercial ou un logement individuel annoncé ou par ailleurs offert en location;

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement aux conditions de location d'un local commercial ou d'un logement individuel.

7(1) Nul employeur ni quiconque agissant pour son compte ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine:

a) soit refuser d'employer une personne ou refuser de continuer de l'employer;

b) soit exercer une discrimination à l'égard d'une personne en matière d'emploi ou de conditions d'emploi.

(2) En ce qui concerne l'âge et l'état matrimonial, le paragraphe (1) est sans effet sur l'application de tout régime de retraite légitime ou des modalités de tout régime d'assurance collective ou d'employés légitime.

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

8(1) Nul ne doit utiliser ou mettre en circulation une formule de demande d'emploi, publier une annonce relative à un poste, existant ou éventuel, ni adresser par écrit ou de vive voix à un candidat une demande de renseignements qui:

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of any person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin.

a) comporte, directement ou indirectement, une restriction, une condition ou une préférence marquant une discrimination fondée sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'état matrimonial, l'âge, l'ascendance ou le lieu d'origine de qui que ce soit;

b) oblige le candidat à fournir de l'information relative à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'état matrimonial, à l'âge, à l'ascendance ou au lieu d'origine.

(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

(2) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

10 No trade union, employers' organization or occupational association shall

10 Nul syndicat, organisme professionnel et nulle association patronale, ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine d'une personne ou d'un adhérent:

(a) exclude any person from membership in it,

(b) expel or suspend any member of it, or

(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or member.

a) exclure une personne de ses rangs;

b) expulser ou suspendre un adhérent;

c) exercer une discrimination à l'égard d'une personne ou d'un adhérent.

11.1 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

11.1 La personne à qui l'on reproche d'avoir enfreint la Loi est réputée ne pas y avoir contrevenu si elle établit que les actes reprochés étaient raisonnables et justifiables dans les circonstances.

16(1) It is the function of the Commission

(a) to forward the principle that every person is equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin,

(b) to promote an understanding of, acceptance of and compliance with this Act,

(c) to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin, and

16(1) La commission a les attributions suivantes:

a) promouvoir le principe selon lequel chacun jouit de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

b) favoriser la compréhension, l'acceptation et le respect de la présente Loi;

c) faire de la recherche, ainsi que concevoir et mettre en œuvre des programmes d'éducation en vue de la suppression des pratiques discriminatoires fondées sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance ou le lieu d'origine;

(d) to encourage and co-ordinate both public and private human rights programs and activities.

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, c. H-11.7

Preamble

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status;

WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity;

WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected . . . .

2(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a class of persons, or

d) encourager et coordonner la mise en œuvre de programmes et d'activités publics et privés en matière de droits de la personne;

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, ch. H-11.7

[TRADUCTION] Préambule

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que tous soient égaux en ce qui concerne la dignité, les droits et les obligations, sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance, au lieu d'origine, à l'état matrimonial, à la source de revenu ou à la situation familiale;

ATTENDU QUE le multiculturalisme reflète la diversité raciale et culturelle de la société albertaine et que son importance est reconnue en Alberta à titre de principe fondamental et de question d'intérêt public;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que tous les Albertains soient sensibilisés à la diversité raciale et culturelle de la société et la valorisent, et que la vie en Alberta est enrichie par l'ouverture à cette diversité;

ATTENDU QU'il est opportun que ces principes soient consacrés par la législature de l'Alberta au moyen d'un texte législatif protégeant ces droits à l'égalité et cette diversité . . .

2(1) Nul ne doit publier, exposer ou émettre en public, ni faire publier, exposer ou émettre en public une déclaration, une publication, un avis, un panneau, un symbole, un emblème ou une autre représentation qui

a) soit dénote une discrimination ou l'intention de faire une discrimination à l'égard d'une personne ou d'une catégorie de personnes sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale de cette personne ou de cette catégorie de personnes;

(b) is likely to expose a person or a class of persons to hatred or contempt

b) soit est susceptible d'exposer une personne ou une catégorie de personnes à la haine ou au mépris sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale de cette personne ou de cette catégorie de personnes.

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.

3 No person shall

3 Nul ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale d'une personne ou d'une catégorie de personnes:

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or

a) soit refuser à cette personne ou à cette catégorie de personnes des biens, des services, l'hébergement ou l'accès à des équipements habituellement offerts au public;

(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

b) soit exercer une discrimination à l'égard de cette personne ou de cette catégorie de personnes relativement à des biens, des services, l'hébergement ou des équipements habituellement offerts au public.

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

4 No person shall

4 Nul ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale d'une personne ou d'une catégorie de personnes:

(a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or

a) soit refuser de louer à une personne ou à une catégorie de personnes un local commercial ou un logement individuel annoncé ou par ailleurs offert en location;

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling units,

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement aux conditions de location d'un local commercial ou d'un logement individuel.

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

7(1) No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of any person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income.

7(1) Nul employeur ne doit sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance, du lieu d'origine, de la situation familiale ou de la source de revenu d'une personne ni de quiconque:

a) soit refuser d'employer ou refuser de continuer d'employer cette personne;

b) soit exercer une discrimination à l'égard de cette personne en matière d'emploi ou de conditions d'emploi.

(2) En ce qui concerne l'âge et l'état matrimonial, le paragraphe (1) est sans effet sur l'application de tout régime de retraite légitime ou des modalités de tout régime d'assurance collective ou d'employés légitime.

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

8(1) Nul ne doit utiliser ou mettre en circulation une formule de demande d'emploi, publier une annonce relative à un poste, existant ou éventuel, ni adresser par écrit ou de vive voix à un candidat une demande de renseignements qui:

a) soit comporte, directement ou indirectement, une restriction, une condition ou une préférence exprimant une discrimination fondée sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'état matrimonial, l'âge, l'ascendance, le lieu d'origine, la situation familiale ou la source de revenu de qui que ce soit;

b) soit oblige le candidat à fournir de l'information relative à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'état matrimonial, à l'âge, à l'ascendance, au lieu d'origine, à la situation familiale ou à la source de revenu.

(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

10 No trade union, employers' organization or occupational association shall

(a) exclude any person from membership in it,

(b) expel or suspend any member of it, or

(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of that person or member.

11.1 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

16(1) It is the function of the Commission

(a) to forward the principle that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,

(b) to promote awareness and appreciation of and respect for the multicultural heritage of Alberta society,

(c) to promote an environment in which all Albertans can participate in and contribute to the cultural, social, economic and political life of Alberta,

(d) to encourage all sectors of Alberta society to provide equality of opportunity,

(e) to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,

(2) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

10 Nul syndicat, organisme professionnel et nulle association patronale, ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance, du lieu d'origine, de la situation familiale ou de la source de revenu d'une personne ou d'un adhérent:

a) exclure une personne de ses rangs;

b) expulser ou suspendre un adhérent;

c) exercer une discrimination à l'égard d'une personne ou d'un adhérent.

11.1 La personne à qui l'on reproche d'avoir enfreint la Loi est réputée ne pas y avoir contrevenu si elle établit que les actes reprochés étaient raisonnables et justifiables dans les circonstances.

16(1) La commission a les attributions suivantes:

a) promouvoir le principe selon lequel tous sont égaux en ce qui concerne la dignité, les droits et les obligations, sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance, au lieu d'origine, à l'état matrimonial, à la source de revenu ou à la situation familiale;

b) promouvoir la sensibilisation au patrimoine multiculturel de la société albertaine, sa valorisation et son respect;

c) promouvoir un milieu où tous les Albertains peuvent participer et contribuer à la vie culturelle, sociale, économique et politique de l'Alberta;

d) inciter tous les secteurs de la société albertaine à offrir l'égalité des chances;

e) faire de la recherche, ainsi que concevoir et mettre en œuvre des programmes d'éducation en vue de la suppression des pratiques discriminatoires fondées sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance, le lieu d'origine, l'état matrimonial, la source de revenu ou la situation familiale;

(f) to promote an understanding of, acceptance of and compliance with this Act,

(g) to encourage and co-ordinate both public and private human rights programs and activities, and

(h) to advise the Minister on matters related to this Act.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) 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 mental or physical disability.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Constitution Act, 1982

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

III. Decisions Below

A. *Alberta Court of Queen's Bench* (1994), 152 A.R. 1

f) promouvoir la compréhension, l'acceptation et le respect de la présente loi;

g) encourager et coordonner la mise en œuvre de programmes et d'activités publics et privés en matière de droits de la personne;

h) conseiller le ministre sur les questions se rapportant à la présente loi.

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Loi constitutionnelle de 1982

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

III. Les décisions des tribunaux d'instance inférieure

A. *Cour du Banc de la Reine de l'Alberta* (1994), 152 A.R. 1

The appellants applied to Russell J., as she then was, for an order (1) declaring that ss. 2(1), 3, 4 and 7(1) of the *IRPA* are inconsistent with s. 15(1) of the *Charter* and infringe the appellants' rights, as a result of the absence of sexual orientation from the list of proscribed grounds of discrimination; (2) that Vriend has the right to file a complaint under the *IRPA* alleging discrimination on the grounds of sexual orientation; and (3) that lesbians and gays have the right to the protections of the *IRPA*.

At the outset she found that the appellants had standing to challenge s. 10 as well as the other sections.

Russell J. was satisfied that the discrimination homosexuals suffer "is so notorious that [she could] take judicial notice of it without evidence" (p. 6). She went on to consider whether homosexuals are a discrete and insular minority entitled to protection under s. 15(1) of the *Charter*, and concluded that sexual orientation is properly considered an analogous ground under s. 15(1). This issue has since been resolved by the decision in *Egan v. Canada*, [1995] 2 S.C.R. 513, which held that sexual orientation is an analogous ground.

Next, Russell J. considered whether the omission of sexual orientation under the *IRPA* constitutes discrimination under s. 15 of the *Charter*. She noted that it has been established that a discriminatory distinction in a law can arise from either a commission or an omission. The Ontario Court of Appeal in *Haig v. Canada* (1992), 9 O.R. (3d) 495, found that, considering the larger social, political and legal context, the omission of sexual orientation in the *Canadian Human Rights Act* constituted discrimination offending s. 15(1) of the *Charter*. Russell J. agreed with this conclusion. She took note of the *obiter* comments of L'Heureux-Dubé J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 436, that the provinces could prohibit discrimination on some

Les appelants ont demandé au juge Russell, maintenant juge à la Cour d'appel, de rendre un jugement déclaratoire portant 1) que les art. 3 et 4 ainsi que les par. 2(1) et 7(1) de l'*IRPA* sont incompatibles avec le par. 15(1) de la *Charte* et violent leurs droits en raison de l'omission de l'orientation sexuelle comme motif de distinction illicite, 2) que M. Vriend a le droit de formuler, en application de l'*IRPA*, une plainte pour discrimination fondée sur l'orientation sexuelle et 3) que les homosexuels ont droit à la protection de l'*IRPA*. 11

Tout d'abord, le juge Russell a conclu que les appelants avaient qualité pour contester la validité de l'art. 10 de même que celle des autres dispositions. 12

Elle s'est dite convaincue que la discrimination exercée contre les homosexuels [TRADUCTION] «est si notoire qu'il y aurait lieu, pour le tribunal, d'en prendre connaissance d'office, à l'exclusion de tout élément de preuve» (p. 6). Elle a examiné ensuite la question de savoir si les homosexuels constituaient une minorité distincte et isolée ayant droit à la protection prévue au par. 15(1) de la *Charte* et elle a conclu que l'orientation sexuelle est à juste titre considérée comme un motif analogue à ceux énumérés au par. 15(1). Cette question a été depuis lors tranchée dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, où notre Cour a statué que l'orientation sexuelle constitue un motif analogue. 13

Le juge Russell s'est ensuite demandé si l'omission dans l'*IRPA* de l'orientation sexuelle comme motif de distinction illicite constituait une discrimination en application de l'art. 15 de la *Charte*. Elle a rappelé qu'une distinction discriminatoire établie par la loi pouvait résulter soit d'une action, soit d'une omission. Dans l'arrêt *Haig c. Canada* (1992), 9 O.R. (3d) 495, la Cour d'appel de l'Ontario, tenant compte du contexte social, politique et juridique plus général, a conclu que l'omission de l'orientation sexuelle comme motif de distinction illicite dans la *Loi canadienne sur les droits de la personne* constituait une discrimination contraire au par. 15(1) de la *Charte*. Le juge Russell a souscrit à cette conclusion. Elle a pris note des remarques incidentes du juge L'Heureux-Dubé 14

grounds but not others without violating the *Charter*. However, in her opinion sexual orientation was related to sex or gender as a prohibited ground and "[w]hile there is no obligation on the Province to legislate to prohibit sexual discrimination, when it does so it must provide even-handed protection in a nondiscriminatory manner, or justify the exclusion" (p. 13).

dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, à la p. 436, selon lesquelles les provinces pouvaient interdire la discrimination fondée sur certains motifs et non sur d'autres, sans violer pour autant la *Charte*. Toutefois, selon elle, l'orientation sexuelle est liée au sexe comme motif de distinction illicite et, [TRADUCTION] «[b]ien qu'elle n'ait pas l'obligation de légiférer pour interdire la discrimination sexuelle, lorsqu'elle le fait, la province doit garantir une protection égale de manière non discriminatoire, ou justifier l'exclusion» (p. 13).

15 Russell J. noted also that discrimination does not depend on a finding of invidious intent, and concluded (at pp. 13-14):

> Regardless of whether there was any intent to discriminate, the effect of the decision to deny homosexuals recognition under the legislation is to reinforce negative stereotyping and prejudice thereby perpetuating and implicitly condoning its occurrence. The facts in this case demonstrate that the legislation had a differential impact on the applicant Vriend. When his employment was terminated because of his personal characteristics he was denied a legal remedy available to other similarly disadvantaged groups. That constitutes discrimination contrary to s. 15(1) of the *Charter*.

Le juge Russell a fait remarquer par ailleurs qu'il n'était pas nécessaire de conclure à l'existence d'une intention d'exercer une discrimination odieuse pour qu'il y ait discrimination et elle a ajouté (aux pp. 13 et 14):

> [TRADUCTION] Peu importe qu'il y ait eu ou non intention d'exercer une discrimination, la décision du législateur de ne pas reconnaître les homosexuels dans la Loi a pour effet de renforcer les stéréotypes et préjugés négatifs et, par conséquent, de les perpétuer et de les tolérer tacitement. Il ressort des faits de cette affaire que la loi a eu un effet particulier sur l'appelant, M. Vriend. Lorsqu'il a été congédié sur la base de ses caractéristiques personnelles, il s'est vu privé du recours légal conféré aux membres d'autres groupes qui sont défavorisés de façon similaire. Il s'agit d'une discrimination portant atteinte au par. 15(1) de la *Charte*.

16 Turning to the s. 1 justification test, Russell J. held that since the Crown had failed to present any rationale to show that the violation was justified, it had failed to meet the requirements of s. 1. Even if the Crown were not required to show justification, she would have concluded that the violation was not justifiable. She found that the limitation was inconsistent with the objective and principles embodied in the preamble to the *IRPA*, and therefore, there was no legislative objective of pressing and substantial concern justifying the limitation. Russell J. further held that the denial of remedies provided by the *IRPA* was not rationally connected to the objective of protecting individual rights, and that, since the omission was complete, it did not represent minimal impairment.

En ce qui concerne la justification sous le régime de l'article premier, le juge Russell a conclu que le ministère public n'avait pas satisfait aux exigences de cette disposition, n'ayant présenté aucun élément susceptible de justifier la violation. Même si le ministère public n'avait pas été tenu d'établir la justification, elle aurait conclu que la violation n'était pas justifiable. Elle est arrivée à la conclusion que la limitation était incompatible avec l'objectif et les principes énoncés dans le préambule de l'*IRPA*, de sorte qu'aucun objectif législatif se rapportant à une préoccupation urgente et réelle ne la justifiait. Elle a conclu en outre que la négation des recours prévus par l'*IRPA* n'avait aucun lien rationnel avec l'objectif de protéger les droits individuels et que, l'omission étant totale, il ne s'agissait pas d'une atteinte minimale.

Russell J. reviewed the possible remedies under s. 52 of the *Constitution Act, 1982* that were set out in *Schachter v. Canada*, [1992] 2 S.C.R. 679, and concluded that the only options in this case were striking down the legislation, with or without a suspension of the declaration of invalidity, or reading in. She decided that in this case, as in *Haig*, reading in was the most appropriate remedy. The omission was precisely defined and could be readily filled by reading in. As well, reading in was preferable because it left the objective of the legislation intact, was less intrusive than striking down, and would not have so great a budgetary impact as to substantially change the legislative scheme. Russell J. therefore ordered that the relevant sections of the Act be "interpreted, applied and administered as though they contained the words 'sexual orientation'" (p. 19).

Le juge Russell a examiné les mesures correctives possibles en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* qui ont été énoncées dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, et elle a conclu que les seules solutions qui s'offraient en l'espèce étaient soit l'annulation des dispositions de la Loi, avec ou sans suspension de la déclaration d'invalidité, soit l'interprétation large. Elle a statué que, tout comme dans l'affaire *Haig*, l'interprétation large était la réparation la plus appropriée en l'espèce. L'omission était définie de manière précise et pouvait facilement être corrigée au moyen de l'interprétation large. Au surplus, cette dernière solution était préférable parce qu'elle préservait l'objectif de la Loi, empiétait moins que l'invalidation et n'avait pas de répercussions financières aussi importantes qu'une modification substantielle du texte législatif. Le juge Russell a donc ordonné que les dispositions pertinentes de la Loi soient [TRADUCTION] «interprétées et appliquées comme si les mots "orientation sexuelle" y figuraient» (p. 19). 17

B. *Alberta Court of Appeal* (1996), 181 A.R. 16

B. *Cour d'appel de l'Alberta* (1996), 181 A.R. 16

1. McClung J.A.

1. Le juge McClung

McClung J.A. held that the first question to be resolved was whether the *IRPA* is "answerable, as it stands" to the *Charter* (at p. 22). He was of the opinion that the omission of "sexual orientation" from the discrimination provisions of the *IRPA* does not amount to governmental action for the purpose of s. 32(1) of the *Charter*. In his view the provisions of the *Charter* could not force the legislature to enact a provision dealing with a "divisive" issue if it has chosen not to do so. He concluded that the province had not exercised its authority with respect to a matter so as to come within s. 32(1)(*b*) of the *Charter*.

Le juge McClung a conclu que la première question à trancher était de savoir si l'*IRPA* [TRADUCTION] «dans sa version actuelle, était visée» par la *Charte* (à la p. 22). Il s'est dit d'avis que l'omission de l'«orientation sexuelle» comme motif de distinction illicite n'équivalait pas à une action gouvernementale pour l'application du par. 32(1) de la *Charte*. Selon lui, les dispositions de la *Charte* ne pouvaient obliger la législature à adopter une disposition portant sur une question «controversée» lorsqu'elle avait décidé de ne pas le faire. Il a conclu que la province n'avait pas exercé son pouvoir dans un domaine de façon à être assujettie à l'al. 32(1)*b*) de la *Charte*. 18

McClung J.A. criticized the reasons of Russell J. as proceeding from the proposition that human rights legislation must perfectly "mirror" the *Charter*. He noted the existence of some variation among provinces with respect to the prohibited grounds of discrimination included in rights legislation, and stated that provinces must have latitude

Le juge McClung a critiqué les motifs du juge Russell parce qu'ils s'appuient sur la proposition voulant que les dispositions des lois sur les droits de la personne doivent «refléter» exactement celles de la *Charte*. Il a signalé l'existence de certaines différences entre les provinces pour ce qui concerne les motifs de distinction illicites prévus dans 19

in implementing their powers under s. 92 of the *Constitution Act, 1867*. To require all legislation to be consistent with the *Charter* would be a "debacle for the autonomy of provincial law-making" (p. 24).

20 Even if the omission by the legislature is subject to *Charter* scrutiny under s. 32(1), McClung J.A. found no violation of s. 15(1). In his opinion the *IRPA* neither drew any distinction between homosexuals and heterosexuals nor resulted in the imposition of burdens, limitations or disadvantages or the denial of benefits or opportunities with respect to homosexuals. He found that any inequality that may exist between homosexuals and heterosexuals exists independently of the *IRPA*; the statute is neutral and "neither confers nor denies benefits to, or withdraws protection from, any Canadian" (p. 29).

21 Although he found no violation of the *Charter*, McClung J.A. considered what the appropriate remedy would have been had there been a violation of the *Charter*. He disagreed with Russell J.'s decision to use the remedy of "reading in" and stated that the preferable response was to declare the Act unconstitutional and invalid, with a stay of the declaration to "permit legislative, not judicial, repair" (p. 29). McClung J.A. suggested that "reading up" constitutes an intrusion of the judiciary into the legislative domain which should be avoided whenever possible. Therefore, he would have, if necessary, declared the Act *ultra vires*, suspending this judgment for a period of one year to allow the legislature to address the defects in the *IRPA*. However, based on his reasons set out earlier he allowed the appeal.

2. O'Leary J.A.

22 O'Leary J.A. agreed with McClung J.A. that the appeal should be allowed but for different reasons. He assumed that the *Charter* applied to the *IRPA*

les lois sur les droits de la personne, et il a dit que les provinces devaient avoir une marge de manœuvre dans l'exercice des pouvoirs que leur confère l'art. 92 de la *Loi constitutionnelle de 1867*. Exiger que toute loi soit compatible avec la *Charte* [TRADUCTION] «sonnerait le glas de l'autonomie législative provinciale» (p. 24).

Même si l'omission du législateur pouvait faire l'objet d'un examen fondé sur la *Charte* en application du par. 32(1), le juge McClung a conclu qu'il n'y avait pas violation du par. 15(1). Selon lui, l'*IRPA* n'établissait pas de distinction entre les homosexuels et les hétérosexuels non plus qu'elle ne créait de fardeaux, de limitations ou d'inconvénients pour les homosexuels ni ne les privait d'avantages ou de possibilités. Il a conclu que toute inégalité pouvant exister entre homosexuels et hétérosexuels existait indépendamment de l'*IRPA* car cette dernière était neutre, et [TRADUCTION] «n'accordait ni ne refusait d'avantage à personne et ne privait aucun Canadien de sa protection» (p. 29).

Bien qu'il ait conclu à l'absence de violation de la *Charte*, le juge McClung s'est demandé quelle aurait été la réparation appropriée s'il y avait eu non-respect de la *Charte*. Il s'est dit en désaccord avec la décision du juge Russell de recourir à l'interprétation large et il a estimé qu'il était préférable de déclarer la Loi inconstitutionnelle et invalide, puis de suspendre la déclaration afin de [TRADUCTION] «permettre au législateur, plutôt qu'aux tribunaux, de corriger la situation» (p. 29). Le juge McClung a laissé entendre que l'interprétation large constituait un empiétement du pouvoir judiciaire sur le domaine législatif qui devait être évité dans la mesure du possible. Par conséquent, il aurait plutôt déclaré la Loi *ultra vires* et aurait suspendu ce jugement pour une période d'un an afin de permettre à la législature de remédier aux lacunes de l'*IRPA*. Cependant, pour les motifs indiqués précédemment, il a accueilli l'appel.

2. Le juge O'Leary

À l'instar du juge McClung, le juge O'Leary a conclu que l'appel devait être accueilli, mais pour des motifs différents. Il a tenu pour acquis que la

and rested his conclusion on a finding that the *IRPA* does not create a distinction based on sexual orientation. In his opinion, therefore, there was no violation of s. 15(1).

Charte s'appliquait à l'*IRPA* et il a fondé sa décision sur le fait que, selon lui, la Loi n'établissait pas une distinction fondée sur l'orientation sexuelle. À son avis, il n'y avait donc aucune violation du par. 15(1).

O'Leary J.A. looked at the "initial hurdle" of the s. 15(1) analysis, which is to show that "there are one or more provisions in the legislation which create, expressly or by 'adverse effect', a distinction between individuals which is contrary to s. 15(1)" (p. 40). This state of affairs is to be distinguished from one in which the social circumstances exist independently of the provision. According to O'Leary J.A. the *IRPA*'s silence with respect to sexual orientation means that the Act makes no distinction between individuals on the basis of sexual orientation.

23 Le juge O'Leary s'est penché sur l'«obstacle initial» de l'analyse fondée sur le par. 15(1) qui consiste à établir qu' [TRADUCTION] «une ou plusieurs dispositions de la loi créent entre des personnes, expressément ou en raison d'un "effet préjudiciable", une distinction qui est contraire au par. 15(1)» (p. 40). Il y a lieu de ne pas confondre avec une situation sociale dont l'existence n'a rien à voir avec l'adoption d'une disposition. Selon le juge O'Leary, en raison du silence de la l'*IRPA* au sujet de l'orientation sexuelle, aucune distinction n'était établie entre des personnes sur le fondement de l'orientation sexuelle.

He found that the *IRPA* only distinguishes between "the specified prohibited grounds of discrimination and the various potential grounds (including sexual orientation) which could be included but are not" (p. 42) and that this cannot be called a distinction on the basis of sexual orientation. As a result, O'Leary J.A. would allow the appeal and set aside the declaration made by the trial judge, on the basis that the *IRPA* does not create a distinction that offends s. 15(1).

24 Il a conclu que l'*IRPA* ne créait une distinction qu'entre [TRADUCTION] «les motifs de distinction illicites qu'elle prévoyait et les divers motifs qui auraient pu être interdits, mais ne l'étaient pas (dont l'orientation sexuelle)» (p. 42), et qu'il ne pouvait donc s'agir d'une distinction fondée sur l'orientation sexuelle. Par conséquent, le juge O'Leary était d'avis d'accueillir l'appel et d'annuler le jugement déclaratoire rendu par le juge de première instance, pour le motif que l'*IRPA* n'établissait aucune distinction contraire au par. 15(1).

3. Hunt J.A. (dissenting)

3. Le juge Hunt (dissidente)

Hunt J.A. partially agreed with the decision of Russell J., finding that ss. 7(1), 8(1) and 10 of the *IRPA* violate s. 15(1) and are not saved by s. 1, but she found that reading in was not the appropriate remedy. With respect to the s. 15 violation, she reached the same conclusion as Russell J. but on slightly different reasoning, in part due to the decisions in *Egan*, *supra*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, which had by then been released.

25 Le juge Hunt était en partie d'accord avec la décision du juge Russell, et elle a conclu que les par. 7(1) et 8(1) ainsi que l'art. 10 de l'*IRPA* violaient le par. 15(1) et n'étaient pas sauvegardés par l'article premier. Elle a estimé toutefois que l'interprétation large ne constituait pas la réparation appropriée. En ce qui concerne la violation de l'art. 15, elle est arrivée à la même conclusion que le juge Russell, mais à l'issue d'un raisonnement légèrement différent, en partie en raison des arrêts *Egan*, précité, *Miron c. Trudel*, [1995] 2 R.C.S. 418, et *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627, qui avaient alors été rendus.

26 At the outset, Hunt J.A. dismissed the argument that s. 15(1) was not applicable in this case because it concerned private activity. It is an Act of the legislature which is being attacked in this case, not private activity, and provincial legislation is clearly subject to the *Charter*.

27 Hunt J.A. disagreed with Russell J.'s characterization of discrimination on the basis of sexual orientation as being "directly associated" with discrimination on the basis of gender and her analogy between this case and the cases of *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal refused, [1986] 1 S.C.R. xii, and *McKinney*, *supra*, where protection was offered from discrimination on the basis of gender and age but only in a limited way.

28 She went on to examine the context and purpose of the law as well as its impact upon those to whom it applies and those whom it excludes. She found that the *IRPA* is a law that is dedicated to achieving equal treatment for all citizens of Alberta. The context is one of existing discrimination against a group which has suffered from historical disadvantage. Hunt J.A. concluded (at p. 58) that "[g]iven these considerations and the context here, it is my opinion that the failure to extend protection to homosexuals under the *IRPA* can be seen as a form of government action that is tantamount to approving ongoing discrimination against homosexuals. Thus, in this case, legislative silence results in the drawing of a distinction".

29 Therefore, Hunt J.A. would have concluded that there was a distinction drawn sufficient to find a potential violation of s. 15(1). In her opinion it was then "easy to conclude" (p. 59) that this distinction resulted in homosexuals as a group being denied equal benefit and protection of the law, since they are denied access to the *IRPA*'s protection and enforcement process.

D'entrée de jeu, le juge Hunt a écarté l'argument voulant que le par. 15(1) ne s'applique pas en l'espèce parce qu'il était question d'une activité privée. C'était une loi de la législature et non une activité privée qui était contestée dans la présente affaire et la législation provinciale était clairement assujettie à la *Charte*.

Le juge Hunt n'est pas d'accord avec le juge Russell pour dire que la discrimination fondée sur l'orientation sexuelle est «directement liée» à la discrimination fondée sur le sexe et qu'une analogie devait être faite entre la présente espèce et les arrêts *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), autorisation de pourvoi refusée, [1986] 1 R.C.S. xii, et *McKinney*, précité, où une protection était offerte contre la discrimination fondée sur le sexe et l'âge, mais seulement de façon limitée.

Elle a examiné ensuite le contexte et l'objet de l'*IRPA*, de même que son incidence sur les personnes auxquelles elle s'applique et sur celles qui sont exclues de son champ d'application. Elle a conclu que la Loi visait à assurer à tous les citoyens de l'Alberta un traitement égal et que le contexte était celui de l'existence d'une discrimination contre un groupe qui avait de tout temps été défavorisé. Le juge Hunt est arrivée à la conclusion suivante (à la p. 58): [TRADUCTION] «compte tenu de ces éléments et du contexte en l'espèce, je suis d'avis que le fait de ne pas accorder la protection de l'*IRPA* aux homosexuels peut être considéré comme une forme d'action gouvernementale qui équivaut à approuver qu'une discrimination continue d'être exercée contre les homosexuels. Ainsi, en l'espèce, le silence de la loi établit une distinction».

Le juge Hunt aurait donc statué que la distinction établie était suffisante pour conclure à la violation potentielle du par. 15(1). Selon elle, il était dès lors [TRADUCTION] «facile de conclure» (p. 59) que cette distinction niait aux homosexuels, en tant que groupe, le droit à la même protection et au même bénéfice de la loi, étant donné qu'ils ne pouvaient pas invoquer la protection de l'*IRPA* ni recourir au mécanisme prévu pour la faire respecter.

The next question was whether this distinction results in discrimination. Hunt J.A. found that according to any of the approaches set out in *Egan*, discrimination could be found in this case. The denial of the equal protection and benefit of the law here is purely on the basis of sexual orientation, not merit or need, and reinforces the stereotype that homosexuals are less deserving of protection and therefore less worthy of value as human beings. Even taking into account the relevance of the distinction to the goals of the legislation, it is "impossible to see how a statute based upon notions of the inherent dignity of all can have as a relevant legislative goal the unequal treatment of some members of society" on the grounds of their membership in a group (at p. 60). This is a case in which the functional values underlying the omission are themselves discriminatory.

30 La question qui se posait ensuite était de savoir si cette distinction engendrait une discrimination. Selon le juge Hunt, l'application de l'une ou l'autre des méthodes énoncées dans l'arrêt *Egan* permettait de conclure à l'existence d'une discrimination en l'espèce. La négation du droit à la même protection et au même bénéfice de la loi était, dans la présente affaire, purement fondée sur l'orientation sexuelle, et non sur les mérites ou les besoins, et elle renforçait le stéréotype voulant que les homosexuels méritent moins d'être protégés et soient moins dignes d'être valorisés en tant qu'êtres humains. Même en analysant la pertinence de la distinction en fonction des objectifs de la loi, il est [TRADUCTION] «impossible de voir comment une loi fondée sur la notion de la dignité inhérente de chacun peut avoir, comme objectif législatif pertinent, le traitement inégal de certains membres de la société» en raison de leur appartenance à un groupe (à la p. 60). Il s'agit en l'espèce d'un cas où les valeurs fonctionnelles qui sous-tendent l'omission sont elles-mêmes discriminatoires.

Turning to s. 1 of the *Charter*, Hunt J.A. noted that the Crown had not presented any evidence concerning justification under s. 1. Hunt J.A. found the material in the Crown's factum inadequate to conduct a s. 1 analysis and thought that the paucity of the Crown's case on this matter would, of itself, support the conclusion of the trial judge that s. 1 justification had not been established. In any case, the omission could not satisfy the *Oakes* test for justification.

31 Relativement à l'article premier de la *Charte*, le juge Hunt a fait observer que le ministère public n'avait présenté aucune preuve pour justifier l'omission conformément à cette disposition. Elle a conclu que les éléments compris dans le mémoire du ministère public ne permettaient pas de procéder à une analyse fondée sur l'article premier et elle a estimé que le caractère ténu de la preuve du ministère public à cet égard appuyait en soi la conclusion du juge de première instance selon laquelle il n'a pas été établi que les dispositions incriminées sont justifiées conformément à l'article premier. De toute façon, l'omission ne pouvait satisfaire au critère énoncé dans l'arrêt *Oakes* en matière de justification.

Although she found an unjustifiable violation of s. 15(1), Hunt J.A. disagreed with the trial judge's choice of remedy. Hunt J.A. was of the opinion that the remedy should be limited to the situation presented in this case and the provisions most closely related to it, i.e. discrimination in employment (s. 7), employment notices (s. 8) and union membership (s. 10), respectively.

32 Bien qu'elle ait estimé injustifiable la violation du par. 15(1), le juge Hunt n'était pas d'accord avec la réparation accordée par le juge de première instance. Elle privilégiait plutôt une réparation ne s'appliquant qu'à la situation considérée en l'espèce et aux dispositions les plus directement visées, soit la discrimination liée à l'emploi (art. 7), les avis en matière d'emploi (art. 8) et l'activité syndicale (art. 10), respectivement.

33 While there were some arguments here in favour of reading in, Hunt J.A. was concerned whether reading in could be accomplished with sufficient precision, and about the possible impact of reading in on s. 7(2) of the *IRPA*, which concerns retirement, pension and insurance plans.

34 Hunt J.A. therefore concluded that the preferable remedy was to declare invalid ss. 7(1), 8(1) and 10 of the *IRPA* to the extent of their inconsistency with the *Charter*. Since an immediate declaration of invalidity would remove protection from everyone, contrary to the *Charter*'s objectives, she would have suspended the declaration of invalidity for a period of one year to allow the Legislature time to bring the *IRPA* into line with the *Charter*.

C. *Alberta Court of Appeal Supplementary Reasons Regarding Costs* (1996), 184 A.R. 351

35 O'Leary J.A. (McClung J.A. concurring) held that the circumstances in this case did not justify deviating from the customary rule of awarding costs to the successful party. O'Leary J.A. acknowledged that the court had discretion in awarding costs and that the public interest character of litigation could be used as an argument for depriving the successful litigant of costs. He noted, however, that such arguments had been rejected in some cases.

36 He therefore awarded the costs of the appeal on a party-and-party basis to the Crown, to include all reasonable disbursements except travelling and accommodation expenses, and including a fee in respect of its written submission on the issue of costs and a second counsel fee.

37 Hunt J.A. dissented. She noted that the decision of the Court of Appeal had involved a 2-1 split with three separate reasons for judgment, and that an important and novel point of law was at issue. She also noted several cases in which the courts

Malgré l'existence de certains éléments militant en faveur du recours à l'interprétation large, le juge Hunt s'est demandé si cette technique permettait une précision suffisante et quelle serait l'incidence possible de l'interprétation large sur le par. 7(2) de l'*IRPA*, qui porte sur les régimes de retraite, de pension et d'assurance.

Le juge Hunt est donc arrivée à la conclusion qu'il était préférable de déclarer invalides les par. 7(1) et 8(1) ainsi que l'art. 10 de l'*IRPA* dans la mesure où ils sont incompatibles avec la *Charte*. Comme une déclaration d'invalidité d'application immédiate priverait tous les citoyens de protection, contrairement aux objectifs de la *Charte*, elle aurait suspendu l'application de la déclaration d'invalidité pour une période d'un an afin de permettre à la législature d'harmoniser la Loi avec la *Charte*.

C. *Motifs supplémentaires de la Cour d'appel de l'Alberta concernant les dépens* (1996), 184 A.R. 351

Le juge O'Leary (avec l'appui du juge McClung) a statué que les circonstances de l'espèce ne justifiaient pas une entorse à la règle habituelle consistant à adjuger les dépens à la partie qui a gain de cause. Il a reconnu que la Cour d'appel avait un pouvoir discrétionnaire en la matière et que le caractère d'intérêt public de l'affaire pouvait être invoqué pour ne pas accorder les dépens à la partie qui a gain de cause. Il a fait cependant remarquer que cette avenue avait été écartée dans certaines affaires.

Il a donc adjugé au ministère public les dépens de l'appel sur la base des frais entre parties, ce qui inclut tous les débours raisonnables, sauf les frais de déplacement et d'hébergement, ainsi que les honoraires pour la présentation d'observations écrites sur la question des dépens et celle des honoraires d'un deuxième avocat.

Le juge Hunt, dissidente, a fait observer que la décision de la Cour d'appel était partagée à deux contre un, que les trois juges avaient rédigé des motifs distincts et qu'une question de droit à la fois importante et nouvelle était en cause. Elle a égale-

have made no costs award, including *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, and *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

ment relevé plusieurs affaires où aucuns dépens n'ont été adjugés, dont *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103, *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, et *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236.

Hunt J.A. agreed that governments should not be assumed to have limitless resources, and that relative resources of the parties is not the critical factor. She also noted, however, that there is no program in Alberta to subsidize the pursuit of important *Charter* litigation, as there is at the federal level. This case was not only novel but was also one that could "truly be described as a test case", where the impact of the rule on the parties is of secondary importance to the settlement of the rule itself (at p. 358). Hunt J.A. was of the opinion that there was a "heavy public interest component" to the legal question (at p. 358).

38 Le juge Hunt a convenu que les ressources de l'État ne devaient pas être tenues pour illimitées et que les ressources relatives des parties ne constituaient pas le facteur déterminant. Elle a fait aussi valoir que, contrairement au niveau fédéral, l'Alberta n'était pas dotée d'un programme d'appui financier aux personnes qui saisissent les tribunaux de questions importantes liées à l'application de la *Charte*. Il s'agissait en l'espèce non seulement d'une affaire sans précédent, mais également d'une affaire qui pouvait [TRADUCTION] «véritablement être qualifiée de cause type», c'est-à-dire que l'établissement de la règle elle-même avait plus d'importance que son incidence sur les parties (à la p. 358). Selon le juge Hunt, la question juridique soulevée comportait un [TRADUCTION] «important volet d'intérêt public» (à la p. 358).

As a result of all of these factors, Hunt J.A. concluded that she would have awarded costs against the respondents (appellants in the Court of Appeal), notwithstanding their success on the appeal. However since the appellants (respondents in the Court of Appeal) in this case merely sought a no costs order that is the order she would have made.

39 Étant donné tous ces facteurs, le juge Hunt a conclu qu'il conviendrait de condamner les intimés (les appelants en cour d'appel) aux dépens, même s'ils avaient eu gain de cause en appel. Cependant, les appelants (intimés en cour d'appel) en l'espèce n'ayant demandé qu'une ordonnance sans frais, telle est l'ordonnance qu'elle aurait rendue.

IV. Issues

The constitutional questions which have been stated by this Court are:

1. Do (a) decisions not to include sexual orientation or (b) the non-inclusion of sexual orientation, as a prohibited ground of discrimination in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7,

IV. Les questions en litige

40 Les questions constitutionnelles énoncées par notre Cour sont les suivantes:

1. Est-ce que a) soit la décision de ne pas inclure l'orientation sexuelle, b) soit la non-inclusion de l'orientation sexuelle, en tant que motif de discrimination illicite dans le préambule et dans les art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2, et ses modifications, intitulée maintenant *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, ch. H-11.7, a pour effet de nier les droits garantis par

infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to Question 1 is "yes", is the infringement or denial demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

41 The parties have also raised issues with respect to standing, the application of the *Charter* and the appropriate remedy.

V. Analysis

A. *Standing*

42 The appellants seek to challenge the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*. The respondents on this appeal submitted that the appellants should have standing to challenge only the sections of the *IRPA* relating to employment, namely ss. 7(1), 8(1) and 10, since the factual background of the case involves discrimination in employment. The Attorney General of Canada goes even further by arguing that the only provision at issue in this case is s. 7(1), which specifically addresses discrimination in employment practices.

43 The originating notice of motion filed by the appellants in the Court of Queen's Bench referred to ss. 2(1), 3, 4 and 7(1) of the *IRPA*. At trial, they were allowed to amend their application to include s. 10, which had been omitted as the result of an oversight. In making this decision, Russell J. applied the test for public interest standing from *Canadian Council of Churches*, *supra*, and concluded that the appellants had standing to challenge s. 10 as well. The way in which she articulated this conclusion implies that the appellants also had standing to challenge the other sections of the Act referred to in the originating notice. There is no reason to disagree with this assessment.

le par. 15(1) de la *Charte canadienne des droits et libertés*, ou d'y porter atteinte?

2. Si la réponse à la question 1 est «oui», est-ce que la négation ou l'atteinte peut être justifiée en tant que limite raisonnable au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Les parties ont également soulevé certaines questions relativement à la qualité pour agir, à l'application de la *Charte* et à la réparation appropriée.

V. L'analyse

A. *La qualité pour agir*

Les appelants contestent la validité du préambule ainsi que celle des art. 3, 4 et 10 ainsi que des par. 2(1), 7(1), 8(1) et 16(1) de l'*IRPA*. Les intimés dans le cadre du présent pourvoi font valoir que les appelants ne devraient avoir qualité pour agir qu'à l'égard des dispositions de l'*IRPA* qui se rapportent à l'emploi, savoir les par. 7(1) et 8(1) ainsi que l'art. 10, étant donné que les faits de l'affaire concernent la discrimination dans l'emploi. Le procureur général du Canada va même plus loin en soutenant que la seule disposition pertinente en l'espèce est le par. 7(1), qui vise expressément la discrimination dans les pratiques en matière d'emploi.

L'avis de requête introductive d'instance produit par les appelants au greffe de la Cour du Banc de la Reine renvoie aux art. 3 et 4 ainsi qu'aux par. 2(1) et 7(1) de l'*IRPA*. Pendant l'instruction, les appelants ont été autorisés à modifier leur demande afin d'y ajouter l'art. 10 qui avait été omis par inadvertance. Pour rendre cette décision, le juge Russell a appliqué le critère établi dans l'arrêt *Conseil canadien des Églises*, précité, pour déterminer s'il y avait lieu de reconnaître la qualité pour agir dans l'intérêt public, et elle a conclu que les appelants avaient aussi qualité pour contester l'art. 10. La formulation de cette conclusion donne à penser que les appelants avaient également qualité pour contester les autres dispositions de la Loi mentionnées dans l'avis de requête introductive d'instance. Aucun motif ne justifie une remise en question de cette évaluation.

In *Canadian Council of Churches* (at p. 253), it was stated that three aspects should be considered:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

It is my opinion that these criteria are met with respect to all of the provisions named by the appellants (the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1)).

A serious issue as to constitutional validity is raised with respect to all of these provisions. The issue is substantially the same for all of the provisions from which sexual orientation is excluded as a prohibited ground of discrimination. There is nothing in particular about s. 7(1) or ss. 7(1), 8(1) and 10 that makes their validity any more questionable than the other provisions dealing with discrimination. The respondents argue that there is no serious issue as to the constitutional validity of the preamble and s. 16 (which sets out the functions of the Human Rights Commission), because those provisions do not confer any specific benefit or protection. Although neither of these two provisions directly confers a benefit or protection, arguably they do so indirectly. An omission from those provisions could well have at least some of the same effects as the omission of these rights from the other sections and therefore raises a serious issue of constitutional validity.

Further Vriend and the other appellants have a genuine and valid interest in all of the provisions they seek to challenge. Both Vriend as an individual and the appellant organizations have a direct interest in the exclusion of sexual orientation from all forms of discrimination. What is at issue here is the exclusion of sexual orientation as a protected ground from the *IRPA* and its procedures for the protection of human rights. This is not a case about employment discrimination as distinct from any other form of discrimination that occurs within the

Dans l'arrêt *Conseil canadien des Églises* (à la p. 253), notre Cour a dit que trois aspects devaient être considérés: 44

> Premièrement, la question de l'invalidité de la loi en question se pose-t-elle sérieusement? Deuxièmement, a-t-on démontré que le demandeur est directement touché par la loi ou qu'il a un intérêt véritable quant à sa validité? Troisièmement, y a-t-il une autre manière raisonnable et efficace de soumettre la question à la cour?

Je suis d'avis que ces critères sont respectés pour chacune des dispositions énumérées par les appelants (le préambule, les art. 3, 4 et 10, ainsi que les par. 2(1), 7(1), 8(1) et 16(1)).

Une question sérieuse est soulevée quant à la validité constitutionnelle de chacune de ces dispositions. La question se pose substantiellement de la même façon pour toutes les dispositions où l'orientation sexuelle est exclue des motifs de distinction illicites. La validité constitutionnelle du par. 7(1) ou des par. 7(1) et 8(1), ainsi que de l'art. 10, n'est pas davantage contestable que celle des autres dispositions relatives à la discrimination. Les intimés prétendent qu'aucune question sérieuse n'est soulevée quant à la validité constitutionnelle du préambule et de l'art. 16 (qui énonce les attributions de la Human Rights Commission), car ceux-ci ne confèrent aucune protection ni aucun avantage précis. Certes, ces dispositions ne confèrent pas directement un avantage ou une protection, mais on peut soutenir qu'elles le font de façon indirecte. Une omission dans ces dispositions pourrait bien avoir à tout le moins certains des effets d'une omission dans les autres dispositions, de sorte qu'elle soulève une question sérieuse sur le plan de la validité constitutionnelle. 45

En outre, M. Vriend et les autres appelants ont un intérêt véritable et valable à l'égard de l'ensemble des dispositions qu'ils cherchent à contester. Monsieur Vriend, en tant que particulier, et les organisations appelantes ont un intérêt direct à l'égard de l'exclusion de l'orientation sexuelle de l'ensemble des formes de discrimination. La question en litige en l'occurrence est l'exclusion de l'orientation sexuelle comme motif ouvrant droit à la protection de la Loi et aux recours que celle-ci prévoit pour la protection des droits de la per- 46

private sphere and is covered by provincial human rights legislation. Insofar as the particular situation and factual background of the appellant Vriend is relevant to establishing the issues on appeal, it is the denial of access to the complaint procedures of the Alberta Human Rights Commission that is the essential element of this case and not his dismissal from King's College. The particular issues relating to his loss of employment would be for the Human Rights Commission to resolve and do not form part of this appeal. It must also be remembered that Vriend is only one of four appellants. The other three are organizations which are generally concerned with the rights of gays and lesbians and their protection from discrimination in all areas of their lives. There is nothing to restrict their involvement in this appeal to matters of employment.

sonne. Il ne s'agit pas d'un cas de discrimination dans l'emploi par opposition aux autres formes de discrimination exercées dans le secteur privé et visées par les dispositions législatives provinciales sur les droits de la personne. Dans la mesure où la situation particulière de l'appelant M. Vriend et les faits de l'espèce sont pertinents pour établir quelles sont les questions soulevées par le pourvoi, c'est le non-accès à la procédure relative aux plaintes présentées à l'Alberta Human Rights Commission qui est l'élément essentiel de la présente affaire, et non le congédiement de l'appelant par le King's College. Il appartient à la Human Rights Commission d'examiner les questions relatives au congédiement, lesquelles sont étrangères au présent pourvoi. Il convient aussi de rappeler que M. Vriend n'est que l'un des quatre appelants. Les trois autres sont des organisations qui s'intéressent généralement aux droits des homosexuels et à leur protection contre la discrimination dans tous les domaines. Rien ne limite leur participation au présent pourvoi aux questions liées à l'emploi.

47 With respect to the third criterion, the only other way the issue could be brought before the Court with respect to the other sections would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. This cannot be a satisfactory result.

Pour ce qui concerne le troisième critère, la seule autre façon dont notre Cour pourrait être saisie de la question relativement aux autres dispositions serait d'attendre qu'une personne soit victime de discrimination fondée sur son orientation sexuelle en matière d'habitation, de consommation et de services, etc. et qu'elle conteste la validité de la disposition pertinente. Ce serait non seulement peu rentable sur le plan des ressources judiciaires, mais également injuste pour les personnes en cause, parce qu'elles auraient à surmonter les obstacles que sont les délais, les frais et la vulnérabilité personnelle face à la discrimination. Ce résultat ne saurait donner satisfaction.

48 As well it is important to recall that all of the provisions are very similar and do not depend on any particular factual context in order to resolve their constitutional status. The fact that homosexuals have suffered discrimination in all aspects of their lives was accepted in *Egan*, *supra*. It follows that there is really no need to adduce additional evidence regarding the provisions concerned with discrimination in areas other than employment.

Aussi, il importe de rappeler que toutes les dispositions se ressemblent beaucoup et que leur constitutionnalité ne dépend pas d'un contexte factuel particulier. Le fait que les homosexuels ont été victimes de discrimination dans tous les aspects de leur vie est reconnu dans l'arrêt *Egan*, précité. Il n'est donc vraiment pas nécessaire de produire des éléments de preuve supplémentaires quant aux dispositions relatives à la discrimination dans les autres domaines que l'emploi.

Therefore, the appellants have standing to challenge the validity of all of the provisions named in the constitutional questions, namely the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*.

B. *Application of the Charter*

1. Application of the *Charter* to a Legislative Omission

Does s. 32 of the *Charter* prohibit consideration of a s. 15 violation when that issue arises from a legislative omission?

The respondents (appellants on the cross-appeal) argue on their cross-appeal that because this case concerns a legislative omission, s. 15 of the *Charter* should not apply pursuant to s. 32. This submission cannot be accepted.

This issue is resolved simply by determining whether the subject of the challenge in this case is one to which the *Charter* applies pursuant to s. 32. Questions relating to the nature of the legislature's decision, its effect, and whether it is neutral, are relevant instead to the s. 15 analysis. The threshold test demands only that there is some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis. At this preliminary stage no judgment should be made as to the nature or validity of this "matter" or subject. Undue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from a full *Charter* analysis.

Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action

En conséquence, les appelants ont qualité pour contester la validité de toutes les dispositions mentionnées dans les questions constitutionnelles, soit le préambule, les art. 3, 4 et 10 ainsi que les par. 2(1), 7(1), 8(1) et 16(1) de l'*IRPA*. 49

B. *L'application de la Charte*

1. Application de la *Charte* à l'omission du législateur

L'article 32 de la *Charte* soustrait-il l'omission du législateur à l'application de l'art. 15? 50

Les intimés (les appelants dans le cadre du pourvoi incident) font valoir que, parce qu'il s'agit en l'espèce d'une omission du législateur, l'art. 15 de la *Charte* ne devrait pas s'appliquer en vertu de l'art. 32. Cette prétention ne saurait être acceptée. 51

Cette question est donc tranchée simplement en déterminant si l'objet de la contestation en l'espèce en est un auquel la *Charte* s'applique en vertu de l'art. 32. Les questions relatives à la nature de la décision prise par le législateur, à l'effet de cette décision et à son caractère neutre concernent plutôt l'analyse fondée sur l'art. 15. Le critère préliminaire exige seulement qu'il s'agisse d'un «domaine relevant de [la] législature» lequel est le véritable sujet de l'analyse fondée sur la *Charte*. À ce stade initial, aucune conclusion ne doit être tirée concernant la nature ou la validité de ce «domaine» ou de ce sujet. Il ne faut pas accorder une trop grande importance à l'application du critère préliminaire, car cela pourrait bien soustraire inutilement des domaines importants à une véritable analyse fondée sur la *Charte*. 52

Une confusion supplémentaire résulte des arguments avancés relativement aux rôles respectifs du législateur et des tribunaux dans le cadre de l'analyse afférente à l'art. 32. Selon ces arguments, les tribunaux doivent respecter la décision du législateur de ne pas adopter une disposition en particulier, et la portée de l'examen fondé sur la *Charte* devrait être limitée de façon qu'une telle décision ne puisse être contestée. Je ne peux accepter cette thèse. Outre la distinction très problématique faite 53

and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in *Charter* analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach. My colleague Iacobucci J. deals with these considerations at greater length more fully in his reasons.

54 The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny. McClung J.A. in the Alberta Court of Appeal criticized the application of the *Charter* to a legislative omission as an encroachment by the courts on legislative autonomy. He objected to what he saw as judges dictating provincial legislation under the pretext of constitutional scrutiny. In his view, a choice by the legislature not to legislate with respect to a particular matter within its jurisdiction, especially a controversial one, should not be open to review by the judiciary: "When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all. . . . The *Canadian Charter of Rights and Freedoms* was not adopted by the provinces to promote the federal extraction of subsidiary legislation from them but only to police it once it is proclaimed — if it is proclaimed" (pp. 25 and 28).

55 There are several answers to this position. The first is that in this case, the constitutional challenge concerns the *IRPA*, legislation that has been proclaimed. The fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority, as

entre l'action et l'inaction du législateur, cet argument vise à modifier substantiellement la nature des considérations relatives au respect dû au législateur dans le cadre d'une analyse fondée sur la *Charte*. La retenue exercée à juste titre à l'égard des choix du législateur sera prise en compte d'abord pour décider si une limite est justifiée conformément à l'article premier et à nouveau pour déterminer la réparation qu'il convient d'accorder pour remédier à une violation de la *Charte*. Mon collègue le juge Iacobucci approfondit ces questions dans ses motifs.

La notion de retenue judiciaire envers les choix du législateur ne devrait cependant pas servir à soustraire certains types de décisions d'ordre législatif à tout examen fondé sur la *Charte*. Le juge McClung de la Cour d'appel de l'Alberta a critiqué l'application de la *Charte* à l'omission du législateur, qu'il voit comme un empiétement du pouvoir judiciaire sur le pouvoir législatif. Il s'est dit opposé à ce que les juges dictent les lois provinciales sous prétexte d'examen constitutionnel. À son avis, la décision du législateur de ne pas légiférer dans un domaine qui relève de sa compétence, spécialement un domaine controversé, devrait échapper à tout examen judiciaire: [TRADUCTION] «La législature provinciale qui opte pour le silence n'a pas à suivre la ligne tracée par la *Charte*. Sur le plan constitutionnel, elle n'a pas à suivre du tout.[. . .] Les provinces n'ont pas souscrit à la *Charte canadienne des droits et libertés* pour autoriser le gouvernement fédéral à établir des lois en leur lieu et place, mais seulement pour assujettir celles-ci à certaines exigences une fois qu'elles sont promulguées — si toutefois elles le sont» (pp. 25 et 28).

Plusieurs éléments peuvent être avancés pour réfuter cette proposition. Premièrement, la contestation constitutionnelle vise en l'espèce une loi dûment promulguée. Que la portée trop limitative de l'*IRPA* soit en cause ne change rien au fait qu'en l'occurence, l'examen fondé sur la *Charte* porte sur l'acte législatif. En outre, le libellé de l'art. 32 n'a pas pour effet de limiter l'application de la *Charte* aux actions positives qui empiètent sur des droits ou à l'exercice abusif d'un pouvoir,

McClung J.A. seems to suggest. These issues will be dealt with shortly. Yet at this point it must be observed that McClung J.A.'s reasons also imply a more fundamental challenge to the role of the courts under the *Charter*, which must also be answered. This issue is addressed in the reasons of my colleague Iacobucci J. below, and that discussion need not be repeated here. However, at the present stage of the analysis it may be useful to clarify the role of the judiciary in responding to a legislative omission which is challenged under the *Charter*.

comme le juge McClung semble le laisser entendre. Je reviendrai sur ces questions un peu plus loin. Je tiens à signaler à ce stade-ci que les motifs du juge McClung impliquent également une remise en question plus fondamentale du rôle des tribunaux sous le régime de la *Charte*, à laquelle il faut réagir. Mon collègue le juge Iacobucci se penche sur la question dans ses motifs, et il n'y a pas lieu de reprendre ici l'analyse qu'il en fait. Toutefois, il peut être utile, à ce moment-ci, de clarifier le rôle des tribunaux appelés à se prononcer sur une omission du législateur contestée sur le fondement de la *Charte*.

It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A. suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.

56 On prétend que le présent pourvoi constitue un affrontement entre le pouvoir des législatures démocratiquement élues d'adopter les lois qu'elles jugent appropriées et celui des tribunaux d'invalider ces lois ou de prescrire l'intégration de certains éléments à celles-ci. Il s'agit d'une façon trompeuse et erronée de présenter le litige. Ce ne sont tout simplement pas les tribunaux qui imposent des limites au législateur, mais bien la Constitution, que les tribunaux doivent interpréter. Il en est nécessairement ainsi dans toutes les démocraties constitutionnelles. Les citoyens doivent avoir le droit de contester les lois qui outrepassent à leur avis les pouvoirs d'une législature. Lorsqu'un tel recours est dûment exercé, les tribunaux sont constitutionnellement tenus de trancher. On prétend toutefois que la présente affaire se distingue parce que la contestation porte essentiellement sur le fait que le législateur n'a pas accordé la protection d'une loi à un groupe de personnes en particulier. Les tenants de cette théorie tiennent pour acquis que seule l'action positive, par opposition à l'omission, peut faire l'objet d'un examen fondé sur la *Charte*. Pour les motifs exposés ci-après, j'estime qu'une telle distinction n'a aucun fondement juridique. Dans toute affaire, y compris en l'espèce, les tribunaux ont l'obligation de déterminer si la contestation est justifiée. Contrairement à ce qu'a laissé entendre le juge McClung, il ne s'agit pas pour les tribunaux d'imposer leur vision de la législation «idéale», mais bien de déterminer la constitutionnalité de l'action ou de l'omission du législateur qui est attaquée.

57 McClung J.A.'s position that judicial interference is inappropriate in this case is based on the assumption that the legislature's "silence" in this case is "neutral". Yet, questions which raise the issue of neutrality can only be dealt with in the context of the s. 15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the *Charter*. The appellants have challenged the law on the ground that it violates the Constitution of Canada, and the courts must hear and consider that challenge. If, as alleged, the *IRPA* excludes some people from receiving benefits and protection it confers on others in a way that contravenes the equality guarantees in the *Charter*, then the courts have no choice but to say so. To do less would be to undermine the Constitution and the rule of law.

La proposition du juge McClung selon laquelle l'intervention des tribunaux est inopportune en l'espèce s'appuie sur le postulat voulant que le «silence» du législateur soit «neutre» en l'occurrence. Or, les questions que soulève la prétendue neutralité ne peuvent être analysées que dans le contexte de l'art.15, à défaut de quoi on ne saurait dire si l'omission est neutre ou non. La neutralité ne peut être présumée, sinon l'omission échapperait à l'examen judiciaire fondé sur la *Charte*. Les appelants ont contesté la loi pour le motif qu'elle viole la Constitution du Canada, et les tribunaux doivent statuer sur leurs allégations. Si, comme le soutiennent les appelants, l'*IRPA* prive certaines personnes des avantages et de la protection qu'elle accorde à d'autres et ce, d'une façon qui va à l'encontre des droits à l'égalité garantis par la *Charte*, les tribunaux n'ont d'autre choix que de rendre un jugement en ce sens. Se soustraire à cette obligation compromettrait la Constitution et la primauté du droit.

58 Let us now consider the substance of the respondents' position on this issue.

Examinons maintenant les points essentiels de la thèse des intimés sur la question.

59 The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. This submission should not be accepted. They assert that there must be some "exercise" of "s. 32 authority" to bring the decision of the legislature within the purview of the *Charter*. Yet there is nothing either in the text of s. 32 or in the jurisprudence concerned with the application of the *Charter* which requires such a narrow view of the *Charter*'s application.

Les intimés prétendent que le choix délibéré de ne pas légiférer ne doit pas être assimilé à une action gouvernementale et, par conséquent, ne peut faire l'objet d'un examen fondé sur la *Charte*. Cette thèse ne saurait être retenue. Les intimés font valoir qu'il doit y avoir un certain «exercice» du pouvoir dans un «domaine visé à l'art. 32» pour que la *Charte* s'applique à la décision de la législature. Or, ni le libellé de l'art. 32 ni la jurisprudence relative à l'application de la *Charte* n'exigent une telle limitation du champ d'application de la *Charte*.

60 The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be

L'alinéa 32(1)*b*) dit que la *Charte* s'applique «à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature». Rien n'indique qu'une action positive empiétant sur des droits soit nécessaire; en fait, l'alinéa parle uniquement des domaines relevant de cette législature. Dianne Pothier a fait remarquer à juste titre que l'art. 32 est [TRADUCTION] «rédigé d'une manière assez générale pour viser les obligations positives du législateur, de telle sorte que la *Charte* s'appliquera même lorsque le

engaged even if the legislature refuses to exercise its authority" ("The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

The *IRPA* is being challenged as unconstitutional because of its failure to protect *Charter* rights, that is to say its underinclusiveness. The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the *Charter* inapplicable. If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*.

It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the *IRPA* is an "act" of the Legislature to which the *Charter* should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the *Charter* is applicable.

It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner. It has been held that certain provisions of the *Charter*, for example those dealing with minority language rights (s. 23),

législateur refuse d'exercer son pouvoir» («The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak» (1996), 7 *Forum constitutionnel* 113, à la p. 115). L'application de la *Charte* n'est pas limitée aux cas où par son action le gouvernement empiète sur des droits.

61 La constitutionnalité de l'*IRPA* est contestée pour le motif qu'elle ne protège pas des droits garantis par la *Charte*, c'est-à-dire en raison de sa portée trop limitative. Le seul fait que la Loi soit contestée pour sa portée trop limitative ne devrait pas nécessairement rendre la *Charte* inapplicable. Si l'omission n'était pas assujettie à la *Charte*, la loi trop limitative, rédigée de façon à simplement omettre une catégorie plutôt qu'à l'exclure expressément, serait à l'abri de toute contestation fondée sur la *Charte*. Si ce point de vue était jugé valable, la forme et non le fond déterminerait si la loi peut être contestée, ce qui serait illogique, mais surtout injuste. Par conséquent, lorsque, comme en l'espèce, la contestation vise une loi adoptée par la législature qui est trop limitative en raison d'une omission, l'art. 32 ne devrait pas être interprété comme faisant obstacle à l'application de la *Charte*.

62 L'on pourrait également soutenir, en l'espèce, que la décision délibérée d'omettre l'orientation sexuelle dans les dispositions de l'*IRPA* est un «acte» du législateur à laquelle la *Charte* devrait s'appliquer. Les mesures concrètes et réfléchies que le gouvernement a prises pour faire en sorte que les victimes de discrimination fondée sur l'orientation sexuelle ne puissent présenter une plainte à la Human Rights Commission étayent cet argument qui n'en est que plus convaincant. Cependant, il n'est pas nécessaire de l'invoquer pour arriver à la conclusion que la *Charte* s'applique.

63 Il est également inutile de se demander si un gouvernement pourrait à juste titre faire l'objet d'une contestation fondée sur l'art. 15 de la *Charte* parce qu'il n'a pas agi du tout, par opposition à un cas où, comme en l'espèce, il a agi d'une manière trop limitative. Notre Cour a statué que certaines dispositions de la *Charte*, notamment celles qui

do indeed require a government to take positive actions to ensure that those rights are respected (see *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 393; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 862-63 and 866).

64 It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in *obiter* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

2. Application of the *Charter* to Private Activity

65 The respondents further argue that the effect of applying the *Charter* to the *IRPA* would be to regulate private activity. Since it has been held that the *Charter* does not apply to private activity (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *McKinney*, *supra*), it is said that the application of the *Charter* in this case would not be appropriate.

portent sur les droits d'une minorité linguistique (art. 23), imposent en effet à un gouvernement l'obligation positive de prendre des mesures pour assurer le respect de ces droits (voir *Mahe c. Alberta*, [1990] 1 R.C.S. 342, à la p. 393, et *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839, aux pp. 862, 863 et 866).

Il n'a pas été nécessaire jusqu'ici de déterminer si dans d'autres contextes la *Charte* pouvait faire peser sur le législateur provincial ou fédéral, des obligations positives, de telle sorte que le fait de ne pas légiférer pourrait être contesté en vertu de la *Charte*. Cette possibilité a cependant été envisagée, sans être écartée, dans certaines affaires. Par exemple, dans l'arrêt *McKinney*, le juge Wilson a fait la remarque incidente suivante: «il n'est pas évident en soi que le gouvernement ne pourrait être reconnu coupable de violation de la *Charte* pour avoir omis d'agir» (p. 412). Dans l'arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995, à la p. 1038, s'exprimant au nom de la majorité et s'appuyant sur les observations du juge en chef Dickson dans l'arrêt *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, le juge L'Heureux-Dubé laisse entendre que la *Charte* pourrait, dans certaines situations, imposer au gouvernement l'obligation positive de prendre des mesures concrètes. Enfin, dans l'arrêt *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, s'exprimant au nom de notre Cour, le juge La Forest laisse sans réponse la question de savoir si la *Charte* pourrait obliger l'État à prendre des mesures concrètes (au par. 73). Toutefois, il n'est ni nécessaire ni opportun d'examiner cette vaste question en l'espèce.

2. L'application de la *Charte* à l'activité privée

Les intimés soutiennent en outre qu'appliquer la *Charte* à l'*IRPA* ce serait réglementer une activité privée. Comme il a été décidé que la *Charte* ne s'applique pas aux activités privées (*SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Tremblay c. Daigle*, [1989] 2 R.C.S. 530; *McKinney*, précité), les intimés font valoir qu'il serait inapproprié d'appliquer la *Charte* en l'espèce. Cet argu-

This argument cannot be accepted. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. It is true that the *IRPA* itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the *IRPA* from the purview of the *Charter*. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny.

The respondents' submission has failed to distinguish between "private activity" and "laws that regulate private activity". The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal. This case can be compared to *McKinney*, where La Forest J., speaking for the majority, stated that "[t]here is no question that, the [Human Rights] Code being a law, the *Charter* applies to it" (p. 290). Those words are applicable to the situation presented in this case. The constitutional challenge here concerns the *IRPA*, an Act of the Alberta Legislature. It does not concern the acts of King's College or any other private entity or person. This, I think, is sufficient to dispose of the respondents' submissions on this point.

C. *Section 15(1)*

1. Approach to Section 15(1)

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or

ment ne peut être accepté. Appliquer la *Charte* à l'*IRPA* ce n'est pas appliquer la *Charte* à une activité privée. Il est vrai que l'*IRPA* vise des activités privées et, par conséquent, elle a une «incidence» sur de telles activités. Mais il ne s'ensuit pas que cette incidence indirecte devrait soustraire l'*IRPA* à l'application de la *Charte*. Il serait inacceptable qu'une loi échappe à l'examen fondé sur la *Charte* pour le seul motif qu'elle régit des activités privées.

66 L'argumentation des intimés ne fait aucune distinction entre l'«activité privée» et la «loi qui régit l'activité privée». La première n'est pas assujettie à la *Charte*, mais la seconde l'est manifestement. Le présent pourvoi porte sur une loi qui régit des activités privées. Il s'apparente à l'affaire *McKinney*, où le juge La Forest, au nom de la majorité de notre Cour, a dit qu'«[i]l n'y a aucun doute que puisque le [Human Rights] Code est une loi, la *Charte* s'y applique» (p. 290). Cette conclusion s'applique à la situation considérée en l'espèce. La présente contestation constitutionnelle porte sur l'*IRPA*, qui a été adoptée par la législature albertaine, et non sur les actes du King's College ou d'une autre personne ou entité privée, ce qui, selon moi, est suffisant pour rejeter les prétentions des intimés à cet égard.

C. *Le paragraphe 15(1)*

1. Façon d'appliquer le par. 15(1)

67 Les droits garantis par le par. 15(1) de la *Charte* sont fondamentaux pour le Canada. Ils reflètent les rêves les plus chers, les espérances les plus élevées et les aspirations les plus nobles de la société canadienne. L'adoption du suffrage universel a eu pour effet de reconnaître, jusqu'à un certain point, l'importance de l'individu. En adoptant le par. 15(1), dont les dispositions ont une large portée et se caractérisent par un grand souci de justice fondamentale, le Canada a franchi une autre étape dans la reconnaissance de l'importance fondamentale et de la dignité inhérente de chacun. Cette démarche est non seulement louable, mais essentielle à la réalisation d'un objectif admirable: le droit de chacun à la dignité. C'est le moyen d'inspirer aux Canadiens un sentiment de fierté. Pour qu'il y ait

other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

égalité, la valeur et l'importance intrinsèques de chaque individu doivent être reconnues sans égard à l'âge, au sexe, à la couleur, aux origines ou à d'autres caractéristiques de la personne. Cette reconnaissance devrait alors susciter chez tous les Canadiens un sentiment de dignité et de valorisation tout en leur inspirant la plus grande fierté et la satisfaction d'appartenir à une grande nation.

68 The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.

Presque intuitivement, tous comprennent la notion et le principe de l'égalité et y sont attachés. Il est facile de louer l'égalité comme le fondement d'une société juste qui permet à chacun de vivre dans la dignité et l'harmonie au sein de la collectivité. La difficulté consiste à la réaliser concrètement. Si difficile soit-il, cet objectif mérite qu'on livre une rude bataille pour l'atteindre. Ce n'est que dans un contexte d'égalité réelle que la fraternité et l'harmonie peuvent exister. C'est alors que chacun peut véritablement vivre dans la dignité.

69 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 enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian 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. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

Il est facile de dire que quiconque «nous» ressemble a droit à l'égalité. Chacun de vous trouve cependant plus difficile de soutenir que les gens «différents», sous un aspect ou un autre, doivent jouir des mêmes droits à l'égalité que nous. Pourtant, dès que nous affirmons qu'un groupe énuméré au par. 15(1) ou un groupe analogue ne mérite pas la même protection et le même bénéfice de la loi, ou n'en est pas digne, toutes les minorités et toute la société canadienne se trouvent avilies. Il est si simple, en apparence, mais tellement préjudiciable, de dire de ceux qui ont une déficience ou dont la race, la religion, la couleur ou l'orientation sexuelle est différente qu'ils sont moins dignes d'estime. Or, lorsque l'égalité prévue à l'art. 15 est niée à un groupe visé ou à un groupe analogue, c'est l'égalité de chacune des autres minorités qui est menacée. Notre Constitution garantit le droit à l'égalité. La reconnaissance de ce droit aux minorités aurait pu, dans le passé, éviter les trop nombreuses tragédies qui ont ponctué l'histoire. Il ne faut jamais oublier que la discrimination est l'antithèse de l'égalité et que c'est la reconnaissance de l'égalité qui assure la dignité de chacun.

70 How then should the analysis of s. 15 proceed? In *Egan* the two-step approach taken in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R.

Comment, dès lors, l'analyse fondée sur l'art. 15 doit-elle être effectuée? Dans l'arrêt *Egan*, la méthode comportant deux étapes employée dans

143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296, was summarized and described in this way (at paras. 130-31):

The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

A similar approach was taken by McLachlin J. in *Miron* (at para. 128):

The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.

In *Miron* and *Egan*, Lamer C.J. and La Forest, Gonthier and Major JJ. articulated a qualification which, as described in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (at para. 64), "focuses on the relevancy of a distinction to the purpose of the legislation where that purpose is not itself discriminatory and recognizes that certain distinctions are outside the scope of s. 15". This

les arrêts *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, et *R. c. Turpin*, [1989] 1 R.C.S. 1296, est résumée et décrite comme suit (aux par. 130 et 131):

La première [étape] consiste à déterminer si, en raison de la distinction créée par la disposition contestée, il y a eu violation du droit d'un plaignant à l'égalité devant la loi, à l'égalité dans la loi, à la même protection de la loi et au même bénéfice de la loi. À cette étape de l'analyse, il s'agit principalement de vérifier si la disposition contestée engendre, entre le plaignant et d'autres personnes, une distinction fondée sur des caractéristiques personnelles.

Les distinctions créées par les lois n'emportent pas toutes discrimination. C'est pourquoi il faut, à la seconde étape, déterminer si la distinction ainsi créée donne lieu à une discrimination. À cette fin, il faut se demander, d'une part, si le droit à l'égalité a été enfreint sur le fondement d'une caractéristique personnelle qui est soit énumérée au par. 15(1), soit analogue à celles qui y sont énumérées et, d'autre part, si la distinction a pour effet d'imposer au plaignant des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux bénéfices et aux avantages offerts à d'autres.

Le juge McLachlin adopte une méthode semblable dans l'arrêt *Miron* (au par. 128):

L'analyse fondée sur le par. 15(1) comporte deux étapes. Premièrement, le demandeur doit démontrer qu'il y a eu négation de son droit «à la même protection» ou «au même bénéfice» de la loi qu'une autre personne. Deuxièmement, le demandeur doit démontrer que cette négation constitue une discrimination. À cette seconde étape, pour établir qu'il y a discrimination, le demandeur doit prouver que la négation repose sur l'un des motifs de discrimination énumérés au par. 15(1) ou sur un motif analogue et que le traitement inégal est fondé sur l'application stéréotypée de présumées caractéristiques personnelles ou de groupe.

71 Dans les arrêts *Miron* et *Egan*, le juge en chef Lamer et les juges La Forest, Gonthier et Major ont apporté un tempérament dont l'arrêt *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358 (au par. 64), dit qu'il «met l'accent sur la pertinence d'une distinction par rapport à l'objet du texte de loi, lorsque cet objet n'est pas lui-même discriminatoire, et elle reconnaît que certaines dis-

approach is, to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group.

72 It has subsequently been explained, however, that it is not only through the "stereotypical application of presumed group or personal characteristics" that discrimination can occur, although this may be common to many instances of discrimination. As stated by Sopinka J. in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at paras. 66-67:

> . . . the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.
>
> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. . . . The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.

73 These approaches to the analysis of s. 15(1) have been summarized and adopted in subsequent cases, e.g. *Eaton* (at para. 62), *Benner* (at para. 69) and, most recently, *Eldridge*. In *Eldridge*, La Forest J., writing for the unanimous Court, stated (at para. 58):

> While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 62, *Miron*, *supra*, and *Egan*, *supra*. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one

tinctions ne sont pas visées par l'art. 15». Cette méthode est dans une certaine mesure compatible avec l'idée que la discrimination comporte habituellement l'attribution de caractéristiques stéréotypées aux membres d'un groupe énuméré ou analogue.

Toutefois, notre Cour a par la suite précisé que la discrimination ne résulte pas seulement de «l'application stéréotypée de présumées caractéristiques personnelles ou de groupe», bien que celle-ci puisse être observée dans de nombreux cas de discrimination. Comme le dit le juge Sopinka dans l'arrêt *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, aux par. 66 et 67:

> . . . le par. 15(1) de la *Charte* a non seulement pour objet d'empêcher la discrimination par l'attribution de caractéristiques stéréotypées à des particuliers, mais également d'améliorer la position de groupes qui, dans la société canadienne, ont subi un désavantage en étant exclus de l'ensemble de la société ordinaire comme ce fut le cas pour les personnes handicapées.
>
> Certains des motifs illicites visent principalement à éliminer la discrimination par l'attribution de caractéristiques fausses fondées sur des attitudes stéréotypées se rapportant à des conditions immuables comme la race ou le sexe. [. . .] L'autre objectif, tout aussi important, vise à tenir compte des véritables caractéristiques de ce groupe qui l'empêchent de jouir des avantages de la société, et à les accommoder en conséquence.

Ces méthodes préconisées relativement à l'analyse fondée sur le par. 15(1) ont été résumées et adoptées dans des arrêts ultérieurs, p. ex. *Eaton*, précité (au par. 62), *Benner*, précité (au par. 69), et plus récemment, *Eldridge*. Dans ce dernier arrêt, le juge La Forest a dit ce qui suit au nom de notre Cour (au par. 58):

> Bien que notre Cour n'ait pas adopté une approche uniforme à l'égard de cette disposition, il y a un large accord général sur le cadre d'analyse général: voir *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, au par. 62, *Miron* et *Egan*, précités. La personne qui allègue une violation du par. 15(1) doit d'abord établir que, en raison d'une distinction faite entre elle et d'autres personnes, elle est privée de la «même protection» ou du «même bénéfice» de la loi. En deuxième lieu, elle doit démontrer que cette privation

of the enumerated grounds listed in s. 15(1) or one analogous thereto.

In this case, as in *Eaton*, *Benner* and *Eldridge*, any differences that may exist in the approach to s. 15(1) would not affect the result, and it is therefore not necessary to address those differences. The essential requirements of all these cases will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.

2. The *IRPA* Creates a Distinction Between the Claimant and Others Based on a Personal Characteristic, and Because of That Distinction, It Denies the Claimant Equal Protection or Equal Benefit of the Law

(a) *Does the IRPA Create a Distinction*?

The respondents have argued that because the *IRPA* merely omits any reference to sexual orientation, this "neutral silence" cannot be understood as creating a distinction. They contend that the *IRPA* extends full protection on the grounds contained within it to heterosexuals and homosexuals alike, and therefore there is no distinction and hence no discrimination. It is the respondents' position that if any distinction is made on the basis of sexual orientation that distinction exists because it is present in society and not because of the *IRPA*.

These arguments cannot be accepted. They are based on that "thin and impoverished" notion of equality referred to in *Eldridge* (at para. 73). It has been repeatedly held that identical treatment will not always constitute equal treatment (see for example *Andrews*, *supra*, at p. 164). It is also clear that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be

constitue une discrimination fondée sur l'un des motifs énumérés au par. 15(1) ou sur un motif analogue.

74 Dans la présente espèce, comme dans les affaires *Eaton*, *Benner* et *Eldridge*, toute différence pouvant exister quant à la méthode à employer relativement au par. 15(1) ne modifie en rien le résultat, de sorte qu'il n'est pas nécessaire de s'y attarder. Les exigences essentielles établies dans ces affaires sont respectées si l'on se demande premièrement s'il y a une distinction entraînant la négation du droit à l'égalité devant la loi ou dans la loi ou la négation du droit à la même protection ou au même bénéfice de la loi et, deuxièmement, si cette négation constitue une discrimination fondée sur un motif énuméré au par. 15(1) ou sur un motif analogue.

2. L'*IRPA* établit une distinction entre le plaignant et d'autres personnes sur le fondement d'une caractéristique personnelle et, à cause de cette distinction, elle prive le plaignant du droit à la même protection et au même bénéfice de la loi

a) *L'IRPA établit-elle une distinction*?

75 Les intimés prétendent que, l'*IRPA* omettant simplement de mentionner l'orientation sexuelle, on ne peut conclure que ce «silence neutre» crée une distinction. Ils font valoir que l'*IRPA* assure tant aux hétérosexuels qu'aux homosexuels une protection entière contre la discrimination fondée sur les motifs qu'elle prévoit de sorte qu'aucune distinction n'est établie et, partant, aucune discrimination n'est exercée. Selon eux, si une distinction est établie sur le fondement de l'orientation sexuelle, elle est imputable à la société, et non à l'*IRPA*.

76 Ces arguments ne peuvent être acceptés. Ils sont fondés sur la notion «étroite et peu généreuse» de l'égalité que mentionne *Eldridge* (au par. 73). Il est bien établi qu'un traitement identique ne constitue pas toujours un traitement égal (voir notamment l'arrêt *Andrews*, précité, à la p. 164). Il est également clair que la formulation d'une exclusion ne devrait pas en masquer la nature de telle sorte que des exclusions libellées différemment soient trai-

treated differently. For example *Schachter*, at p. 698, discussed this point in the context of remedies, and quoted *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.), at pp. 384-85:

> Where the state makes a distinction between two classes of individuals, A and B, . . . the manner in which the legislative provision or law is drafted is irrelevant for constitutional purposes; i.e., it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B. In both cases, the impact upon the individual within group B is the same.

77 The respondents concede that if homosexuals were excluded altogether from the protection of the *IRPA* in the sense that they were not protected from discrimination on any grounds, this would be discriminatory. Clearly that would be discrimination of the most egregious kind. It is true that gay and lesbian individuals are not entirely excluded from the protection of the *IRPA*. They can claim protection on some grounds. Yet that certainly does not mean that there is no discrimination present. For example, the fact that a lesbian and a heterosexual woman are both entitled to bring a complaint of discrimination on the basis of gender does not mean that they have equal protection under the Act. Lesbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation.

78 The respondents also seek to distinguish this case from *McKinney*, *supra*, and *Blainey*, *supra*. In *Blainey*, the Ontario human rights legislation prohibited discrimination on the basis of gender, but expressly allowed it in athletic organizations. Similarly, in *McKinney*, the impugned legislation prohibited discrimination on the basis of age, but in circumstances of employment, "age" was defined as 18 to 65, thereby depriving elderly workers of a benefit under the statute on the basis of their age. In both cases the legislation was found to violate s. 15(1).

tées différemment. Par exemple, dans l'arrêt *Schachter*, à la p. 698, cette question est examinée dans le contexte de la réparation à accorder et l'arrêt *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (C.S.), est cité, aux pp. 384 et 385:

> [TRADUCTION] Lorsque l'État établit une distinction entre deux catégories de personnes, A et B,[. . .] la façon dont la disposition législative ou la loi est rédigée n'est pas pertinente sur le plan constitutionnel; c.-à-d. qu'il importe peu que la loi visée dispose: (1) A a droit aux bénéfices ou (2) tous ont droit aux bénéfices, sauf B. Dans les deux cas, le résultat est le même pour les membres du groupe B.

Les intimés concèdent que si les homosexuels étaient complètement exclus de la protection de l'*IRPA*, c'est-à-dire si elle ne les protégeait contre aucun des motifs de distinction qu'elle énumère, il y aurait discrimination. Manifestement, il s'agirait d'une discrimination des plus insignes. Il est vrai que les homosexuels ne sont pas entièrement exclus de la protection de l'*IRPA*. Ils peuvent en effet réclamer cette protection pour certains motifs. Cela ne veut pas dire pour autant qu'il n'y a pas de discrimination. Par exemple, le fait qu'une homosexuelle et qu'une hétérosexuelle aient toutes deux le droit de déposer une plainte de discrimination fondée sur le sexe ne signifie pas qu'elles jouissent d'une protection égale sous le régime de la Loi. Les homosexuels sont toujours privés de protection contre la discrimination fondée sur le motif le plus susceptible de revêtir pour eux la plus grande importance, soit l'orientation sexuelle.

Les intimés tentent également d'établir une distinction entre la présente espèce et les arrêts *McKinney* et *Blainey*, précités. Dans *Blainey*, la loi ontarienne sur les droits de la personne interdisait la discrimination fondée sur le sexe, mais l'autorisait expressément au sein des organisations sportives. De même, dans *McKinney*, la loi incriminée interdisait la discrimination fondée sur l'âge, mais en matière d'emploi; l'«âge» était défini comme étant la période comprise entre 18 et 65 ans, ce qui privait les travailleurs âgés du bénéfice de la loi en raison de leur âge. Dans les deux cas, le tribunal a conclu que la loi violait le par. 15(1).

The respondents suggest that because the government in those cases had decided to provide protection, it had to do so in a non-discriminatory manner, but that the present case is distinguishable because the *IRPA* remains silent with respect to sexual orientation. The fact that the legislation explicitly places limits on protection (to some within a category as in *McKinney*, or excluding a particular area of discrimination as in *Blainey*) cannot provide the sole basis for determining whether a distinction has been drawn by the legislation. This case too is one of partial protection although the exclusion or limit on protection takes a different form from that presented in *McKinney* and *Blainey*. Protection from discrimination is provided by the Government, by means of the *IRPA*, but only to some groups.

79 Selon les intimés, dans ces cas, le gouvernement ayant décidé d'assurer une protection, il devait le faire d'une façon non discriminatoire, mais en l'espèce, il y a lieu d'établir une distinction puisque l'*IRPA* est muette au sujet de l'orientation sexuelle. Le fait que le texte législatif limite explicitement la protection prévue (en l'accordant à certaines personnes au sein d'une catégorie, comme dans *McKinney*, ou en excluant un type particulier de discrimination, comme dans *Blainey*) ne permet à lui seul de déterminer si la loi établit une distinction. En l'espèce aussi, une protection partielle est accordée, bien que l'exclusion ou la limitation du régime de protection revête une forme différente de celles considérées dans les arrêts *McKinney* et *Blainey*. La protection contre la discrimination est assurée par le gouvernement, au moyen de l'*IRPA*, mais seulement à certains groupes.

If the mere silence of the legislation was enough to remove it from s. 15(1) scrutiny then any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. Such an approach would ignore the recognition that this Court has given to the principle that discrimination can arise from underinclusive legislation. This principle was expressed with great clarity by Dickson C.J. in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240. There he stated: "Underinclusion may be simply a backhanded way of permitting discrimination".

80 Si le simple silence de l'*IRPA* suffisait à la soustraire à l'examen fondé sur le par. 15(1), le législateur pourrait facilement contourner les objectifs de cette disposition en rédigeant des textes législatifs qui ne mentionne pas à dessein les groupes exclus. Ce serait faire fi de la reconnaissance, par notre Cour, du principe voulant qu'une loi trop limitative puisse être discriminatoire, lequel a été énoncé très clairement par le juge en chef Dickson dans l'arrêt *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219, à la p. 1240. S'exprimant au nom de la Cour, il a dit: «La couverture sélective constitue peut-être simplement un moyen détourné de permettre la discrimination».

It is clear that the *IRPA*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

81 Il est évident que l'*IRPA*, en raison de sa portée trop limitative, établit effectivement une distinction et ce, sous deux rapports différents simultanément. Premièrement, une distinction est créée entre les homosexuels, d'une part, et les autres groupes défavorisés qui bénéficient de la protection de l'*IRPA*, d'autre part. Les homosexuels ne jouissent même pas d'une égalité formelle par rapport aux groupes protégés, puisque, ceux-ci sont explicitement inclus alors que les homosexuels ne le sont pas.

The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more diffi-

82 Deuxièmement, une distinction encore plus fondamentale, selon moi, est créée entre homosexuels et hétérosexuels. Elle peut être plus difficile à

cult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group. This was well expressed by W. N. Renke, "Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925, at pp. 942-43:

> If both heterosexuals and homosexuals equally suffered discrimination on the basis of sexual orientation, neither might complain of unfairness if the *IRPA* extended no remedies for discrimination on the basis of sexual orientation. A person belonging to one group would be treated like a person belonging to the other. Where, though, discrimination is visited virtually exclusively against persons with one type of sexual orientation, an absence of legislative remedies for discrimination based on sexual orientation has a differential impact. The absence of remedies has no real impact on heterosexuals, since they have no complaints to make concerning sexual orientation discrimination. The absence of remedies has a real impact on homosexuals, since they are the persons discriminated against on the basis of sexual orientation. Furthermore, a heterosexual has recourse to all the currently available heads of discrimination, should a complaint be necessary. A homosexual, it is true, may also have recourse to those heads of discrimination, but the only type of discrimination he or she may suffer may be sexual orientation discrimination. He or she would have no remedy for this type of discrimination. Seen in this way, the *IRPA* does distinguish between homosexuals and heterosexuals.

See also Pothier, *supra*, at p. 119. It is possible that a heterosexual individual could be discriminated against on the ground of sexual orientation. Yet this is far less likely to occur than discrimination against a homosexual or lesbian on that same ground. It thus is apparent that there is a clear dis-

déceler parce qu'il y a en apparence une certaine égalité formelle: les homosexuels ont un même droit à la protection de l'*IRPA* que les hétérosexuels dans la mesure où ils peuvent saisir la commission d'une plainte de discrimination fondée sur l'un des motifs actuellement énumérés. Cependant, compte tenu de la réalité sociale de la discrimination exercée contre les homosexuels, l'exclusion de l'orientation sexuelle a de toute évidence un effet disproportionné sur ces derniers par comparaison avec les hétérosexuels. En raison de son caractère trop limitatif, l'*IRPA* nie donc aux homosexuels le droit à l'égalité réelle. Cela est fort bien expliqué par W. N. Renke dans «Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice» (1996), 34 *Alta. L. Rev.* 925, aux pp. 942 et 943:

> [TRADUCTION] Si hétérosexuels et homosexuels étaient également victimes de discrimination fondée sur l'orientation sexuelle, ni les uns ni les autres ne pourraient se plaindre d'injustice si l'*IRPA* ne conférait aucun recours à l'égard de la discrimination fondée sur l'orientation sexuelle. Les personnes appartenant à un groupe seraient traitées comme celles faisant partie de l'autre. Cependant, lorsque la discrimination est exercée presque exclusivement contre les personnes ayant une orientation sexuelle donnée, l'absence de recours légaux dans le cas de la discrimination fondée sur l'orientation sexuelle a un effet différent. L'absence de recours n'a aucune incidence réelle sur les hétérosexuels, puisqu'ils n'ont aucun motif de plainte concernant l'orientation sexuelle. Elle a par contre un effet véritable sur les homosexuels, car ils sont les victimes de la discrimination fondée sur l'orientation sexuelle. En outre, l'hétérosexuel peut, au besoin, invoquer tous les motifs de discrimination actuellement énumérés dans la Loi. Il est vrai que c'est également le cas pour l'homosexuel, mais il se peut que la seule discrimination exercée contre lui soit la discrimination fondée sur l'orientation sexuelle. Il n'aurait aucun recours contre ce type de discrimination. Dans cette optique, l'*IRPA* établit bel et bien une distinction entre homosexuels et hétérosexuels.

Voir également Pothier, *loc. cit.*, à la p. 119. Il est possible qu'un hétérosexuel soit victime de discrimination fondée sur l'orientation sexuelle. Mais cela risque beaucoup moins de se produire que la discrimination contre un homosexuel pour le même motif. Il appert donc qu'une nette distinc-

tinction created by the disproportionate impact which arises from the exclusion of the ground from the *IRPA*.

This case is similar in some respects to the recent case of *Eldridge*, *supra*. There the *Charter*'s requirement of substantive, not merely formal, equality was unanimously affirmed. It was, as well, recognized that substantive equality may be violated by a legislative omission. At paras. 60-61 the principle was explained in this way:

> The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.
>
> This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. . . . Section 15(1), the Court held [in *Andrews*], was intended to ensure a measure of substantive, not merely formal equality.

Finally, the respondents' contention that the distinction is not created by law, but rather exists independently of the *IRPA* in society, cannot be accepted. It is, of course, true that discrimination against gays and lesbians exists in society. The reality of this cruel and unfortunate discrimination was recognized in *Egan*. Indeed it provides the context in which the legislative distinction challenged in this case must be analysed. The reality of society's discrimination against lesbians and gay men demonstrates that there is a distinction drawn in the *IRPA* which denies these groups equal protection of the law by excluding lesbians and gay men from its protection, the very protection they so urgently need because of the existence of dis-

tion est créée par l'effet disproportionné qu'a l'exclusion de ce motif dans l'*IRPA*.

La présente espèce s'apparente à certains égards à la récente affaire *Eldridge*, précitée, où notre Cour a confirmé à l'unanimité que l'égalité doit être réelle, et non seulement formelle. Cet arrêt établit également qu'une omission du législateur peut porter atteinte à l'égalité réelle. Le principe est expliqué comme suit aux par. 60 et 61: 83

> La seule question à trancher en l'espèce est donc de savoir si les appelants ont droit au «même bénéfice de la loi, indépendamment de toute discrimination» aux termes du par. 15(1) de la *Charte*. À première vue, le régime d'assurance-maladie de la Colombie-Britannique s'applique d'une manière égale aux entendants et aux personnes atteintes de surdité. Il ne fait pas de «distinction» explicite fondée sur la déficience en accordant un traitement différent aux personnes atteintes de surdité. Tant ces dernières que les entendants ont droit de recevoir certains services médicaux gratuitement. Les appelants prétendent néanmoins que l'absence de financement pour les services d'interprètes gestuels les empêche de bénéficier du régime établi par la loi dans la même mesure que les entendants. Autrement dit, ils invoquent la discrimination découlant d'«effets préjudiciables».
>
> Notre Cour a statué de façon constante que le par. 15(1) de la *Charte* protège contre ce type de discrimination. [. . .] Le paragraphe 15(1), a statué la Cour [dans *Andrews*], vise à assurer une certaine égalité matérielle et non simplement formelle.

Enfin, la prétention des intimés selon laquelle la distinction n'est pas établie par la loi, mais existe en fait indépendamment de celle-ci dans la société, ne peut être acceptée. Il est évidemment vrai que les homosexuels sont victimes de discrimination dans la société. La réalité de cette discrimination cruelle et déplorable est reconnue dans l'arrêt *Egan*. Cet état de fait fournit le contexte dans lequel la distinction législative contestée en l'espèce doit être analysée. La réalité de la discrimination sociale dont les homosexuels sont victimes montre que l'*IRPA* établit une distinction qui nie à ces personnes le droit à la même protection de la loi en les excluant alors même qu'elles ont un pressant besoin de protection à cause de la discri- 84

crimination against them in society. It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.

85 Although the respondents try to distinguish this case from *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, the reasoning they put forward is very much reminiscent of the approach taken in that case. (See S. K. O'Byrne and J. F. McGinnis, "Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996), 34 *Alta. L. Rev.* 892, at pp. 920-22.) There it was held that a longer qualifying period for unemployment benefits relating to pregnancy was not discriminatory because it applied to all pregnant individuals, and that if this category happened only to include women, that was a distinction created by nature, not by law. This reasoning has since been emphatically rejected (see e.g. *Brooks*). *Eldridge* also emphatically rejected an argument that underinclusive legislation did not discriminate because the inequality existed independently of the benefit provided by the state (at paras. 68-69).

86 The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The "silence" of the *IRPA* with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

(b) *Denial of Equal Benefit and Protection of the Law*

87 It is apparent that the omission from the *IRPA* creates a distinction. That distinction results in a denial of the equal benefit and equal protection of the law. It is the exclusion of sexual orientation from the list of grounds in the *IRPA* which denies

mination exercée contre elles dans la société. Il n'est pas nécessaire de conclure que la loi crée la discrimination qui a cours dans la société pour déterminer qu'elle établit une distinction potentiellement discriminatoire.

Les intimés tentent de distinguer la présente espèce de l'arrêt *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183, mais le raisonnement qu'ils avancent rappelle beaucoup le point de vue adopté dans cette affaire. (Voir S. K. O'Byrne et J. F. McGinnis, «Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta» (1996), 34 *Alta. L. Rev.* 892, aux pp. 920 à 922.) Dans cet arrêt, il a été décidé que la fixation d'une période de référence plus longue pour l'obtention des prestations d'assurance-chômage en cas de grossesse n'était pas discriminatoire, car elle s'appliquait à toutes les personnes enceintes, et le fait que cette catégorie n'inclut que des femmes était attribuable à une distinction établie par la nature, non par la loi. Ce raisonnement a été rejeté catégoriquement depuis lors (voir, p. ex., l'arrêt *Brooks*). Dans l'arrêt *Eldridge*, elle a aussi rejeté de manière énergique l'argument voulant qu'une loi trop limitative ne soit pas discriminatoire parce que l'inégalité existe indépendamment de l'avantage que confère l'État (aux par. 68 et 69).

L'omission de l'orientation sexuelle dans les motifs de distinction interdits par l'*IRPA* crée une distinction fondée sur l'orientation sexuelle. Ce «silence» de l'*IRPA* en ce qui concerne la discrimination fondée sur l'orientation sexuelle n'est pas «neutre». Les homosexuels sont traités différemment d'autres groupes défavorisés et des hétérosexuels. Ceux-ci, contrairement aux homosexuels, sont protégés contre la discrimination fondée sur des motifs susceptibles de les concerner.

b) *La négation du droit au même bénéfice et à la même protection de la loi*

Il appert que l'omission du législateur crée une distinction et que cette distinction emporte la négation du droit au même bénéfice et à la même protection de la loi. C'est l'exclusion de l'orientation sexuelle des motifs de distinction interdits par

lesbians and gay men the protection and benefit of the Act in two important ways. They are excluded from the government's statement of policy against discrimination, and they are also denied access to the remedial procedures established by the Act.

l'*IRPA* qui prive les homosexuels du droit à la même protection et au même bénéfice de la Loi et ce, de deux manières importantes. Les homosexuels ne sont pas visés par l'énoncé de politique du gouvernement contre la discrimination, et on leur refuse l'accès aux recours permettant d'obtenir réparation en application de la Loi.

Therefore, the *IRPA*, by its omission or underinclusiveness, denies gays and lesbians the equal benefit and protection of the law on the basis of a personal characteristic, namely sexual orientation.

88 Par conséquent, en raison de l'omission du législateur ou de la portée trop limitative de l'*IRPA*, celle-ci nie aux homosexuels le droit à la même protection et au même bénéfice de la loi sur le fondement d'une caractéristique personnelle, à savoir l'orientation sexuelle.

3. The Denial of Equal Benefit and Equal Protection Constitutes Discrimination Contrary to Section 15(1)

3. La négation du droit au même bénéfice et à la même protection de la loi constitue une discrimination contraire au par. 15(1)

In *Egan*, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131). A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (*Egan*, at para. 56, *per* L'Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (*Miron*, at para. 128, *per* McLachlin J.).

89 Dans l'arrêt *Egan*, notre Cour a dit que deux aspects sont pertinents aux fins de déterminer si la distinction créée par une loi constitue une discrimination. Premièrement, il faut se demander «si le droit à l'égalité a été enfreint sur le fondement d'une caractéristique personnelle qui est soit énumérée au par. 15(1), soit analogue à celles qui y sont énumérées». Deuxièmement, il faut se demander si «la distinction a pour effet d'imposer au plaignant des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux bénéfices et aux avantages offerts à d'autres» (par. 131). Notre Cour a également dit qu'une distinction est discriminatoire lorsqu'elle est «susceptible de favoriser ou de perpétuer l'opinion que les individus lésés par cette distinction sont moins capables ou moins dignes d'être reconnus ou valorisés en tant qu'êtres humains ou en tant que membres de la société canadienne qui méritent le même intérêt, le même respect et la même considération» (*Egan*, au par. 56, le juge L'Heureux-Dubé). On peut également se demander si le traitement inégal se fonde sur «l'application stéréotypée de présumées caractéristiques personnelles ou de groupe» (*Miron*, au par. 128, le juge McLachlin).

(a) *The Equality Right is Denied on the Basis of a Personal Characteristic Which Is Analogous to Those Enumerated in Section 15(1)*

90 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). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.

91 It has been noted, for example by Iacobucci J. in *Benner*, at para. 69, that:

> Where the denial is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions: see, e.g., *Weatherall v. Canada (Attorney General*), [1993] 2 S.C.R. 872.

It could therefore be assumed that a denial of the equal protection and benefit of the law on the basis of the analogous ground of sexual orientation is discriminatory. Yet in this case there are other factors present which support this conclusion.

(b) *The Distinction Has the Effect of Imposing a Burden or Disadvantage Not Imposed on Others and Withholds Benefits or Advantages Which Are Available to Others*

(i) Discriminatory Purpose

92 It was submitted by the appellants and several of the interveners that the purpose of the Alberta Government in excluding sexual orientation was itself discriminatory. The appellants suggest that the purpose behind the deliberate choice of the Government not to include sexual orientation as a protected ground is to deny that homosexuals are or were disadvantaged by discrimination, or alternatively to deny that homosexuals are worthy of protection against that discrimination. This, they

a) *Le droit à l'égalité est nié sur le fondement d'une caractéristique personnelle analogue à celles énumérées au par. 15(1)*

Dans l'arrêt *Egan*, il a été décidé, en raison des «désavantages sociaux, politiques et économiques» dont souffrent les homosexuels, de l'émergence d'un consensus législatif (au par. 176) et des décisions judiciaires antérieures (au par. 177), que l'orientation sexuelle constitue un motif analogue à ceux énumérés au par. 15(1). L'orientation sexuelle est «une caractéristique profondément personnelle qui est soit immuable, soit susceptible de n'être modifiée qu'à un prix personnel inacceptable» (par. 5). Elle est analogue aux autres caractéristiques personnelles énumérées au par. 15(1), de sorte que ce volet du critère est respecté.

Il a été souligné, par exemple, par le juge Iacobucci dans l'arrêt *Benner*, au par. 69:

> Lorsque la négation du droit en cause est fondée sur l'un des motifs expressément énumérés au par. 15(1) ou sur un motif analogue, elle sera généralement jugée discriminatoire, bien qu'il puisse évidemment y avoir des exceptions: voir, par exemple, *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872.

Pourrait donc être tenue pour discriminatoire la négation du droit à la même protection et au même bénéfice de la loi fondée sur le motif analogue de l'orientation sexuelle. Cependant, d'autres facteurs appuient en l'espèce cette conclusion.

b) *La distinction a pour effet d'imposer des fardeaux ou des désavantages non imposés à d'autres et d'empêcher l'accès aux avantages offerts à d'autres.*

(i) Objet discriminatoire

Les appelants et plusieurs des intervenants font valoir que l'objet que cherchait à atteindre le gouvernement albertain en excluant l'orientation sexuelle est lui-même discriminatoire. Les appelants prétendent qu'en décidant délibérément de ne pas prévoir l'orientation sexuelle comme motif de distinction illicite le gouvernement cherchait à nier que les homosexuels sont ou ont été victimes de discrimination ou, subsidiairement, à nier que les homosexuels soient dignes d'être protégés contre

contend, is a discriminatory purpose. The respondents, on the other hand, argued that there is insufficient evidence of a deliberate discriminatory intent on the part of the Government.

la discrimination. Il s'agit selon eux d'un objet discriminatoire. Pour leur part, les intimés font valoir l'insuffisance de la preuve concernant l'intention discriminatoire délibérée du gouvernement.

It is, however, unnecessary to decide whether there is evidence of a discriminatory purpose on the part of the provincial government. It is well-established that a finding of discrimination does not depend on an invidious, discriminatory intent (see e.g. *Turpin*, *supra*, and more recently *Eldridge*, at para. 62). Even unintentional discrimination may violate the *Charter*. In any *Charter* case either an unconstitutional purpose or an unconstitutional effect is sufficient to invalidate the challenged legislation (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331). Therefore a finding of a discriminatory purpose in this case would merely provide another ground for the conclusion that the law is discriminatory, but is not necessary for that conclusion. In this case, the discriminatory effects of the legislation are sufficient in themselves to establish that there is discrimination in this case.

93 Il n'est pas nécessaire, toutefois, de statuer sur l'existence d'une preuve établissant l'objet discriminatoire que cherche à réaliser le gouvernement provincial. Il est bien établi que la preuve d'une intention discriminatoire odieuse n'est pas nécessaire pour conclure à l'existence d'une discrimination (voir, p. ex., *Turpin*, précité, et, plus récemment, l'arrêt *Eldridge*, au par. 62). Même une discrimination involontaire peut contrevenir à la *Charte*. Dans toute affaire relative à l'application de celle-ci, un objet inconstitutionnel ou un effet inconstitutionnel peuvent l'un et l'autre suffire à rendre la loi contestée invalide (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 331). Par conséquent, la preuve qu'un objet discriminatoire était poursuivi en l'espèce fournirait simplement un motif supplémentaire de conclure que la loi est discriminatoire, elle ne serait pas nécessaire pour fonder une telle conclusion. Dans la présente affaire, les effets discriminatoires de la loi considérée suffisent en eux-mêmes pour établir l'existence de la discrimination.

(ii) Discriminatory Effects of the Exclusion

(ii) Effets discriminatoires de l'exclusion

94 The effects of the exclusion of sexual orientation from the protected grounds listed in the *IRPA* must be understood in the context of the nature and purpose of the legislation. The *IRPA* is a broad, comprehensive scheme for the protection of individuals from discrimination in the private sector. The preamble of the *IRPA* sets out the purposes and principles underlying the legislation in this manner:

94 Les effets de l'exclusion de l'orientation sexuelle des motifs ouvrant droit à la protection prévue par l'*IRPA* doivent être considérés dans le contexte de la nature et de l'objet du texte législatif. L'*IRPA* crée un régime général et complet pour la protection des individus contre la discrimination dans le secteur privé. Son préambule énumère comme suit les objets et les principes qui la sous-tendent:

[TRADUCTION]

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights without regard to race,

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race,

religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin; and

WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .

95 The commendable goal of the legislation, then, is to affirm and give effect to the principle that all persons are equal in dignity and rights. It prohibits discrimination in a number of areas and with respect to an increasingly expansive list of grounds.

96 The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection. It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another. This is, I believe, the type of case to which L'Heureux-Dubé J. was referring in the comments she made in *obiter* in her dissenting reasons in *McKinney* (at p. 436): "in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the *Charter*". McClung J.A. in the Alberta Court of Appeal was of the opinion that these comments were binding on the court and compelled the allowance of the appeal. With respect I believe he was mistaken. Those comments contemplated a type of legislation different from that at issue in this case, namely, legislation which seeks to address one specific problem or type of discrimination. The case at bar presents a very different situation. It is concerned with legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta. The selective exclusion of one group from that comprehensive protection therefore has a very different effect.

97 The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal

aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

L'objectif louable de la loi est donc d'affirmer et de mettre en œuvre le principe selon lequel chacun jouit de la même dignité et des mêmes droits. La discrimination est interdite dans un certain nombre de domaines et sur le fondement de motifs de plus en plus nombreux.

Le fait que la Loi établit un régime complet doit être pris en considération dans l'analyse de l'effet qu'a l'exclusion d'un motif de distinction illicite. Ce n'est pas comme si la législature avait simplement choisi de s'attaquer à un type de discrimination en particulier. En pareil cas, il aurait pu être acceptable de ne viser que ce type de discrimination, et pas les autres. C'est la situation à laquelle fait allusion, je crois, le juge L'Heureux-Dubé dans les remarques incidentes formulées dans son opinion dissidente dans l'arrêt *McKinney* (à la p. 436): «j'estime que si les provinces choisissaient d'adopter des lois sur les droits de la personne qui n'interdisent que la discrimination fondée sur le sexe et non sur l'âge, on ne pourrait dire que ces lois violent la *Charte*». Le juge McClung de la Cour d'appel de l'Alberta a estimé que ces remarques liaient la cour et l'obligeaient à accueillir l'appel. En toute déférence, je crois qu'il a été induit en erreur. Ces remarques avaient trait à une loi d'un caractère différent de celle qui est contestée en l'espèce, savoir une loi visant un problème ou type particulier de discrimination. Les faits de la présente espèce sont très différents. Le texte législatif incriminé vise à assurer à chacun une protection complète contre la discrimination en Alberta. L'exclusion sélective d'un groupe en particulier de cette protection complète a donc un effet très différent.

Le premier effet, et le plus évident, de l'exclusion de l'orientation sexuelle est que les homosexuels victimes de discrimination fondée sur leur orientation sexuelle n'ont pas accès à la procédure établie par l'*IRPA* pour le dépôt d'une plainte offi-

complaint of discrimination and seek a legal remedy. Thus, the Alberta Human Rights Commission could not hear Vriend's complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation. The denial of access to remedial procedures for discrimination on the ground of sexual orientation must have dire and demeaning consequences for those affected. This result is exacerbated both because the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status. Persons who are discriminated against on the ground of sexual orientation, unlike others protected by the Act, are left without effective legal recourse for the discrimination they have suffered.

cielle et l'obtention d'une réparation. Ainsi, l'Alberta Human Rights Commission n'a pu connaître de la plainte de M. Vriend et ne peut être saisie de la plainte d'une victime de discrimination fondée sur l'orientation sexuelle ni prendre quelque mesure que ce soit pour le compte d'une telle personne. Les conséquences tragiques et infamantes que ne peut manquer d'avoir le non-accès des victimes de discrimination fondée sur l'orientation sexuelle aux recours prévus par la Loi sont exacerbées tant par l'exclusion de tout recours au civil que par le peu de succès qu'ont eu les homosexuels qui ont tenté d'obtenir réparation pour une discrimination fondée sur l'orientation sexuelle en invoquant d'autres motifs comme le sexe ou l'état matrimonial. Contrairement aux personnes protégées par l'*IRPA*, les victimes de discrimination fondée sur l'orientation sexuelle sont privées de tout recours juridique efficace à cet égard.

It may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However it imposes a heavy and disabling burden on those excluded. In *Romer v. Evans*, 116 S.Ct. 1620 (1996), the U.S. Supreme Court observed, at p. 1627:

98

Il peut être difficile de saisir d'emblée l'importance d'être exclu de la protection assurée par une loi sur les droits de la personne. Il en résulte cependant un fardeau lourd qui réduit la capacité des personnes touchées par cette exclusion. Comme l'a fait observer la Cour suprême des États-Unis dans *Romer c. Evans*, 116 S.Ct. 1620 (1996), à la p. 1627:

. . . the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

[TRADUCTION] . . . en raison de l'exclusion une incapacité particulière frappe ces seules personnes. Les homosexuels se voient refuser les garanties accordées aux autres ou que les autres peuvent revendiquer sans contrainte. [. . .] Il s'agit d'une protection que la plupart des gens tiennent pour acquise parce qu'ils en bénéficient déjà ou qu'ils n'en ont pas besoin; il s'agit d'une protection contre l'exclusion à l'égard d'un nombre presque illimité de rapports et d'activités dont est faite la vie du citoyen ordinaire dans une société libre.

While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.

Bien que cette affaire porte sur un cas explicite d'exclusion du régime de protection contre la discrimination, l'effet de la loi est semblable en l'espèce. Le refus, par la voie d'une omission du législateur, d'accorder la protection à des personnes fort susceptibles d'en avoir besoin est tout aussi grave que l'exclusion explicite du régime de protection, et ses conséquences sont toutes aussi sérieuses.

99 Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In *Haig*, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the "silence" of the *IRPA* reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the *IRPA*, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.

Outre l'effet immédiat de la privation de tout recours en cas de discrimination, il existe d'autres répercussions qui, bien qu'elles puissent être moins évidentes, sont à tout le moins aussi préjudiciables. Dans l'arrêt *Haig*, la Cour d'appel de l'Ontario a conclu à l'exercice d'une discrimination sur le fondement à la fois [TRADUCTION] «de l'omission de prévoir une voie de recours au bénéfice des homosexuels qui sont victimes d'actes préjudiciables» et «du fait que l'omission permet de conclure que de tels actes sont acceptables» (p. 503). Il est plausible que l'absence de tout recours légal en cas de discrimination fondée sur l'orientation sexuelle perpétue, voire encourage, ce genre de discrimination. Les intimés soutiennent qu'on ne peut supposer que le «silence» de l'*IRPA* renforce ou perpétue la discrimination, étant donné que l'État «ne peut régir les mentalités». Toutefois, cet argument semble captieux étant donné que l'*IRPA* vise expressément à empêcher la discrimination. On ne peut dire qu'une loi sur les droits de la personne contribuera à protéger les individus contre la discrimination et, en même temps, prétendre qu'une exclusion du bénéfice de la loi n'aura aucun effet.

100 However, let us assume, contrary to all reasonable inferences, that exclusion from the *IRPA*'s protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

Cependant, supposons, malgré toutes les conclusions qu'il est raisonnable de tirer, que l'exclusion d'un motif ouvrant droit à la protection prévue par l'*IRPA* n'a pas pour effet d'accroître la discrimination fondée sur ce motif. Cette exclusion, établie délibérément dans un contexte où il est évident que la discrimination fondée sur l'orientation sexuelle existe dans la société, transmet néanmoins un message à la fois clair et sinistre. Le fait même que l'orientation sexuelle ne soit pas un motif de distinction illicite aux termes de l'*IRPA*, laquelle constitue le principal énoncé de politique du gouvernement contre la discrimination, laisse certainement entendre que la discrimination fondée sur l'orientation sexuelle n'est pas aussi grave ou condamnable que les autres formes de discrimination. On pourrait même soutenir que cela équivaut à tolérer ou même à encourager la discrimination contre les homosexuels. En conséquence, cette exclusion a manifestement un effet qui constitue de la discrimination.

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

L'exclusion envoie à tous les Albertains le message qu'il est permis et, peut-être même, acceptable d'exercer une discrimination à l'égard d'une personne sur le fondement de son orientation sexuelle. On ne saurait sous-estimer l'ampleur des répercussions d'un tel message sur les homosexuels. Sur le plan pratique, ce message leur dit qu'ils ne sont pas protégés contre la discrimination fondée sur l'orientation sexuelle. Privés de tout recours légal, ils doivent accepter la discrimination et craindre constamment d'en être victimes. Il s'agit là de fardeaux que n'ont pas à porter les hétérosexuels. 101

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 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.

La souffrance psychologique est peut-être le préjudice le plus important dans de telles circonstances. La crainte d'être victime de discrimination mènera logiquement à la dissimulation de son identité véritable, ce qui nuit certainement à la confiance en soi et à l'estime de soi. S'ajoute à cet effet le message tacite découlant de l'exclusion, savoir que les homosexuels, contrairement aux autres personnes, ne méritent aucune protection. Il s'agit clairement d'une distinction qui avilit la personne et qui renforce et perpétue l'idée voulant que les homosexuels soient des personnes moins dignes de protection au sein de la société canadienne. L'atteinte potentielle à la dignité des homosexuels et à la valeur qu'on leur reconnaît constitue une forme particulièrement cruelle de discrimination. 102

Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognized in the following statement from *Egan* (at para. 161):

> The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them . . . . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.

Même si la discrimination est le fait de particuliers, c'est l'État qui nie toute protection aux victimes. Ainsi, les répercussions défavorables sont particulièrement odieuses. C'est ce qui a été reconnu dans l'extrait suivant de l'arrêt *Egan* (au par. 161): 103

> La loi confère un avantage considérable en attribuant la reconnaissance de l'État à la légitimité d'un statut particulier. Le refus d'une telle reconnaissance risque d'avoir un effet gravement préjudiciable sur le sentiment de valeur personnelle et de dignité des membres d'un groupe car, même s'ils ne subissent aucune perte financière, ils s'en trouvent stigmatisés. [. . .] Une telle loi porterait clairement atteinte au par. 15(1) parce que ses dispositions feraient croire que les groupes exclus sont inférieurs et ne sont pas aussi dignes que les autres de bénéficier des avantages.

This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.

104 In excluding sexual orientation from the *IRPA*'s protection, the Government has, in effect, stated that "all persons are equal in dignity and rights", except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the "section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual" (*Egan*, at para. 128). This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the *IRPA* constitutes discrimination.

4. "Mirror" Argument

105 The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to "mirror" the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

106 It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982*, the *Charter* is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the

Ce raisonnement s'applique à plus forte raison dans le cas où, comme en l'espèce, le refus de reconnaissance porte sur quelque chose d'aussi fondamental que le droit d'être protégé contre la discrimination.

En soustrayant à l'application de l'*IRPA* la discrimination fondée sur l'orientation sexuelle, le gouvernement a, dans les faits, affirmé que «chacun joui[t] de la même dignité et des mêmes droits», sauf les homosexuels. Un tel message, même s'il n'est que tacite, ne peut que violer le par. 15(1), la «disposition de la *Charte*, plus que toute autre, qui reconnaît et défend la dignité humaine innée de chacun» (*Egan*, au par. 128). Cet effet, combiné à la privation de tout recours juridique efficace en cas de discrimination fondée sur l'orientation sexuelle, suffit pour conclure que la distinction créée par l'exclusion de l'*IRPA* constitue une discrimination.

4. L'argument relatif au «reflet»

Les intimés font valoir que si les appelants ont gain de cause, toute loi sur les droits de la personne devra toujours être le «reflet» de la *Charte* et prévoir tous les motifs énumérés dans celle-ci, de même que les motifs analogues. Un tel résultat n'est pas souhaitable selon eux parce que ce serait restreindre indûment les choix du législateur et permettre que la *Charte* régisse indirectement l'activité privée, laquelle devrait continuer de ressortir aux législatures.

Il est vrai que si les prétentions des appelants sont acceptées, l'omission de l'un des motifs énumérés au par. 15(1) ou des motifs analogues dans les dispositions clés d'une loi d'ensemble sur les droits de la personne serait toujours susceptible d'être contestée sur le plan constitutionnel. Toutefois, il n'est pas nécessaire d'examiner la question car il n'est tout simplement pas exact de dire que les dispositions sur les droits de la personne devront toujours être l'exact «reflet» de la *Charte*. Aux termes de l'art. 52 de la *Loi constitutionnelle de 1982*, la *Charte* fait partie de la «loi suprême du Canada», de sorte que les dispositions relatives aux

notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

droits de la personne, à l'instar de toute autre loi au Canada, doivent se conformer à ses exigences. Cependant, la notion de «reflet» est trop simpliste. La constitutionnalité d'une omission doit être évaluée en fonction des faits de chaque espèce, compte tenu de la nature de l'exclusion et de la loi en cause, ainsi que du contexte dans lequel cette dernière a été adoptée. La détermination de la conformité d'une exclusion donnée à l'art. 15 de la *Charte* ne consiste pas à appliquer, de façon mécanique, un principe de reflet, mais plutôt, comme c'est le cas pour toute autre mesure, à se demander si l'exclusion s'avère discriminatoire dans son contexte particulier et si la discrimination peut être justifiée conformément à l'article premier. Les tribunaux pourront faire preuve de retenue à l'égard du choix d'un législateur provincial qui décide de prendre des mesures législatives qui n'incluent pas tous les motifs énumérés de la *Charte* ou les motifs analogues dans la mesure où il est satisfait aux critères de justification de l'article premier, y compris le critère du lien rationnel.

5. Conclusion Regarding Section 15

In summary, this Court has no choice but to conclude that the *IRPA*, by reason of the omission of sexual orientation as a protected ground, clearly violates s. 15 of the *Charter*. The *IRPA* in its underinclusive state creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which has been found to be analogous to the grounds enumerated in s. 15. This, in itself, would be sufficient to conclude that discrimination is present and therefore there is a violation of s. 15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. As a result, it is clear that the *IRPA*, as it stands, violates the equality rights of the appellant Vriend and of other gays and lesbians. It is therefore necessary to determine whether this violation can be justified under s. 1. This analysis will be undertaken by my colleague.

5. Conclusion concernant l'art. 15

107 En résumé, notre Cour n'a d'autre choix que de conclure qu'étant donné l'omission de l'orientation sexuelle comme motif de distinction illicite, l'*IRPA* viole manifestement l'art. 15 de la *Charte*. De par sa portée trop limitative, l'*IRPA* crée une distinction qui conduit à la négation du droit au même bénéfice et à la même protection de la loi sur le fondement de l'orientation sexuelle, caractéristique personnelle reconnue comme étant analogue aux motifs énumérés à l'art. 15. En soi, cela suffirait pour conclure qu'il y a discrimination et, partant, violation de l'art. 15. Les effets discriminatoires graves de l'exclusion de l'orientation sexuelle de la Loi renforcent cette conclusion. En conséquence, l'*IRPA*, dans sa version actuelle, viole de toute évidence les droits à l'égalité de l'appelant Vriend et des autres homosexuels. Il est donc nécessaire de décider si cette violation peut être justifiée conformément à l'article premier, analyse à laquelle procédera mon collègue.

IACOBUCCI J.

I. Analysis

A. *Section 1 of the Charter*

108 Section 1 of the *Charter* guarantees the rights and freedoms set out therein, but allows for *Charter* infringements provided that the state can establish that they are reasonably justifiable in a free and democratic society. The analytical framework for determining whether a statutory provision is a reasonable limit on a *Charter* right or freedom has been set out many times since it was first established in *R. v. Oakes*, [1986] 1 S.C.R. 103. It was recently restated in *Egan*, *supra*, at para. 182, which was quoted with approval in *Eldridge*, *supra*, at para. 84:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

1. Pressing and Substantial Objective

109 The appellants note that the jurisprudence is somewhat divided with respect to the proper focus of the analysis at this stage of the s. 1 inquiry. While some authorities have examined the purpose of the legislation in its entirety (see e.g. *Miron*, *supra*; *Egan*, *supra*), others have considered only the purpose of the limitation that allegedly infringes the *Charter* (see e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, *per* McLachlin J.; *McKinney*, *supra*).

LE JUGE IACOBUCCI

I. Analyse

A. *L'article premier de la Charte*

L'article premier de la *Charte* garantit les droits et libertés énoncés dans ce texte de loi, mais prévoit qu'il peut y être porté atteinte dans la mesure où l'État peut démontrer que la violation est raisonnable et justifiable dans une société libre et démocratique. Le cadre analytique servant à déterminer si une disposition législative constitue une limite raisonnable apportée à une liberté ou à un droit garantis par la *Charte* a été exposé à maintes reprises depuis qu'il a été énoncé la première fois dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Le dernier exposé qui en a été fait dans l'arrêt *Egan*, précité, au par. 182, a été cité et approuvé dans l'arrêt *Eldridge*, précité, au par. 84:

> L'atteinte à une garantie constitutionnelle sera valide à deux conditions. Dans un premier temps, l'objectif de la loi doit se rapporter à des préoccupations urgentes et réelles. Dans un deuxième temps, le moyen utilisé pour atteindre l'objectif législatif doit être raisonnable et doit pouvoir se justifier dans une société libre et démocratique. Cette seconde condition appelle trois critères: (1) la violation des droits doit avoir un lien rationnel avec l'objectif législatif; (2) la disposition contestée doit porter le moins possible atteinte au droit garanti par la *Charte*, et (3) il doit y avoir proportionnalité entre l'effet de la mesure et son objectif de sorte que l'atteinte au droit garanti ne l'emporte pas sur la réalisation de l'objectif législatif. Dans le contexte de l'article premier, il incombe toujours au gouvernement de prouver selon la prépondérance des probabilités que la violation peut se justifier.

1. Objectif urgent et réel

Les appelants font observer que la jurisprudence paraît quelque peu divisée sur la portée de l'examen qu'il convient d'effectuer à cette étape de l'analyse fondée sur l'article premier. Dans certaines décisions, en effet, la Cour a examiné l'objet de la loi prise dans son ensemble (notamment dans les arrêts *Miron* et *Egan*, précités), tandis que dans d'autres, seul l'objectif de la disposition limitative censée enfreindre la *Charte* a fait l'objet d'un examen (voir, par ex., les arrêts *RJR-MacDonald Inc.*

In my view, where, as here, a law has been found to violate the *Charter* owing to underinclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered.

c. Canada (Procureur général), [1995] 3 R.C.S 199, le juge McLachlin, et *McKinney*, précité). À mon avis, lorsque, comme en l'espèce, une loi est jugée contraire à la *Charte* en raison de sa portée trop limitative, c'est tout à la fois la loi considérée dans son ensemble, les dispositions contestées ainsi que l'omission elle-même qu'il y a lieu de prendre en compte.

Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission. Indeed, in *Oakes*, *supra*, at p. 138, Dickson C.J. noted that it was the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (emphasis added) that must be pressing and substantial.

110 L'article premier de la *Charte* dispose que ce sont les restrictions apportées aux droits et libertés qui y sont garantis dont la justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Il s'ensuit que suivant la première partie du critère de l'arrêt *Oakes*, l'analyse doit être axée sur l'objectif de la restriction contestée ou, en l'occurrence, de l'omission. De fait, dans l'arrêt *Oakes*, précité, à la p. 138, le juge en chef Dickson a souligné que c'était l'objectif «que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*» (je souligne) qui devait être urgent et réel.

However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation.

111 À mon avis, toutefois, on ne peut appréhender pleinement l'objectif visé par l'omission si on l'analyse isolément. Il me semble qu'il faut prendre également en considération tant les objets de la Loi dans son ensemble que les dispositions particulières contestées, de façon à situer l'objectif de l'omission dans un contexte permettant d'en mieux saisir le sens eu égard à l'économie générale de la loi.

Applying these principles to the case at bar, the preamble of the *IRPA* suggests that the object of the Act in its entirety is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Clearly, the protection of human rights in our society is a laudable goal and is aptly described as pressing and substantial. As to the impugned provisions, their objective can generally be described as the protection against discrimination for Albertans belonging to specific groups in various settings, for example, employment and accommodation. This too is properly regarded as a pressing and substantial objective.

112 Appliquons ces principes à la présente espèce. Le préambule de l'*IRPA* donne à entendre que, dans son ensemble, la Loi vise à reconnaître et à protéger la dignité inhérente et les droits inaliénables des citoyens de l'Alberta par l'élimination des pratiques discriminatoires. Dans notre société, la protection des droits de la personne est certainement un objectif louable qu'on peut à bon droit qualifier d'urgent et de réel. Pour ce qui est des dispositions contestées, on peut dire que de manière générale leur objectif est la protection des Albertains appartenant à des groupes déterminés contre la discrimination exercée dans divers domaines, tel l'emploi et l'hébergement. Cet objectif peut à juste titre être également considéré comme un objectif urgent et réel.

113 Against this backdrop, what can be said of the objective of the omission? The respondents submit that only the overall goal of the Act need be examined and offer no direct submissions in answer to this question. In the Court of Appeal, absent any evidence on this point, Hunt J.A. relied on the factum of the respondents from which she gleaned several possible reasons why, when the matter was debated by the Alberta Legislature in 1985 and considered at various other times, a decision was made not to add sexual orientation to the *IRPA*. Some of these same reasons appear in the factum that the respondents have submitted to this Court and include the following:

- The *IRPA* is inadequate to address some of the concerns expressed by the homosexual community (e.g. parental acceptance) (paragraph 57);
- Attitudes cannot be changed by order of the Human Rights Commission (paragraph 57);
- Despite the Minister asking for examples which would be ameliorated by the inclusion of sexual orientation in the *IRPA* (e.g. employment), only a few illustrations were provided (paragraph 57);
- Codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups (paragraph 66).

114 In my view, although these statements go some distance toward explaining the Legislature's choice to exclude sexual orientation from the *IRPA*, this is not the type of evidence required under the first step of the *Oakes* test. At the first stage of that test, the government is asked to demonstrate that the "objective" of the omission is pressing and substantial. An "objective", being a goal or a purpose to be achieved, is a very different concept from an "explanation" which makes plain that which is not immediately obvious. In my opin-

Avec cette toile de fond, que dire de l'objectif de l'omission? Les intimés soutiennent qu'il ne faut examiner que l'objectif d'ensemble de la Loi, et leur argumentation ne permet pas de répondre directement à cette question. En cour d'appel, faute de preuve sur ce point, le juge Hunt s'est fondée sur le mémoire des intimés. Elle en a dégagé plusieurs raisons pouvant expliquer pourquoi, lorsque la question a été débattue par la législature de l'Alberta en 1985 et examinée à diverses autres occasions, on a décidé de ne pas ajouter l'orientation sexuelle dans l'*IRPA*. Les intimés ont repris certaines de ces raisons dans le mémoire qu'ils ont présenté à notre Cour, dont les suivantes:

- L'*IRPA* n'offre pas le cadre approprié pour répondre à certaines des préoccupations exprimées par la communauté homosexuelle (par ex. l'acceptation parentale) (paragraphe 57);
- Ce n'est pas une ordonnance de la Commission des droits de la personne qui peut changer les attitudes (paragraphe 57);
- Bien que le ministre ait demandé qu'on lui donne des exemples de cas où l'inclusion de l'orientation sexuelle dans l'*IRPA* (par ex. en matière d'emploi) pourrait apporter une amélioration, seuls quelques cas lui ont été fournis (paragraphe 57);
- La codification de motifs marginaux touchant un petit nombre de personnes soulève des objections de la part de groupes numériquement supérieurs, ce qui ajoute au nombre des exemptions qui seraient nécessaires pour satisfaire les deux groupes (paragraphe 66).

Bien que ces énoncés contribuent, dans une certaine mesure, à expliquer le choix du législateur d'exclure l'orientation sexuelle de l'*IRPA*, ce n'est pas, à mon sens, le type de preuve qu'il faut faire dans le cadre de la première étape du critère de *Oakes*. À cette première étape, le gouvernement doit démontrer que l'«objectif» de l'omission est urgent et réel. Or, la notion d'«objectif», savoir un but ou un objet à atteindre, est très différente de la notion d'«explication», qui signifie rendre clair ce qui n'apparaît pas évident d'emblée. À mon avis,

ion, the above statements fall into the latter category and hence are of little help.

In his reasons for judgment, McClung J.A. alludes to "moral" considerations that likely informed the Legislature's choice. However, even if such considerations could be said to amount to a pressing and substantial objective (a position which I find difficult to accept in this case), I note that it is well established that the onus of justifying a *Charter* infringement rests on the government (see e.g. *Andrews v. Law Society of British Columbia*, *supra*). In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission, the respondents have failed to discharge their evidentiary burden, and thus, I conclude that their case must fail at this first stage of the s. 1 analysis.

Often, the objective of an omission is discernible from the Act as a whole. Where it is not, one can look to the effects of the omission. Even if I were to put the evidentiary burden aside in an attempt to discover an objective for the omission from the provisions of the *IRPA*, in my view, the result would be the same. As I noted above, the overall goal of the *IRPA* is the protection of the dignity and rights of all persons living in Alberta. The exclusion of sexual orientation from the Act effectively denies gay men and lesbians such protection. In my view, where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights. Thus, on either analysis, the respondents' case fails at the initial step of the *Oakes* test.

2. Proportionality Analysis

(a) *Rational Connection*

On the basis of my conclusion above, it is not necessary to analyse the second part of the *Oakes* test to dispose of this appeal. However, to deal

les énoncés susmentionnés relèvent de la dernière catégorie et ne sont donc pas d'un grand secours.

115 Dans ses motifs, le juge McClung fait allusion aux considérations «morales» qui ont vraisemblablement guidé le choix du législateur. Toutefois, même si ces considérations pouvaient être qualifiées d'urgentes et réelles (opinion difficilement acceptable à mon sens en l'espèce), je souligne que, selon une jurisprudence constante, c'est au gouvernement qu'incombe la responsabilité de justifier la violation de la *Charte* (voir par ex. *Andrews c. Law Society of British Columbia*, précité). Vu l'absence d'observations quant à la nature urgente et réelle de l'objectif de l'omission, les intimés ne se sont pas déchargés de leur fardeau de preuve et j'en conclus qu'ils n'ont pas réussi à franchir cette première étape de l'analyse fondée sur l'article premier.

116 L'objectif d'une omission se dégage souvent de la Loi considérée dans son ensemble. Dans le cas contraire, l'on peut examiner les effets de l'omission. Toutefois, même si j'écartais la question du fardeau de la preuve pour tenter de discerner l'objectif de l'omission dans les dispositions de l'*IRPA*, le résultat serait à mon avis le même. Comme je l'ai indiqué précédemment, le but général de l'*IRPA* est la protection de la dignité et des droits de tous les habitants de l'Alberta. Or, l'exclusion de l'orientation sexuelle nie de fait cette protection aux homosexuels. À mon sens, lorsque, comme en l'espèce, une omission du législateur est à première vue l'antithèse des principes qu'incarne le texte dans son ensemble, on ne peut dire que l'omission correspond à un objectif qui ressort de la Loi elle-même et qui serait urgent et réel, de telle sorte que soit justifiée une dérogation à des droits constitutionnellement protégés. Donc, suivant l'une ou l'autre analyse, les intimés échouent à l'étape initiale du critère de l'arrêt *Oakes*.

2. Évaluation de la proportionnalité

a) *Lien rationnel*

117 Compte tenu de la conclusion que je viens de tirer, il n'est pas nécessaire d'analyser la seconde partie du critère de l'arrêt *Oakes* pour trancher le

with this matter more fully, I will go on to consider the remainder of the test. I will assume, solely for the sake of the analysis, that the respondents correctly argued that where the objective of the whole of the legislation is pressing and substantial, this is sufficient to satisfy the first stage of the inquiry under s. 1 of the *Charter*.

présent pourvoi. Toutefois, pour analyser cette question plus avant, j'examinerai les autres aspects du critère. Je présume, uniquement aux fins de l'analyse, que les intimés ont prétendu à bon droit que lorsque le texte législatif dans son ensemble vise un objectif urgent et réel, cela suffit à satisfaire à la première étape de l'analyse fondée sur l'article premier de la *Charte*.

118 At the second stage of the *Oakes* test, the preliminary inquiry is a consideration of the rationality of the impugned provisions (*Oakes*, *supra*, at p. 141). The party invoking s. 1 must demonstrate that a rational connection exists between the objective of the provisions under attack and the measures that have been adopted. Thus, in the case at bar, it falls to the Legislature to show that there is a rational connection between the goal of protection against discrimination for Albertans belonging to specific groups in various settings, and the exclusion of gay men and lesbians from the impugned provisions of the *IRPA*.

À la seconde étape du critère de l'arrêt *Oakes*, l'examen préliminaire porte sur la rationalité des dispositions contestées (*Oakes*, précité, à la p. 141). La partie invoquant l'article premier doit établir qu'il existe un lien rationnel entre l'objectif des dispositions attaquées et les mesures qui ont été adoptées. En l'espèce, il incombe donc au législateur de prouver qu'il y a un lien rationnel entre d'une part le but à atteindre, soit la protection des Albertains appartenant à des groupes déterminés contre la discrimination exercée dans divers domaines, et d'autre part l'exclusion des homosexuels des dispositions contestées de l'*IRPA*.

119 Far from being rationally connected to the objective of the impugned provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. Indeed, it would be nonsensical to say that the goal of protecting persons from discrimination is rationally connected to, or advanced by, denying such protection to a group which this Court has recognized as historically disadvantaged (see *Egan*, *supra*).

Loin d'être rationnellement liée à l'objectif des dispositions contestées, l'exclusion de l'orientation sexuelle en est l'antithèse. Il serait absurde, en vérité, d'affirmer qu'il existe un lien rationnel entre la protection contre la discrimination et le refus d'accorder cette même protection à un groupe qui, d'après la jurisprudence de notre Cour, a été victime d'un désavantage historique (voir l'arrêt *Egan*, précité), ou de soutenir que l'objectif de protection peut être atteint de cette façon.

120 However, relying on the reasons of Sopinka J. in *Egan*, the respondents submit that a rational connection to the purpose of a statute can be achieved through the use of incremental means which, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. The respondents further suggest that the legislative history of the *IRPA* demonstrates a pattern of progressive incrementalism sufficient to meet the Government's onus under the rational connection stage of the *Oakes*

Les intimés, toutefois, s'appuyant sur les motifs du juge Sopinka dans l'arrêt *Egan*, soutiennent que le lien rationnel peut s'établir de façon graduelle, par élargissement progressif de la portée de la loi, de façon que celle-ci s'applique avec le temps à tous ceux qui, d'après le législateur, ont besoin de protection législative. Les intimés affirment en outre que l'historique de l'*IRPA* montre l'existence d'un élargissement progressif permettant au gouvernement de s'acquitter du fardeau de la preuve qui lui incombe à l'étape relative au lien rationnel

test. In my view, this argument cannot be sustained.

The incrementalism approach was advocated in *Egan* by Sopinka J. in a context very different from that in the case at bar. Firstly, in *Egan*, where the concern was the exclusion of same-sex couples from the *Old Age Security Act*'s definition of the term "spouse", the Attorney General took the position that more acceptable arrangements could be worked out over time. In contrast, in the present case, the inclusion of sexual orientation in the *IRPA* has been repeatedly rejected by the Alberta Legislature. Thus, it is difficult to see how any form of "incrementalism" is being applied with regard to the protection of the rights of gay men and lesbians. Secondly, in *Egan* there was considerable concern regarding the financial impact of extending a benefits scheme to a previously excluded group. Including sexual orientation in the *IRPA* does not give rise to the same concerns. Indeed, the trial judge, despite the absence of evidence on this matter, assumed that the budgetary impact on the Human Rights Commission would not be substantial enough to change the scheme of the legislation. Having not heard anything persuasive to the contrary, I am prepared to make this same assumption.

In addition, in *Egan*, writing on behalf of myself and Cory J., I took the position that the need for governmental incrementalism was an inappropriate justification for *Charter* violations. I remain convinced that this approach is generally not suitable for that purpose, especially where, as here, the statute in issue is a comprehensive code of human rights provisions. In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the

de l'application du critère établi dans l'arrêt *Oakes*. Selon moi, cet argument n'est pas fondé.

121 Le contexte ayant amené le juge Sopinka à préconiser la formule graduelle dans l'arrêt *Egan* diffère passablement de la présente situation. Premièrement, dans cette affaire portant sur l'exclusion des couples de même sexe de la définition du terme «conjoint» énoncée dans la *Loi sur la sécurité de la vieillesse*, le procureur général avait soutenu qu'il était possible de parvenir, avec le temps, à des solutions plus acceptables. En l'espèce, par contre, la législature de l'Alberta a refusé à maintes reprises d'ajouter l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA*. Il est difficile d'y voir une progression graduelle de la protection des droits des homosexuels. Deuxièmement, on s'était beaucoup intéressé, dans l'affaire *Egan*, à la question des répercussions financières qu'entraînerait l'application d'un régime de prestations à un groupe auparavant exclu. L'ajout de l'orientation sexuelle dans l'*IRPA* ne suscite pas les mêmes préoccupations. En fait, le juge de première instance a tenu pour acquis, malgré l'absence de preuve sur ce point, que les conséquences de cet ajout sur le budget de la Human Rights Commission ne seraient pas assez importantes pour modifier l'économie de la Loi. Comme on ne m'a pas convaincu du contraire, j'incline à tirer la même conclusion.

122 En outre, j'ai exprimé l'opinion, dans les motifs que j'ai exposés en mon nom et au nom du juge Cory dans l'arrêt *Egan*, que la nécessité pour le gouvernement de procéder par étape ne pouvait justifier une violation de la *Charte*. Je demeure convaincu que cette approche ne convient pas en général, surtout lorsque la loi en cause est, comme en l'espèce, un code complet des droits de la personne. À mon avis, on ne peut demander à des groupes qui sont depuis longtemps victimes de discrimination d'attendre patiemment que les gouvernements en viennent, étape par étape, à protéger leur dignité et leur droit à l'égalité. Si on tolère que les atteintes aux droits et aux libertés de ces groupes se poursuivent pendant que les gouverne-

guarantees of the *Charter* will be reduced to little more than empty words.

(b) *Minimal Impairment*

123 The respondents contend that an *IRPA* which is silent as to sexual orientation minimally impairs the appellants' s. 15 rights. The *IRPA* is alleged to be the type of social policy legislation that requires the Alberta Legislature to mediate between competing groups. It is suggested that the competing interests in the present case are religious freedom and homosexuality. Relying upon Sopinka J.'s reasons in *Egan*, the respondents advocate judicial deference in these circumstances. I reject these submissions for several reasons.

124 To begin, I cannot accede to the suggestion that the Alberta Legislature has been cast in the role of mediator between competing groups. To the extent that there may be a conflict between religious freedom and the protection of gay men and lesbians, the *IRPA* contains internal mechanisms for balancing these rival concerns. Section 11.1 of the *IRPA* provides a defence where the discrimination was "reasonable and justifiable in the circumstances". In addition, ss. 7(3) and 8(2) excuse discrimination which can be linked to a *bona fide* occupational requirement. The balancing provisions ensure that no conferral of rights is absolute. Rather, rights are recognized in tandem, with no one right being automatically paramount to another.

125 Given the presence of the internal balancing mechanisms, the argument that the Government's choices regarding the conferral of rights are constrained by its role as mediator between competing concerns cannot be sustained. The Alberta Legislature is not being asked to abandon the role of mediator. Rather, by virtue of the provisions of the *IRPA*, this is a task which is carried out as the Act is applied on a case-by-case basis in specific factual contexts. Thus, in the present case it is no answer to say that rights cannot be conferred upon one group because of a conflict with the rights of

ments négligent de prendre des mesures diligentes pour réaliser l'égalité, les garanties inscrites dans la *Charte* ne seront guère plus que des vœux pieux.

b) *Atteinte minimale*

Les intimés prétendent que l'*IRPA*, qui ne fait pas mention de l'orientation sexuelle, porte le moins possible atteinte aux droits des appelants garantis par l'art. 15. Selon eux, l'*IRPA* est un instrument législatif de politique sociale qui requiert de la législature de l'Alberta qu'elle agisse comme arbitre des revendications de groupes opposés. Ils affirment que les intérêts opposés en cause sont la liberté de religion et l'homosexualité. Invoquant les motifs du juge Sopinka dans l'arrêt *Egan*, les intimés exhortent la Cour à faire preuve de retenue judiciaire. Plusieurs raisons s'opposent à ce que je me rende à leurs arguments.

D'abord, je ne puis souscrire à l'opinion selon laquelle la législature de l'Alberta assume un rôle d'arbitre entre des groupes opposés. Si tant est qu'il y ait conflit entre la liberté de religion et la protection des homosexuels, l'*IRPA* renferme des mécanismes permettant de pondérer ces intérêts rivaux. En effet, l'art. 11.1 de l'*IRPA* prévoit un moyen de défense lorsque la discrimination est [TRADUCTION] «raisonnable et justifiable dans les circonstances», et les par. 7(3) et 8(2) excusent la discrimination lorsqu'elle se rattache à une exigence professionnelle justifiée. Ces dispositions de pondération font en sorte qu'aucun des droits conférés n'est absolu. Les droits sont reconnus les uns par rapport aux autres, et aucun n'a automatiquement préséance sur un autre.

Étant donné l'existence de ces mécanismes internes de pondération, l'argument voulant que le rôle d'arbitre entre des intérêts opposés que joue le gouvernement réduit les options qui lui sont ouvertes en matière d'octroi de droits ne saurait être retenu. Il ne s'agit pas de demander à la législature de l'Alberta de renoncer à son rôle de médiateur. En vertu de l'*IRPA*, cette tâche doit plutôt être accomplie, au cas par cas, en fonction des faits de chaque affaire. En l'espèce, par conséquent, il n'est pas fondé d'affirmer que des droits ne peuvent être conférés à un groupe en raison

others. A complete solution to any such conflict already exists within the legislation.

In any event, although this Court has recognized that the Legislatures ought to be accorded some leeway when making choices between competing social concerns (see e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Egan*, *supra*, *per* Sopinka J.), judicial deference is not without limits. In *Eldridge*, *supra*, La Forest J. quoted with approval from his reasons in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, wherein he stated that "the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights". This position was echoed by McLachlin J. in *RJR-MacDonald*, *supra*, at para. 136:

> . . . care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

In the present case, the Government of Alberta has failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the *IRPA*. Gay men and lesbians do not have any, much less equal, protection against discrimination on the basis of sexual orientation under the *IRPA*. The exclusion constitutes total, not minimal, impairment of the *Charter* guarantee of equality.

d'un conflit avec les droits des autres. La Loi prévoit déjà la façon de régler de tels conflits.

126 Quoi qu'il en soit, même si notre Cour a reconnu que le législateur doit jouir d'une certaine latitude lorsqu'il fait des choix entre des intérêts sociaux divergents (voir les arrêts *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, et *Egan*, précité, le juge Sopinka), le principe de la retenue judiciaire n'est pas sans limite. Dans l'arrêt *Eldridge*, précité, le juge La Forest a repris les motifs qu'il avait prononcés dans l'arrêt *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22, à la p. 44, et dans lesquels il affirmait que «la retenue dont il sera fait preuve à l'égard du gouvernement qui légifère en ces matières ne lui permet pas d'enfreindre en toute impunité les droits dont bénéficie un individu en vertu de la *Charte*». Le juge McLachlin a fait écho à cette position dans l'arrêt *RJR-MacDonald*, précité, au par. 136:

> . . . il faut prendre soin de ne pas pousser trop loin la notion du respect. Le respect porté ne doit pas aller jusqu'au point de libérer le gouvernement de l'obligation que la *Charte* lui impose de démontrer que les restrictions qu'il apporte aux droits garantis sont raisonnables et justifiables. Le Parlement a son rôle: choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle: déterminer de façon objective et impartiale si le choix du Parlement s'inscrit dans les limites prévues par la Constitition. Les tribunaux n'ont pas plus le droit que le Parlement d'abdiquer leur responsabilité. Les tribunaux se trouveraient à diminuer leur rôle à l'intérieur du processus constitutionnel et à affaiblir la structure des droits sur lesquels notre constitution et notre nation sont fondées, s'ils portaient le respect jusqu'au point d'accepter le point de vue du Parlement simplement pour le motif que le problème est sérieux et la solution difficile.

127 En l'espèce, le gouvernement de l'Alberta n'a pas démontré qu'il avait un motif raisonnable d'exclure l'orientation sexuelle de l'*IRPA*. Cette loi ne confère aux homosexuels aucune protection contre la discrimination fondée sur l'orientation sexuelle, et encore moins une protection égale. Une telle exclusion constitue une atteinte intégrale, et non minimale, à la garantie d'égalité énoncée

In these circumstances, the call for judicial deference is inappropriate.

(c) *Proportionality Between the Effect of the Measure and the Objective of the Legislation*

128 The respondents did not address this third element of the proportionality requirement. However, in my view, the deleterious effects of the exclusion of sexual orientation from the *IRPA*, as noted by Cory J., are numerous and clear. As the Alberta Government has failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, I cannot accept that there is any proportionality between the attainment of the legislative goal and the infringement of the appellants' equality rights. I conclude that the exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly, it cannot be saved under s. 1 of the *Charter*.

II. Remedy

A. *Introduction: The Relationship Between the Legislatures and the Courts Under the Charter*

129 Having found the exclusion of sexual orientation from the *IRPA* to be an unjustifiable violation of the appellants' equality rights, I now turn to the question of remedy under s. 52 of the *Constitution Act, 1982*. Before discussing the jurisprudence on remedies, I believe it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*.

130 Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day goes by without some comment or criticism to the effect that under

par la *Charte*. Dans ces circonstances, il ne convient pas d'invoquer le principe de la retenue judiciaire.

c) *Proportionnalité entre l'effet de la mesure et l'objectif de la loi*

Les intimés n'ont pas abordé ce troisième élément de l'exigence relative à la proportionnalité. J'estime toutefois que les effets néfastes de l'exclusion de l'orientation sexuelle de l'*IRPA* sont, ainsi que le juge Cory l'a mentionné, nombreux et clairs. Comme le gouvernement de l'Alberta n'a pas établi quels bienfaits cette exclusion apportait à la promotion et à la protection des droits de la personne, je ne puis conclure à l'existence d'une quelconque proportionnalité entre l'atteinte de l'objectif législatif et la violation des droits à l'égalité des appelants. Je suis donc d'avis que l'exclusion de l'orientation sexuelle de l'*IRPA* ne satisfait pas aux exigences du critère énoncé dans l'arrêt *Oakes* et qu'elle ne peut, en conséquence, être justifiée en vertu de l'article premier.

II. Réparation

A. *Introduction: la relation entre le législateur et les tribunaux sous le régime de la Charte*

Vu ma conclusion selon laquelle l'exclusion de l'orientation sexuelle de l'*IRPA* contrevient de façon injustifiable aux droits des appelants à l'égalité, j'aborde maintenant la question de la réparation à accorder sous le régime de l'art. 52 de la *Loi constitutionnelle de 1982*. Il pourrait être utile, avant d'analyser la jurisprudence en cette matière, d'approfondir la question plus générale de la relation existant entre le législateur et les tribunaux à l'ère de la *Charte*.

On a soutenu avec insistance, au cours de l'argumentation, qu'il n'était pas souhaitable que la Cour intervienne ou s'immisce autrement dans ce qui est considéré comme le rôle propre du législateur, savoir, en l'espèce, trancher la question de l'ajout de l'orientation sexuelle au nombre des motifs de discrimination interdits par la loi albertaine relative aux droits de la personne. De fait, il

the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy ("Keynote Address", in *The Cambridge Lectures 1985* (1985), at pp. 3-4). Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 as I previously discussed. Inevitably disputes over the meaning of the rights and their justification would have to be settled and here the role of the judiciary enters to resolve these disputes. Many countries have assigned the important role of judicial review to their supreme or constitutional courts (for an excellent analysis on these developments see D. M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (1994); B. Ackerman, "The Rise of World Constitutionalism" (1997), 83 *Va. L. Rev.* 771).

We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid.

However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the "legitimacy" of courts taking such action. As eloquently put by A. M. Bickel in his outstanding work *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), "it thwarts the will of representatives of the . . . people" (p. 17). So judicial review, it is alleged, is illegitimate

se passe rarement une journée, semble-t-il, sans qu'on entende des commentaires ou des critiques selon lesquels la *Charte* permet aux tribunaux d'usurper le rôle du législateur. Je crois que ces propos reflètent une méconnaissance de ce qui s'est passé et de ce que l'on cherchait à accomplir quand notre pays a adopté la *Charte* en 1981-1982.

131 Lorsque la *Charte* a été introduite, le Canada est passé du système de la suprématie parlementaire à celui de la suprématie constitutionnelle, pour reprendre les propos de l'ancien juge en chef Brian Dickson («Keynote Address», dans *The Cambridge Lectures 1985* (1985), aux pp. 3 et 4). Plus simplement, chaque citoyen canadien a reçu des droits et des libertés qu'aucun gouvernement ni aucune législature ne pouvait lui reprendre. Ces droits et libertés n'étant pas absolus, toutefois, les gouvernements et les législatures pouvaient justifier la restriction ou la violation de ces droits constitutionnels en conformité avec l'article premier, ainsi que je l'ai déjà expliqué. Il était inévitable que surgissent des litiges concernant la portée des droits et leur justification et que les tribunaux soient appelés à les régler. Dans de nombreux pays, l'importante tâche de la révision judiciaire a été confiée à la cour suprême ou à la cour constitutionnelle (pour une excellente analyse de cette tendance nouvelle, voir D. M. Beatty, dir., *Human Rights and Judicial Review: A Comparative Perspective* (1994); B. Ackerman, «The Rise of World Constitutionalism» (1997), 83 *Va. L. Rev.* 771).

132 Souvenons-nous que les législatures provinciales et le Parlement ont volontairement décidé, en adoptant la *Charte*, de confier un rôle interprétatif aux tribunaux et de leur prescrire, sous le régime de l'art. 52, de déclarer invalides les lois inconstitutionnelles.

133 Toutefois, le fait de conférer aux tribunaux le pouvoir et l'obligation d'invalider des lois lorsque cela était nécessaire n'a pas éliminé le débat entourant la «légitimité» d'une telle action par les tribunaux. Comme A. M. Bickel l'exprime éloquemment dans son remarquable ouvrage *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2e éd. 1986), [TRADUCTION] «cela contredit la volonté des représentants du peuple»

because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators) (see e.g. A. A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (1996); R. Knopff and F. L. Morton, *Charter Politics* (1992); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994), c. 2).

(p. 17). Ainsi, les tenants de cette opinion soutiennent que la révision judiciaire est illégitime parce qu'elle permet à des personnes qui n'ont pas été élues (les juges) d'infirmer les décisions des élus (le législateur), ce qui est antidémocratique (voir par ex. A. A. Peacock, dir., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (1996); R. Knopff et F. L. Morton, *Charter Politics* (1992); M. Mandel, *La Charte des droits et libertés et la judiciarisation du politique au Canada* (1996), ch. 2).

134 To respond, it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

Pour répondre à ces arguments, il faut, encore une fois, insister sur le fait que, par le truchement de ses élus, le peuple canadien a choisi, dans le cadre de la redéfinition de la démocratie canadienne, d'adopter la *Charte* et, par suite, de donner au tribunaux un rôle correctif à jouer. Notre Constitution a été réaménagée de façon à déclarer que dorénavant le pouvoir législatif et le pouvoir exécutif devront exercer leurs fonctions dans le respect des libertés et droits constitutionnels nouvellement reconnus. La dévolution aux tribunaux du rôle de fiduciaires à l'égard de ces droits en cas de litiges quant à leur interprétation constituait un élément nécessaire de ce nouveau régime.

135 So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982.*

Il s'ensuit obligatoirement qu'en leur qualité de fiduciaires ou d'arbitres, les tribunaux doivent examiner les actes du pouvoir législatif et du pouvoir exécutif, non en leur nom propre mais pour l'exécution du nouveau contrat social démocratiquement conclu. Ce rôle découle implicitement du pouvoir conféré aux tribunaux par l'art. 24 de la *Charte* et l'art. 52 de la *Loi constitutionnelle de 1982*.

136 Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution

Parce que les tribunaux sont indépendants des pouvoirs exécutif et législatif, les justiciables et les citoyens en général peuvent habituellement s'attendre à ce qu'ils rendent des décisions motivées et étayées, conformes aux prescriptions constitutionnelles, même si certaines d'entre elles peuvent ne pas faire l'unanimité. Les tribunaux n'ont pas, pour accomplir leurs fonctions, à se substituer après coup aux législatures ou aux gouvernements; ils ne doivent pas passer de jugement de valeur sur ce qu'ils considèrent comme les politiques à adop-

and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

ter; cette tâche appartient aux autres organes de gouvernement. Il incombe plutôt aux tribunaux de faire respecter la Constitution, et c'est la Constitution elle-même qui leur confère expressément ce rôle. Toutefois, il est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l'exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux.

This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).

137 Ce respect mutuel ressort d'une certaine façon de l'énoncé même de certains droits constitutionnels dans notre Constitution. Par exemple, l'art. 7 de la *Charte* énonce qu'il ne peut être porté atteinte aux droits qui y sont énumérés qu'en conformité avec les principes de justice fondamentale, lesquels comprennent l'application régulière de la loi et l'action législative. L'article premier et la jurisprudence qui s'y rapporte revêtent également une grande importance pour le respect de l'action législative et des intérêts collectifs et sociétaux que représente la législation. De plus, comme nous le verrons plus loin, lorsqu'un tribunal se prononce sur une mesure visant à corriger une contravention à la *Charte*, il ne doit jamais oublier le rôle du législateur. En outre, la disposition de dérogation — l'art. 33 — a pour effet, dans notre régime constitutionnel, de laisser le dernier mot au législateur et non aux tribunaux (voir P. Hogg et A. Bushell, «The *Charter* Dialogue Between Courts and Legislatures» (1997), 35 *Osgoode Hall L.J.* 75).

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

138 À mon avis, la *Charte* a suscité une interaction plus dynamique entre les organes du gouvernement, que d'aucuns ont qualifiée, à juste titre, de «dialogue» (voir par exemple Hogg et Bushell, *loc. cit.*). En examinant la validité constitutionnelle de textes de loi ou de décisions de l'exécutif, les tribunaux parlent au législatif et à l'exécutif. Comme il en a été fait mention, la plupart des dispositions législatives qui n'ont pas résisté à un examen constitutionnel ont été suivies de nouvelles dispositions visant des objectifs similaires (voir Hogg et Bushell, *loc. cit.*, à la p. 82). Le législateur, de cette façon, répond aux tribunaux, d'où l'analogie du dialogue entre les différents organes du gouvernement.

139 To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

La révision judiciaire et ce dialogue sont précieux, selon moi, parce qu'ils obligent en quelque sorte les divers organes du gouvernement à se rendre mutuellement des comptes. Les tribunaux examinent le travail du législateur, et le législateur réagit aux décisions des tribunaux en adoptant d'autres textes de loi (ou même en se prévalant de l'art. 33 de la *Charte* pour les soustraire à la *Charte*). Ce dialogue et ce processus de reddition de compte entre organes du gouvernement, loin de nuire au processus démocratique, l'enrichissent.

140 There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in *Oakes*, *supra*, at p. 136:

Un autre aspect de la révision judiciaire contribue à la promotion des valeurs démocratiques. Même si l'invalidation judiciaire d'une disposition législative contredit habituellement la volonté de la majorité, il ne faut pas perdre de vue que l'idée de démocratie transcende la règle de la majorité, toute fondamentale que soit cette dernière. Il serait bon, à cet égard, de ne pas oublier les propos suivants du juge en chef Dickson dans l'arrêt *Oakes*, précité, à la p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société.

141 So, for example, when a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a democratic society. Although it is not necessary to articulate the complete list of democratic attributes in these remarks, Dickson C.J.'s comments remain instructive (see also: *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* Dickson C.J.; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, *per* La Forest J.).

Ainsi, par exemple, le tribunal qui interprète une disposition législative présentée comme une limite raisonnable dans une société libre et démocratique au sens de l'article premier de la *Charte*, doit inévitablement définir certaines caractéristiques d'une société démocratique. Bien qu'il ne soit pas nécessaire d'évoquer toutes les caractéristiques démocratiques énumérées dans ces remarques, le commentaire du juge en chef Dickson demeure pertinent (voir également: *R. c. Keegstra*, [1990] 3 R.C.S. 697, le juge en chef Dickson; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, précité, le juge La Forest).

142 Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so,

Le pouvoir législatif et le pouvoir exécutif ont l'obligation de tenir compte des valeurs et des principes démocratiques reconnus dans la *Charte*

courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter* (see W. Black, "*Vriend*, Rights and Democracy" (1996), 7 *Constitutional Forum* 126; D. M. Beatty, "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131, at p. 149; M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661).

et, s'ils ne le font pas, les tribunaux doivent être prêts à intervenir pour protéger comme il se doit ces valeurs et principes. Comme certains auteurs l'ont affirmé avec vigueur, les juges n'agissent pas de façon antidémocratique en intervenant lorsque des décisions d'ordre législatif ou exécutif ne semblent pas avoir été prises en conformité avec les principes démocratiques prescrits par la *Charte* (voir W. Black, «*Vriend*, Rights and Democracy» (1996), 7 *Forum constitutionnel* 126; D. M. Beatty, «Law and Politics» (1996), 44 *Am. J. Comp. L.* 131, à la p. 149; M. Jackman, «Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*» (1996), 34 *Osgoode Hall L.J.* 661).

With this background in mind, I now turn to discuss the jurisprudence on the specific question of the choice of the appropriate remedy that should apply in this appeal. 143

Ayant tendu cette toile de fond, je passe maintenant à l'examen de la jurisprudence portant précisément sur le choix de la mesure corrective à appliquer en l'espèce.

B. *Remedial Principles*

B. *Principes applicables en matière de mesures correctives*

The leading case on constitutional remedies is *Schachter*, *supra*. Writing on behalf of the majority in *Schachter*, Lamer C.J. stated that the first step in selecting a remedial course under s. 52 is to define the extent of the *Charter* inconsistency which must be struck down. In the present case, that inconsistency is the exclusion of sexual orientation from the protected grounds of the *IRPA*. As I have concluded above, this exclusion is an unjustifiable infringement upon the equality rights guaranteed in s. 15 of the *Charter*. 144

L'arrêt de principe pour ce qui est des mesures correctives constitutionnelles est *Schachter*, précité. S'exprimant au nom des juges majoritaires, le juge en chef Lamer a dit que la première étape à suivre pour choisir une mesure corrective sous le régime de l'art. 52 consiste à déterminer l'étendue de l'incompatibilité avec la *Charte* qui doit être annulée. En l'espèce, cette incompatibilité est l'exclusion de l'orientation sexuelle des motifs ouvrant droit à la protection de l'*IRPA*. Cette exclusion constitue, suivant la conclusion à laquelle je suis parvenu plus haut, une atteinte injustifiable aux droits à l'égalité garantis par l'art. 15 de la *Charte*.

Once the *Charter* inconsistency has been identified, the next step is to determine which remedy is appropriate. In *Schachter*, this Court noted that, depending upon the circumstances, there are several remedial options available to a court in dealing with a *Charter* violation that was not saved by s. 1. These include striking down the legislation, severance of the offending sections, striking down or severance with a temporary suspension of the 145

Une fois l'incompatibilité précisée, l'étape suivante consiste à déterminer quelle est la mesure corrective appropriée. Dans l'arrêt *Schachter*, notre Cour a signalé que, tout dépendant des circonstances, un tribunal peut choisir entre plusieurs mesures correctives lorsqu'il conclut à l'existence d'une violation de la *Charte* non justifiée en vertu de l'article premier. Il peut notamment annuler la loi, retrancher les dispositions fautives, ordonner l'annulation ou la dissociation assortie d'une suspension temporaire de la déclaration d'invalidité,

declaration of invalidity, reading down, and reading provisions into the legislation.

146 Because the *Charter* violation in the instant case stems from an omission, the remedy of reading down is simply not available. Further, I note that given the considerable number of sections at issue in this case and the important roles they play in the scheme of the *IRPA* as a whole, severance of these sections from the remainder of the Act would be akin to striking down the entire Act.

147 The appellants suggest that the circumstances of this case warrant the reading in of sexual orientation into the offending sections of the *IRPA*. However, in the Alberta Court of Appeal, O'Leary J.A. and Hunt J.A. agreed that the appropriate remedy would be to declare the relevant provisions of the *IRPA* unconstitutional and to suspend that declaration for a period of time to allow the Legislature to address the matter. McClung J.A. would have gone further and declared the *IRPA* invalid in its entirety. With respect, for the reasons that follow, I cannot agree with either remedy chosen by the Court of Appeal.

148 In *Schachter*, Lamer C.J. noted that when determining whether the remedy of reading in is appropriate, courts must have regard to the "twin guiding principles", namely, respect for the role of the legislature and respect for the purposes of the *Charter*, which I have discussed generally above. Turning first to the role of the legislature, Lamer C.J. stated at p. 700 that reading in is an important tool in "avoiding undue intrusion into the legislative sphere. . . . [T]he purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."

149 He went on to quote the following passage from Carol Rogerson in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness", in R. J. Sharpe, ed., *Charter Litigation* (1987), 233, at p. 288:

recourir à l'interprétation atténuée ou inclure des dispositions par interprétation large.

Parce que la violation de la *Charte* découle d'une omission en l'espèce, l'interprétation atténuée n'est pas une option. En outre, je constate que, vu le grand nombre de dispositions en cause et le rôle important qu'elles jouent dans l'économie générale de l'*IRPA*, la dissociation équivaudrait à l'annulation de la totalité de la Loi.

Les appelants affirment qu'il est justifié, compte tenu des circonstances de la présente espèce, d'inclure l'orientation sexuelle, par interprétation large, dans les dispositions fautives de l'*IRPA*. Les juges O'Leary et Hunt de la Cour d'appel de l'Alberta, toutefois, ont tous deux estimé qu'il convenait de déclarer inconstitutionnelles les dispositions visées et de suspendre cette déclaration de façon à permettre à la législature de corriger la situation. Le juge McClung serait allé plus loin: il aurait déclaré invalide la totalité de l'*IRPA*. En toute déférence, je ne puis, pour les motifs suivants, me rallier à aucune des mesures choisies par la Cour d'appel.

Dans l'arrêt *Schachter*, le juge en chef Lamer a fait remarquer que les tribunaux, lorsqu'ils examinent s'il convient d'adopter une interprétation large, doivent tenir compte des «deux principes directeurs» que j'ai précédemment abordés de façon générale, savoir le respect du rôle du législateur et le respect des objets de la *Charte*. Relativement au rôle du législateur, le juge en chef Lamer a affirmé, à la p. 700, que l'interprétation large est un moyen important d'«empêcher un empiétement injustifié sur le domaine législatif. [. . .] [L]'objet de l'interprétation large est d'être aussi fidèle que possible, dans le cadre des exigences de la Constitution, au texte législatif adopté par le législateur.»

Il a ensuite cité le passage suivant du texte de Carol Rogerson, «The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness», dans R. J. Sharpe, dir., *Charter Litigation* (1987), 233, à la p. 288:

Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

[TRADUCTION] Les tribunaux devraient certainement aller aussi loin que nécessaire pour assurer la protection des droits, mais pas davantage. L'empiétement sur les objets législatifs légitimes devrait être réduit au minimum et les lois devraient demeurer opérantes dans la mesure où il n'y a pas violation de droits. Une loi qui sert des fins sociales souhaitables peut être constitutive de droits qui méritent une certaine protection.

As I discussed above, the purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. It seems to me that the remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the Legislature.

150 Comme je l'ai déjà dit, l'*IRPA* a pour objet de reconnaître et de protéger la dignité inhérente et les droits inaliénables des Albertains au moyen de l'élimination des pratiques discriminatoires. Je crois que le recours à l'interprétation large réduirait l'empiétement sur cet objet manifestement légitime et éviterait ainsi une ingérence excessive dans le domaine législatif, alors que l'annulation de l'*IRPA* priverait tous les Albertains de la protection des droits de la personne, ce qui modifierait indûment l'économie de la loi adoptée par le législateur.

I find support for my position in *Haig*, *supra*, where the Ontario Court of Appeal read the words "sexual orientation" into s. 3(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. At p. 508, Krever J.A., writing for a unanimous court, stated that it was

151 L'arrêt de la Cour d'appel de l'Ontario *Haig*, précité, étaye mon point de vue. La Cour a ajouté les mots «orientation sexuelle», par interprétation large, au par. 3(1) de la *Loi canadienne sur les droits de la personne*, L.R.C. (1985), ch. H-6, et, à la p. 14, le juge Krever, exprimant l'avis unanime de la Cour, a écrit qu'il était

inconceivable . . . that Parliament would have preferred no human rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament.

[TRADUCTION] inconcevable que le Parlement aurait préféré qu'il n'y ait pas de loi sur les droits de la personne plutôt que d'en avoir une qui ajoute l'orientation sexuelle à la liste des motifs de discrimination illicites. Conclure autrement serait un affront gratuit au Parlement.

Turning to the second of the twin guiding principles, the respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be "inconsistent with the deeper social purposes of the *Charter*".

152 Relativement au second principe directeur, les intimés plaident que les faits de l'espèce démontrent l'existence d'un conflit entre deux motifs de discrimination, savoir la religion et l'orientation sexuelle. Selon eux, la protection contre la discrimination religieuse, un objet fondamental de l'*IRPA*, serait affaiblie si l'on ajoutait, par interprétation large, l'orientation sexuelle aux motifs interdits. Ce résultat, soutiennent-ils, dérogerait [TRADUCTION] «aux objets sociaux fondamentaux de la *Charte*».

153 I concluded above that the internal balancing mechanisms of the *IRPA* were an adequate means of disposing of any conflict that might arise between religion and sexual orientation. Thus, I cannot accept the respondents' assertion that the reading in approach does not respect the purposes of the *Charter*. In fact, as I see the matter, reading sexual orientation into the *IRPA* as a further ground of prohibited discrimination can only enhance those purposes. The *Charter*, like the *IRPA*, is concerned with the promotion and protection of inherent dignity and inalienable rights. Thus, expanding the list of prohibited grounds of discrimination in the *IRPA* allows this Court to act in a manner which, consistent with the purposes of the *Charter*, would augment the scope of the *IRPA*'s protections. In contrast, striking down or severing parts of the *IRPA* would deny all Albertans protection from marketplace discrimination. In my view, this result is clearly antithetical to the purposes of the *Charter*.

Puisque j'ai conclu que les mécanismes internes de pondération de l'*IRPA* permettent de régler tout conflit pouvant surgir entre la religion et l'orientation sexuelle, je ne puis recevoir l'argument des intimés selon lequel l'interprétation large ne respecterait pas les objets de la *Charte*. De fait, de mon point de vue, l'ajout par interprétation large de l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA* ne peut que servir ces objets. La *Charte*, tout comme la Loi, vise à promouvoir et à protéger la dignité inhérente et les droits inaliénables des citoyens. Ainsi, en allongeant la liste des motifs illicites de discrimination établie par l'*IRPA*, la Cour, en accord avec les objets de la *Charte*, élargirait la portée des protections offertes par la Loi. Si, par contre, elle annulait l'*IRPA* ou en retranchait des dispositions, elle priverait tous les Albertains de leur protection contre la discrimination du marché, ce qui me semble absolument contraire aux objets de la *Charte*.

154 In *Schachter*, *supra*, Lamer C.J. noted that the twin guiding principles can only be fulfilled if due consideration is given to several additional criteria which further inform the determination as to whether the remedy of reading in is appropriate. These include remedial precision, budgetary implications, effects on the thrust of the legislation, and interference with legislative objectives.

Dans l'arrêt *Schachter*, précité, le juge en chef Lamer a indiqué que, pour satisfaire aux deux principes directeurs susmentionnés, il faut examiner soigneusement plusieurs autres facteurs susceptibles de nous éclairer sur la pertinence de recourir à l'interprétation large, notamment la précision de la mesure corrective, les conséquences financières, les répercussions sur l'économie de la loi et l'empiétement sur les objectifs législatifs.

155 As to the first of the above listed criteria, the court must be able to define with a "sufficient degree of precision" how the statute ought to be extended in order to comply with the Constitution. I do not believe that the present case is one in which this Court has been improperly called upon to fill in large gaps in the legislation. Rather, in my view, there is remedial precision insofar as the insertion of the words "sexual orientation" into the prohibited grounds of discrimination listed in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* will, without more, ensure the validity of the legislation and remedy the constitutional wrong.

S'agissant du premier de ces facteurs, les tribunaux doivent être en mesure de déterminer avec «suffisamment de précision» dans quelle mesure il faut élargir la portée d'une loi afin de la rendre compatible avec la Constitution. Je ne crois pas que dans la présente espèce, notre Cour ait été appelée à tort à combler d'importantes lacunes de la Loi. J'estime plutôt que la mesure corrective est précise dans la mesure où l'inclusion des mots «orientation sexuelle» dans les motifs de discrimination illicites énumérés dans le préambule de l'*IRPA* ainsi qu'aux art. 3, 4 et 10, de même qu'aux par. 2(1), 7(1), 8(1) et 16(1) aura pour seul effet d'assurer la validité de la Loi et d'en corriger l'inconstitutionnalité.

In her reasons in this case, Hunt J.A. concluded that there was insufficient remedial precision to justify the remedy of reading in. She expressed two concerns. Firstly, she held that adequate precision likely would not be possible without a definition of the term "sexual orientation". With respect, I cannot agree. Although the term "sexual orientation" has been defined in the human rights legislation of the Yukon Territory, it appears undefined in the *Canadian Human Rights Act*, the human rights legislation of Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, British Columbia, and s. 718.2(*a*)(i) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended by S.C. 1995, c. 22, s. 6. In addition, "sexual orientation" was not defined when it was recognized by this Court in *Egan*, *supra*, as an analogous ground under s. 15 of the *Charter*. In my opinion, "sexual orientation" is a commonly used term with an easily discernible common sense meaning.

156 Dans ses motifs, le juge Hunt de la Cour d'appel a conclu que la mesure corrective n'était pas assez précise pour justifier le recours à l'interprétation large, et ce, pour deux raisons. Premièrement, elle a estimé qu'il serait vraisemblablement impossible de parvenir à une précision suffisante sans définir l'expression «orientation sexuelle». Je ne puis, en toute déférence, souscrire à une telle opinion. Cette expression, même si elle est définie dans la loi du Yukon concernant les droits de la personne, est employée sans définition dans la *Loi canadienne sur les droits de la personne* et dans les lois relatives aux droits de la personne de la Nouvelle-Écosse, du Nouveau-Brunswick, du Québec, de l'Ontario, du Manitoba, de la Saskatchewan et de la Colombie-Britannique de même qu'au sous-al. 718.2*a*)(i) du *Code criminel*, L.R.C. (1985), ch. C-46, modifié par L.C. 1995, ch. 22, art. 6. Notre Cour non plus n'a pas défini l'expression quand, dans l'arrêt *Egan*, précité, elle a reconnu que l'orientation sexuelle constituait un motif analogue sous le régime de l'art. 15 de la *Charte*. À mon avis, les mots «orientation sexuelle» sont des mots usuels dont le sens courant se comprend aisément.

In addition, I concur with the comments of R. Khullar (in "*Vriend*: Remedial Issues for Unremedied Discrimination" (1998), 7 *N.J.C.L.* 221) who stated (at pp. 237-38) that,

> [i]f there is any ambiguity in the term "sexual orientation," it is no greater than that encompassed by terms such as "race," "ethnic origin" or "religion," all of which are undefined prohibited grounds of discrimination in the *Charter* which have not posed any undue difficulty for the courts or legislatures to understand and apply.

157 De plus, je souscris aux commentaires de R. Khullar (dans «*Vriend*: Remedial Issues for Unremedied Discrimination» (1998), 7 *N.J.C.L.* 221) qui a écrit (aux pp. 237 et 238):

> [TRADUCTION] Si tant est que l'expression «orientation sexuelle» soit ambiguë, elle ne l'est pas davantage que les mots «race», «origine ethnique» ou «religion», lesquels sont tous des motifs de discrimination interdits par la *Charte* qui ne sont pas définis et que les tribunaux ou les législatures n'ont eu aucune difficulté particulière à comprendre ou à appliquer.

Hunt J.A. was also troubled by the possible impact of reading in upon s. 7(2) of the *IRPA*. This section states that s. 7(1) (employment), as regards age and marital status, "does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan". As the Court of Appeal heard no argument on this point and as there was no evidence before the court to explain the rationale behind this provision, Hunt J.A. held that, if

158 Le juge Hunt s'inquiétait également des répercussions possibles de l'interprétation large sur le par. 7(2) de l'*IRPA*. Cette disposition énonce que le par. 7(1) (emploi) est, relativement à l'âge et à l'état matrimonial, [TRADUCTION] «sans effet sur l'application de tout régime de retraite légitime et des modalités de tout régime d'assurance collective ou d'employés légitime». Comme la Cour d'appel n'avait entendu aucun argument sur ce point et qu'aucune preuve n'avait été présentée

the protections of the *IRPA* were to be extended to gay men and lesbians, it would be necessary to decide whether this group would be included or excluded from s. 7(2). She found that this was something the court was in no position to do. In light of this difficulty, Hunt J.A. was concerned that the reading in remedy "would engage the court in the kind of 'filling in of details' against which Lamer, C.J.C., cautions in *Schachter* [*supra*]" (p. 69).

159 In my view, whether gay men and lesbians are included or excluded from s. 7(2) is a peripheral issue which does not deprive the reading in remedy of the requisite precision. I agree with K. Roach who noted that the legislature "can always subsequently intervene on matters of detail that are not dictated by the Constitution" (*Constitutional Remedies in Canada* (1994 (loose-leaf)), at p. 14-64.1). I therefore conclude on this point that, in the present case, there is sufficient remedial precision to justify the remedy of reading in.

160 Turning to budgetary repercussions, in the circumstances of the present appeal, such considerations are not sufficiently significant to warrant avoiding the reading in approach. On this issue, the trial judge stated (at p. 18):

> There will undoubtedly be some budgetary impact on the Human Rights Commission as a result of the addition of sexual orientation as a prohibited ground of discrimination. But, unlike *Schachter* [*supra*], it would not be substantial enough to change the nature of the scheme of the legislation.

Although the scope of this Court's review of the *IRPA* is considerably broader than that which the trial judge was asked to undertake, as I noted above, having not heard anything persuasive to the contrary, I am not prepared to interfere with the trial judge's findings on this matter.

161 As to the effects on the thrust of the legislation, it is difficult to see any deleterious impact. All persons covered under the current scope of the *IRPA*

pour expliquer le fondement de cette disposition, le juge Hunt a conclu que si l'on étendait la protection de l'*IRPA* aux homosexuels, il serait nécessaire de décider si ce groupe était visé ou non par le par. 7(2). Elle a jugé que la Cour n'était pas en mesure de trancher une telle question. Cette difficulté faisait craindre au juge Hunt qu'en recourant à l'interprétation large [TRADUCTION] «la Cour ne soit amenée à "combler les lacunes" ce contre quoi le juge en chef Lamer mettait les tribunaux en garde dans l'arrêt *Schachter* [précité]» (p. 69).

Selon moi, la question de savoir si le par. 7(2) s'applique ou non aux homosexuels est secondaire et ne fait pas perdre à l'interprétation large le degré de précision requis. Je partage l'opinion de K. Roach, lequel estime que le législateur [TRADUCTION] «peut toujours revenir ensuite sur les détails qui ne sont pas dictés par la Constitution» (*Constitutional Remedies in Canada* (1994 (éd. feuilles mobiles)), à la p. 14-64.1). Je suis donc d'avis qu'en l'espèce, que la mesure corrective est suffisamment précise pour justifier le recours à l'interprétation large.

S'agissant des conséquences financières, elles ne revêtent pas, dans le présent pourvoi, une importance suffisante pour écarter l'interprétation large. Sur cette question, le juge de première instance a écrit (à la p. 18):

> [TRADUCTION] L'ajout de l'orientation sexuelle au nombre des motifs de discrimination illicites aura certainement des conséquences financières pour la Human Rights Commission. Mais contrairement à l'affaire *Schachter* [précitée], celles-ci ne sont pas assez importantes pour modifier la nature du régime prévu par la Loi.

Bien que l'examen de l'*IRPA* effectué par notre Cour a une portée beaucoup plus large que celle que le juge de première instance était appelée à effectuer, je ne suis pas disposé, comme je l'ai déjà mentionné, à modifier ses conclusions en cette matière puisqu'on ne m'a présenté aucune preuve convaincante du contraire.

Quant aux effets sur l'économie de la Loi, il est difficile de concevoir quelque conséquence néfaste. Toutes les personnes actuellement visées

would continue to benefit from the protection provided by the Act in the same manner as they had before the reading in of sexual orientation. Thus, I conclude that it is reasonable to assume that, if the Legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen. As the inclusion of sexual orientation in the *IRPA* does not alter the legislation to any significant degree, it is reasonable to assume that the Legislature would have enacted it in any event.

par l'*IRPA* continueraient d'être protégées par ses dispositions de la même façon qu'elles l'étaient avant l'ajout de l'orientation sexuelle par interprétation large. Il est donc raisonnable de supposer que si le législateur avait eu le choix entre renoncer à faire passer une loi relative aux droits de la personne ou en adopter une qui interdit la discrimination fondée sur l'orientation sexuelle, il aurait opté pour la deuxième solution. Puisque l'inclusion de l'orientation sexuelle dans l'*IRPA* ne modifie pas substantiellement celle-ci, il est raisonnable de penser que le législateur l'aurait adoptée de toute façon.

In addition, in *Schachter*, *supra*, Lamer C.J. noted that, in cases where the issue is whether to extend benefits to a group excluded from the legislation, the question of the effects on the thrust of the legislation will sometimes focus on the size of the group to be added as compared to the group originally benefited. He quoted with approval from *Knodel*, *supra*, where Rowles J. extended the provision of benefits to spouses to include same-sex spouses. In her view, the remedy of reading in was far less intrusive to the intention of the legislature than striking down the benefits scheme because the group to be added was much smaller than the group already receiving the benefits.

162 En outre, le juge en chef Lamer, dans l'arrêt *Schachter*, précité, a signalé que lorsqu'il s'agit de savoir si l'on doit accorder des avantages à un groupe exclu de la loi, la question des effets de cette mesure sur l'économie du texte de loi sera quelquefois centrée sur la taille du groupe à ajouter par rapport à celle du groupe initial des bénéficiaires. Il a cité, en les approuvant, les motifs du juge Rowles dans la décision *Knodel*, précité, où le juge a étendu aux conjoints de même sexe le droit à des prestations pour conjoints. Selon elle, l'inclusion par interprétation large portait moins atteinte à l'intention législative que l'annulation du régime de prestations, parce que le groupe à ajouter était beaucoup plus petit que celui qui recevait les prestations.

Lamer C.J. went on to note that, "[w]here the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one" (p. 712). In the present case, gay men and lesbians are clearly a smaller group than those already benefited by the *IRPA*. Thus, in my view, reading in remains the less intrusive option.

163 Le juge en chef Lamer a ajouté: «[s]i le groupe à ajouter est numériquement moins important que le groupe initial de bénéficiaires, c'est une indication que la supposition que le législateur aurait de toute façon adopté le bénéfice est fondée» (p. 712). En l'espèce, les homosexuels forment indéniablement un groupe inférieur en nombre au groupe jouissant du bénéfice de l'*IRPA*. J'estime donc que l'interprétation large demeure la solution la moins attentatoire.

The final criterion to examine is interference with the legislative objective. In *Schachter*, Lamer C.J. commented upon this factor as follows (at pp. 707-8):

164 Le dernier facteur à examiner est celui de l'ingérence dans l'objectif législatif. Dans l'arrêt *Schachter*, précité, le juge en chef Lamer a fait le commentaire suivant au sujet de ce facteur (aux pp. 707 et 708):

The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. . . . A second level of legislative intention may be manifest in the means chosen to pursue that objective.

Ce n'est qu'en examinant de près l'objectif de la loi en question que l'on peut déterminer le degré d'empiétement d'une réparation particulière sur le domaine législatif. [. . .] Un second niveau d'intention législative peut ressortir des moyens choisis pour atteindre cet objectif.

165 With regard to the first level of legislative intention, as I discussed above, it is clear that reading sexual orientation into the *IRPA* would not interfere with the objective of the legislation. Rather, in my view, it can only enhance that objective. However, at first blush, it appears that reading in might interfere with the second level of legislative intention identified by Lamer C.J.

Il est évident, comme je l'ai déjà indiqué, que relativement au premier niveau d'intention législative, l'ajout par interprétation large de l'orientation sexuelle dans l'*IRPA* ne porterait pas atteinte à l'objectif du texte de loi; je suis même d'avis qu'il ne pourrait que servir cet objectif. À première vue, toutefois, il semble que l'interprétation large puisse empiéter sur le second niveau d'intention législative mis en lumière par le juge en chef Lamer.

166 As the Alberta Legislature has expressly chosen to exclude sexual orientation from the list of prohibited grounds of discrimination in the *IRPA*, the respondents argue that reading in would unduly interfere with the will of the Government. McClung J.A. shares this view. In his opinion, the remedy of reading in will never be appropriate where a legislative omission reflects a deliberate choice of the legislating body. He states that if a statute is unconstitutional, "the preferred consequence should be its return to the sponsoring legislature for representative, constitutional overhaul" (p. 35). However, as I see the matter, by definition, *Charter* scrutiny will always involve some interference with the legislative will.

Les intimés soutiennent que, la législature de l'Alberta ayant expressément résolu d'exclure l'orientation sexuelle de la liste des motifs de discrimination interdits par l'*IRPA*, l'interprétation large constituerait un empiétement indu sur la volonté du gouvernement. Le juge McClung partage cet avis. Selon lui, le recours à l'interprétation large n'est jamais acceptable lorsque l'omission du législateur résulte d'un choix délibéré. Il affirme que si une loi est inconstitutionnelle, [TRADUCTION] «c'est l'option du renvoi à l'autorité législative compétente pour permettre aux élus de remédier au vice constitutionnel qu'il convient de retenir» (p. 35). De mon point de vue, cependant, l'examen fondé sur la *Charte* comportera toujours, par définition, une forme d'empiétement sur la volonté du législateur.

167 Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent. Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional. As I see the matter, a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to

Lorsqu'une loi est jugée inconstitutionnelle, que le tribunal choisisse d'avoir recours à l'interprétation large ou d'annuler la loi, il y a nécessairement une certaine ingérence dans l'intention du législateur. Par conséquent, la solution qui respecte le plus l'intention du législateur est celle qui consiste à se demander ce que le législateur aurait vraisemblablement fait s'il avait su que ses dispositions seraient jugées inconstitutionnelles. De mon point de vue, le choix délibéré des moyens n'empêche pas le recours à l'interprétation large, sauf dans les cas où l'on peut établir que les moyens choisis revêtent une importance à ce point centrale eu

the scheme of the legislation, that the legislature would not have enacted the statute without them.

Indeed, as noted by the intervener Canadian Jewish Congress, if reading in is always deemed an inappropriate remedy where a government has expressly chosen a course of action, this amounts to the suggestion that whenever a government violates a *Charter* right, it ought to do so in a deliberate manner so as to avoid the remedy of reading in. In my view, this is a wholly unacceptable result.

In the case at bar, the means chosen by the legislature, namely, the exclusion of sexual orientation from the *IRPA*, can hardly be described as integral to the scheme of that Act. Nor can I accept that this choice was of such centrality to the aims of the legislature that it would prefer to sacrifice the entire *IRPA* rather than include sexual orientation as a prohibited ground of discrimination, particularly for the reasons I will now discuss.

As mentioned by my colleague Cory J., in 1993, the Alberta Legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Alberta Human Rights Commission. The Panel issued a report making several recommendations including the inclusion of sexual orientation as a prohibited ground of discrimination in all areas covered by the Act. The Government responded to this recommendation by deferring the decision to the judiciary: "This recommendation will be dealt with through the current court case *Vriend v. Her Majesty the Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta*" (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*, *supra*, at p. 21).

In my opinion, this statement is a clear indication that, in light of the controversy surrounding the protection of gay men and lesbians under the *IRPA*, it was the intention of the Alberta Legisla-

égard aux buts poursuivis par le législateur et sont à ce point essentiels à l'économie de la loi que le législateur ne l'aurait pas adopter sans eux.

168 En effet, comme l'a souligné l'intervenant, le Congrès juif canadien, juger que l'interprétation large n'est jamais applicable à une ligne de conduite expressément choisie par un gouvernement équivaut à dire qu'un gouvernement n'a qu'à contrevenir de façon délibérée à un droit garanti par la *Charte* pour échapper à l'interprétation large. Selon moi, pareil résultat est tout à fait inacceptable.

169 Dans l'affaire qui nous occupe, on peut difficilement soutenir que les moyens choisis par le législateur, savoir l'exclusion de l'orientation sexuelle de l'*IRPA*, sont essentiels à l'économie de la Loi. Je ne suis pas disposé non plus à reconnaître que ce choix revêtait une importance à ce point centrale eu égard aux buts poursuivis par le législateur que celui-ci aurait choisi de sacrifier l'ensemble de l'*IRPA* plutôt que d'intégrer l'orientation sexuelle au nombre des motifs de discrimination illicites, en particulier pour les motifs que j'expose ici.

170 Comme le juge Cory l'a indiqué, la législature de l'Alberta a créé l'Alberta Human Rights Review Panel, en 1993, et a chargé ce comité d'examiner l'*IRPA* ainsi que l'Alberta Human Rights Commission. Le comité, dans son rapport, a formulé plusieurs recommandations, dont celle d'inclure l'orientation sexuelle dans les motifs de discrimination illicites, pour tous les domaines visés par la Loi. Le gouvernement a répondu à cette recommandation en s'en remettant aux tribunaux: [TRADUCTION] «Les suites à donner à cette recommandation seront déterminées par l'issue de l'affaire *Vriend c. Her Majesty the Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta*» (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*, *op. cit.*, à la p. 21).

171 À mon avis, cet énoncé indique clairement que la législature de l'Alberta, tenant compte de la controverse entourant la protection des homosexuels sous le régime de l'*IRPA*, a voulu s'en remettre à la

ture to defer to the courts on this issue. Indeed, I interpret this statement to be an express invitation for the courts to read sexual orientation into the *IRPA* in the event that its exclusion from the legislation is found to violate the provisions of the *Charter*. Therefore, primarily because of this and contrary to the assertions of the respondents, I believe that, in these circumstances, the remedy of reading in is entirely consistent with the legislative intention.

décision des tribunaux sur cette question. J'y vois, en fait, une invitation expresse faite aux tribunaux d'inclure l'orientation sexuelle dans l'*IRPA* si l'exclusion de ce motif est jugée contraire à la *Charte*. C'est cela, principalement, qui me fait conclure, quoi qu'en dise les intimés, que, dans les circonstances, l'interprétation large est parfaitement compatible avec l'intention du législateur.

172 In addition to the comments which I outlined above, McClung J.A. also criticizes the remedy of reading in on a more fundamental level. He views the reading of provisions into a statute as an unacceptable intrusion of the courts into the legislative process. Commenting upon the trial judge's decision to read sexual orientation into the *IRPA* he stated (at pp. 29-30):

Le juge McLung de la Cour d'appel, en plus de faire le commentaire que j'ai cité plus haut, formule des critiques plus fondamentales concernant le recours à l'interprétation large. Il considère l'inclusion de dispositions dans une loi par interprétation large comme une ingérence inacceptable des tribunaux dans le processus législatif. Au sujet de la décision du juge de première instance d'ajouter l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA*, il s'exprime ainsi (aux pp. 29 et 30):

> To amend and extend it, by reading up to include "sexual orientation" was a sizeable judicial intervention into the affairs of the community and, at a minimum, an undesirable arrogation of legislative power by the court. . . . [T]o me it is an extravagant exercise for any s. 96 judge to use the enormous review power of his or her office in this way in order to wean competent legislatures from their "errors".

> [TRADUCTION] La modifier et en élargir la portée en l'interprétant comme incluant l'orientation sexuelle, c'est, pour un tribunal, s'immiscer considérablement dans les affaires publiques et, à tout le moins, empiéter de façon indésirable sur le pouvoir législatif [. . .] [J]'estime qu'un juge nommé en vertu de l'art. 96, qui se sert ainsi de l'énorme pouvoir de révision qui lui est conféré pour tirer l'autorité législative compétente de ses «erreurs», exerce ce pouvoir de façon excessive.

173 McClung J.A. goes on to suggest that, by reading in, the trial judge overrode the express will of the electors of the Province of Alberta who, speaking through their parliamentary representatives, have decided that sexual orientation is not to be included in the protected categories of the *IRPA*.

Le juge McClung poursuit en affirmant que le juge de première instance, en recourant à l'interprétation large, a passé outre à la volonté expresse des électeurs de la province de l'Alberta qui, s'exprimant par le truchement de leurs représentants parlementaires, ont décidé de ne pas inclure l'orientation sexuelle dans les catégories protégées par l'*IRPA*.

174 With respect, for the reasons outlined in the previous section of these reasons, I do not accept that extending the legislation in this case is an undemocratic exercise of judicial power. Rather, I concur with the comments of W. Black, who states (*supra*, at p. 128) that:

Pour les motifs que j'ai exposés précédemment, je ne puis, en toute déférence, voir dans l'élargissement de la portée de la Loi en l'espèce, un exercice non démocratique du pouvoir judiciaire. Je souscris plutôt aux vues de W. Black lorsqu'il affirme (*loc. cit.*, à la p. 128):

. . . there is no conflict between judicial review and democracy if judges intervene where there are indications that a decision was not reached in accordance with democratic principles. Democracy requires that all citizens be allowed to participate in the democratic process, either directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself.

[TRADUCTION] . . . la révision judiciaire n'entre pas en conflit avec la démocratie lorsque l'intervention des tribunaux vise des décisions qui ne semblent pas avoir été prises en conformité avec les principes démocratiques. La démocratie exige que tous les citoyens aient la possibilité de prendre part au processus démocratique, directement ou par le truchement de représentants qui leur accordent une considération égale. La souveraineté parlementaire est un moyen de parvenir à cette fin et non une fin en soi.

In my view, the process by which the Alberta Legislature decided to exclude sexual orientation from the *IRPA* was inconsistent with democratic principles. Both the trial judge and all judges in the Court of Appeal agreed that the exclusion of sexual orientation from the *IRPA* was a conscious and deliberate legislative choice. While McClung J.A. relies on this fact as a reason for the courts not to intervene, the theories of judicial review developed by several authors (see e.g. Black, *supra*; J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); P. Monahan, "A Theory of Judicial Review Under the Charter", in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), at pp. 97-138; D. M. Beatty, *Constitutional Law in Theory and Practice* (1995)) suggest the opposite conclusion.

175 À mon avis, le processus par lequel la législature de l'Alberta a décidé d'exclure l'orientation sexuelle de l'*IRPA* n'était pas conforme aux principes démocratiques. Le juge de première instance et les juges de la Cour d'appel ont convenu que l'exclusion de l'orientation sexuelle de l'*IRPA* procédait d'un choix législatif conscient et délibéré. Bien que le juge McClung invoque ce fait pour justifier la non-intervention des tribunaux, plusieurs auteurs arrivent à la conclusion contraire dans les théories relatives à la révision judiciaire qu'ils ont élaborées (voir, par exemple, Black, *loc. cit.*; J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); P. Monahan, «A Theory of Judicial Review Under the Charter», dans *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), aux pp. 97 à 138; D. M. Beatty, *Constitutional Law in Theory and Practice* (1995)).

As I have already discussed, the concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly (see Black, *supra*; Jackman, *supra*, at p. 680).

176 Je le répète, la notion de démocratie ne se limite pas à la règle de la majorité, ainsi que nous l'a si bien rappelé le juge en chef Dickson dans l'arrêt *Oakes*, précité. À mon avis, la démocratie suppose que le législateur tienne compte des intérêts de la majorité comme de ceux des minorités, car ses décisions toucheront tout le monde. Si le législateur néglige de prendre en considération les intérêts d'une minorité, en particulier si cette minorité a été historiquement victime de préjugés et de discrimination, j'estime que le pouvoir judiciaire est justifié d'intervenir et de rectifier le processus démocratique faussé (voir Black, *loc. cit*; Jackman, *loc. cit.*, à la p. 680).

At p. 35 of his reasons, McClung J.A. states:

177 Le juge McClung écrit, à la p. 35 de ses motifs:

Allowing judicial, and basically final, proclamation of legislative change ignores our adopted British parlia-

[TRADUCTION] Permettre au pouvoir judiciaire d'apporter à des dispositions législatives des modifications pra-

mentary safeguards, historic in themselves, and which are the practical bulkheads that protect representative government. When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.

tiquement définitives c'est méconnaître les garanties parlementaires britanniques, elles-mêmes historiques, que nous avons fait nôtres et qui constituent de fait le rampart du gouvernement représentatif. Lorsque des juges non élus choisissent de légiférer, le système de poids, de contrepoids et de conventions parlementaires est tout simplement écarté.

178 With respect, I do not agree. When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, in my view, the "parliamentary safeguards" remain. Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified under s. 1 of the *Charter*. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response, as I outlined above (see also Hogg and Bushell, *supra*). Moreover, the legislators can always turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate "parliamentary safeguard".

En toute déférence, je ne puis souscrire à cette opinion. Le recours par un tribunal à l'interprétation large pour corriger une loi inconstitutionnelle contraint certainement le processus législatif. En conséquence, il convient de ne pas retenir inutilement cette solution et de ne le faire qu'après mûre réflexion. Toutefois, les «garanties parlementaires» ne disparaissent pas, à mon avis, car les gouvernements demeurent libres de revenir sur la loi modifiée et d'y inclure les exceptions et les moyens de défense qui, d'après eux, peuvent se justifier sous le régime de l'article premier de la *Charte*. Ainsi, lorsqu'un tribunal recourt à l'interprétation large, il ne met pas un terme au processus législatif puisque le législateur peut en réponse adopter une nouvelle loi, comme je l'ai signalé plus haut (voir également Hogg et Bushell, *loc. cit.*). De plus, le législateur peut toujours invoquer l'art. 33 de la *Charte*, la disposition de dérogation, laquelle constitue, selon moi, la «garantie parlementaire» par excellence.

179 On the basis of the foregoing analysis, I conclude that reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. The appellants suggest that this remedy should have immediate effect. I agree. There is no risk in the present case of harmful unintended consequences upon private parties or public funds (see e.g. *Egan*, *supra*). Further, the mechanisms to deal with complaints of discrimination on the basis of sexual orientation are already in place and require no significant adjustment. I find additional support for my position in both *Haig*, *supra*, and *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.), where sexual orientation was read into the impugned statutes without a suspension of the remedy. There is no evidence before this Court to

L'analyse qui précède m'amène à conclure que l'inclusion de l'orientation sexuelle dans l'*IRPA* par le recours à l'interprétation large est la meilleure façon de corriger la portée trop limitative de ce texte de loi. Les appelants soutiennent que la mesure corrective devrait prendre effet immédiatement. Je partage leur avis. Cette mesure ne risque pas d'entraîner des conséquences néfastes imprévues sur des particuliers ni sur les fonds publics (voir par ex. *Egan*, précité). En outre, les mécanismes permettant l'examen de plaintes de discrimination fondée sur l'orientation sexuelle existent déjà et ne nécessitent aucun aménagement important. L'arrêt *Haig*, précité, et la décision *Newfoundland (Human Rights Commission) c. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (C.S.T.-N.), me confortent dans cette position. Dans les deux cas, la décision d'ajouter l'orientation

suggest that any harm resulted from the immediate operation of the remedy in those cases.

III. Conclusions and Disposition

For the reasons outlined by Cory J., I conclude that the exclusion of sexual orientation from the protected grounds of discrimination in the *IRPA* violates s. 15 of the *Charter*. In addition, for the reasons set out above, the impugned legislation cannot be saved under s. 1 of the *Charter*. Accordingly, I would allow the appeal, dismiss the cross-appeal, and set aside the judgment of the Alberta Court of Appeal with party-and-party costs throughout.

I would answer the constitutional questions as follows:

1. Do (a) decisions not to include sexual orientation or (b) the non-inclusion of sexual orientation, as a prohibited ground of discrimination in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to Question 1 is "yes", is the infringement or denial demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. — I am in general agreement with the results reached by my colleagues, Cory and Iacobucci JJ. While I agree with Iacobucci J.'s approach to s. 1 of the *Canadian Charter of Rights and Freedoms*, I wish to reiterate

sexuelle à la loi contestée n'était assortie d'aucune suspension. Aucun élément de preuve n'a été présenté à la Cour pour établir que l'application immédiate de la mesure corrective a causé un quelconque préjudice dans ces affaires.

III. Conclusions et dispositif

180 Pour les motifs exposés par le juge Cory, je conclus que l'exclusion de l'orientation sexuelle des motifs de discrimination interdits par l'*IRPA* enfreint l'art. 15 de la *Charte*. En outre, pour les motifs précédemment énoncés, la loi contestée ne peut être sauvegardée par application de l'article premier de la *Charte*. En conséquence, je suis d'avis d'accueillir le pourvoi principal, de rejeter le pourvoi incident et d'annuler le jugement de la Cour d'appel de l'Alberta avec dépens sur la base de frais entre parties devant toutes les cours.

181 Je suis d'avis de répondre de la façon suivante aux questions constitutionnelles:

1. Est-ce que *a*) soit la décision de ne pas inclure l'orientation sexuelle, *b*) soit la non-inclusion de l'orientation sexuelle, en tant que motif de discrimination illicite dans le préambule et dans les art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2, et ses modifications, intitulée maintenant *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, ch. H-11.7, a pour effet de nier les droits garantis par le par. 15(1) de la *Charte canadienne des droits et libertés*, ou d'y porter atteinte?

Réponse: Oui.

2. Si la réponse à la question 1 est «oui», est-ce que la négation ou l'atteinte peut être justifiée en tant que limite raisonnable au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse: Non.

Version française des motifs rendus par

182 LE JUGE L'HEUREUX-DUBÉ — Je suis d'accord pour l'essentiel avec les résultats auxquels parviennent mes collègues les juges Cory et Iacobucci. Bien que je souscrive à l'analyse du juge Iacobucci en ce qui concerne l'article premier de la *Charte*

the position which I have maintained throughout with respect to the approach to be taken to s. 15(1).

183 In my view, s. 15(1) of the *Charter* is first and foremost an equality provision. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, this Court unanimously accepted s. 15's primary mission as "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". In *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 39, I articulated the approach to equality in a similar vein:

> [A]t the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the *Charter* when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of "discrimination" — a definition that focuses on impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction). [Emphasis in original.]

Integral to the inquiry into whether a legislative distinction is in fact discriminatory within the meaning of s. 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and the nature of the interest which is affected in terms of its importance to human dignity and personhood.

184 Given this purpose, every legislative distinction (including, as in this case, a legislative omission) which negatively impacts on an individual or group who has been found to be disadvantaged in our society, the impact of which deprives the individual or group of the law's protection or benefit in a way which negatively affects their human dignity and personhood, does not treat these persons

canadienne des droits et libertés, je tiens à réitérer l'approche que j'ai toujours préconisée en ce qui a trait au par. 15(1).

À mon avis, le par. 15(1) de la *Charte* est une disposition qui porte d'abord et avant tout sur l'égalité. Dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, à la p. 171, notre Cour a décidé à l'unanimité que l'art. 15 a pour objet principal de «favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération». Dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, au par. 39, j'ai exposé de façon similaire la façon dont il convient d'aborder l'égalité:

> [A]u cœur de l'art. 15 se situe la promotion d'une société où tous ont la certitude que la loi les reconnaît en tant qu'êtres humains égaux, tous aussi capables et méritants les uns que les autres. Une personne ou un groupe de personnes est victime de discrimination au sens de l'art. 15 de la *Charte* si, du fait de la distinction législative contestée, les membres de ce groupe ont l'impression d'être moins capables ou de moins mériter d'être reconnus ou valorisés en tant qu'êtres humains ou en tant que membres de la société canadienne qui méritent le même intérêt, le même respect et la même considération. Ce sont là les éléments essentiels de la définition de la «discrimination» — une définition qui insiste davantage sur l'impact (c'est-à-dire l'effet discriminatoire) que sur les éléments constitutifs (c'est-à-dire les motifs de la distinction). [Souligné dans l'original.]

L'un des éléments essentiels de l'examen permettant de déterminer si une distinction législative est, de fait, discriminatoire au sens du par. 15(1), porte tant sur la vulnérabilité sociale de l'individu ou du groupe concerné que sur la nature du droit auquel il est porté atteinte quant à son importance pour la dignité humaine et la personnalité.

Compte tenu de cet objectif, toute distinction législative (y compris, comme en l'espèce, une omission du législateur) qui a un impact négatif sur une personne ou un groupe considéré comme désavantagé dans notre société et prive la personne ou le groupe de la protection et du bénéfice de la loi en portant atteinte à leur dignité humaine et à leur personnalité, n'accorde pas à ces personnes ou à

or groups with "equal concern, respect and consideration". Consequently, s. 15(1) of the *Charter* is engaged. At this point, the burden shifts to the legislature to justify such an infringement of s. 15(1) under s. 1. It is at this stage only that the relevancy of the distinction to the legislative objective, among other factors, may be pertinent.

ces groupes «le même respect, la même déférence et la même considération». Le paragraphe 15(1) de la *Charte* est dès lors engagé. Il incombe alors au législateur de justifier une telle violation du par. 15(1) en application de l'article premier. C'est seulement à cette étape que d'autres facteurs, entre autres la pertinence de la distinction au regard de l'objectif législatif, peuvent être appropriés.

I do not agree with the centrality of enumerated and analogous grounds in Cory J.'s approach to s. 15(1). Although the presence of enumerated or analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined. Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group. As McIntyre J. stated for the Court in *Andrews*, *supra*, at p. 165:

185 Je ne suis pas d'accord avec l'approche du juge Cory qui met l'accent sur les motifs énumérés et les motifs analogues dans son analyse du par. 15(1). Quoique ces motifs puissent être des indices de discrimination ou puissent même donner naissance à une présomption de discrimination, c'est dans l'appréciation de la nature de la personne ou du groupe lésé qu'ils doivent être examinés. Lorsqu'il s'agit de déterminer s'il y a discrimination, c'est l'effet de la distinction législative sur cette personne ou ce groupe qui revêt la plus haute importance. Comme le juge McIntyre l'a exprimé au nom de la Cour dans l'arrêt *Andrews*, précité, à la p. 165:

> To approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned. [Emphasis added.]

> Pour s'approcher de l'idéal d'une égalité complète et entière devant la loi et dans la loi [. . .] la principale considération doit être l'effet de la loi sur l'individu ou le groupe concerné. [Je souligne.]

The s. 15(1) analysis should properly focus on uncovering and understanding the negative impacts of a legislative distinction on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. In my view, to instead make the presence of an enumerated or analogous ground a precondition to the search for discriminatory effects is inconsistent with a liberal and purposive approach to *Charter* interpretation generally, and specifically, to a *Charter* guarantee which is at the heart of our aspirations as a society that everyone be treated equally.

L'analyse fondée sur le par. 15(1) devrait principalement viser à détecter et à comprendre les incidences négatives de la distinction législative sur la personne ou le groupe concerné plutôt qu'à déterminer si la distinction en cause a été établie sur le fondement d'un motif énuméré ou d'un motif analogue. À mon avis, faire de la présence d'un motif énuméré ou d'un motif analogue une condition préalable à la recherche des effets discriminatoires est incompatible, de façon générale, avec une interprétation de la *Charte* qui soit libérale et fondée sur l'objet visé et, en particulier, avec cette promesse de la *Charte* qui est au cœur même de nos aspirations, en tant que société: l'égalité pour tous.

As a final comment, I wish to stress that I cannot agree with Cory J.'s incorporation of La Forest J.'s narrow approach to defining analogous grounds. At para. 90 of his reasons, Cory J. concludes that sexual orientation is an analogous

186 En dernier lieu, je tiens à souligner que je ne puis donner mon adhésion à la reprise par le juge Cory de la définition stricte du juge La Forest en ce qui concerne les motifs analogues. Au paragraphe 90 de ses motifs, le juge Cory conclut que

ground because it is, in La Forest J.'s words from *Egan*, *supra*, at para. 5, "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs". La Forest J. in *Egan*, at the end of para. 5, also restrictively characterized analogous grounds as being those based on "innate" characteristics. As demonstrated by McLachlin J., writing for the majority in *Miron v. Trudel*, [1995] 2 S.C.R. 418, this Court has endorsed a much more varied and comprehensive approach to the determination of whether a particular basis for discrimination is analogous to those grounds enumerated in s. 15(1). At paras. 148-49, she explained that:

One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews*, *supra*, at p. 152 *per* Wilson J.; *Turpin*, *supra*, at pp. 1331-32. Another may be the fact that the group constitutes a "discrete and insular minority": *Andrews*, *supra*, at p. 152 *per* Wilson J. and at p. 183 *per* McIntyre J.; *Turpin*, *supra*, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "(d)istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" (pp. 174-75). By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1): *Andrews*, *supra*, at p. 195 *per* La Forest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada*, *supra*, *per* Cory J.

All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition — that any or all of them must be present to find an analogous ground — is invalid. As Wilson J. recognized in *Turpin* (at

l'orientation sexuelle est un motif analogue parce qu'il s'agit, comme l'a dit le juge La Forest dans l'arrêt *Egan*, précité, au par. 5, d'«une caractéristique profondément personnelle qui est soit immuable, soit susceptible de n'être modifiée qu'à un prix personnel inacceptable». Le juge La Forest, dans l'arrêt *Egan*, à la fin du par. 5, a également qualifié de façon restrictive les motifs analogues lorsqu'il a dit qu'il s'agissait de motifs fondés sur des caractéristiques «innées». Comme l'a démontré le juge McLachlin, au nom de la majorité dans l'arrêt *Miron c. Trudel*, [1995] 2 R.C.S. 418, notre Cour a adopté une méthode beaucoup plus nuancée et compréhensive pour déterminer si un motif particulier de discrimination est analogue aux motifs énumérés au par. 15(1). Aux paragraphes 148 et 149, elle a expliqué:

Un indice de motif analogue pourrait être le fait que le groupe visé a subi un désavantage historique, indépendamment de la distinction contestée: *Andrews*, précité, à la p. 152, le juge Wilson, et *Turpin*, précité, aux pp. 1331 et 1332. Un autre pourrait être que le groupe constitue une «minorité discrète et isolée»: *Andrews*, précité, à la p. 152, le juge Wilson, et à la p. 183, le juge McIntyre; *Turpin*, précité, à la p. 1333. Un autre indice serait le cas où une distinction est fondée sur une caractéristique personnelle; comme l'affirme le juge McIntyre dans l'arrêt *Andrews*, «[l]es distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement» (pp. 174 et 175). Par extension, on a soutenu que des distinctions fondées sur des caractéristiques personnelles et immuables doivent être discriminatoires au sens du par. 15(1): *Andrews*, précité, à la p. 195, le juge La Forest. Une comparaison entre le motif soulevé et les motifs énumérés peut également être utile, de même que la reconnaissance que les législateurs et les juristes considèrent que le motif en question est discriminatoire: voir *Egan c. Canada*, précité, le juge Cory.

Tous ces éléments peuvent être des indices valides au sens où leur présence peut constituer un signe de l'existence d'un motif analogue. Cependant, n'est pas valide la proposition contraire — selon laquelle un ou l'ensemble de ces éléments doivent être présents si l'on veut

p. 1333), they are but "analytical tools" which may be "of assistance". [Emphasis in original.]

This being said, I agree with Cory and Iacobucci JJ. to allow the appeal and dismiss the cross-appeal with costs

The following are the reasons delivered by

MAJOR J. (dissenting in part) — The *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 ("*IRPA*" or "the Act"), provided at the relevant time in its preamble among other things that the purpose of that human rights Act is to recognize the principle that all persons are equal in dignity and rights and to provide protection of those rights to all individuals in Alberta. It stated:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin; and

WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .

Section 7 of the *IRPA* stated:

7(1) No employer or person acting on behalf of an employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discrimination against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age,

conclure à l'existence d'un motif analogue. Comme l'a reconnu le juge Wilson dans l'arrêt *Turpin* (à la p. 1333), ils ne sont qu'«un moyen analytique» utilisé pour «déterminer» une question. [Souligné dans l'original.]

Cela dit, je suis d'accord avec les juges Cory et Iacobucci pour accueillir le pourvoi principal et rejeter le pourvoi incident avec dépens. 187

Version française des motifs rendus par

LE JUGE MAJOR (dissident en partie) — Le préambule de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2 («l'*IRPA*» ou la «Loi»), énonçait à l'époque en cause notamment que cette loi sur les droits de la personne visait à reconnaître le principe que chacun jouit de la même dignité et des mêmes droits et à garantir à chacun l'exercice de ces droits en Alberta. Il était conçu ainsi: 188

[TRADUCTION]

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

L'article 7 de la Loi prévoyait:

[TRADUCTION]

7(1) Nul employeur ni quiconque agissant pour son compte ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine:

a) soit refuser d'employer une personne ou refuser de continuer de l'employer;

b) soit exercer une discrimination à l'égard d'une personne en matière d'emploi ou de conditions d'emploi.

ancestry or place of origin of that person or of any other person.

. . .

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Section 33 of the *Canadian Charter of Rights and Freedoms* provides:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Analysis

189 In the preamble of the *IRPA* the Province of Alberta makes it clear that the purpose of the legislation is to recognize the principle that all persons are equal in dignity and rights, and to provide protection of those rights to all individuals in Alberta through the elimination of discriminatory practices.

190 Section 7 provides that no employer shall discriminate against any person with respect to employment because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person. The absence of sexual orientation from the enumerated grounds gave rise to the litigation resulting in this appeal.

. . .

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

L'article 33 de la *Charte canadienne des droits et libertés* prévoit:

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Analyse

Dans le préambule, la province de l'Alberta dit clairement que la Loi vise à reconnaître le principe que chacun jouit de la même dignité et des mêmes droits et à garantir à chacun la jouissance de ces droits en Alberta par la suppression des pratiques discriminatoires.

L'article 7 prévoit que nul employeur ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine, exercer une discrimination contre une personne en matière d'emploi. L'absence de l'orientation sexuelle des motifs énumérés est à l'origine du litige donnant lieu au présent pourvoi.

The Province of Alberta was invited to but declined at the appeal to explain how people with different sexual orientation were not part of the phrase "all persons are equal in dignity and rights". As well, the Province of Alberta failed to demonstrate how the exclusion of sexual orientation from the *IRPA* accords with its legislative purpose. It is puzzling that the Legislature, having enacted comprehensive human rights legislation that applies to everyone in the province, would then selectively deny the protection of the Act to certain groups of individuals. No explanation was given, and none is apparent from the evidence filed by the Province.

191 La province de l'Alberta a été invitée, dans le cadre du présent pourvoi, à expliquer comment il se faisait que les personnes ayant une orientation sexuelle différente n'étaient pas visées par l'expression «chacun jouisse de la même dignité et des mêmes droits», ce qu'elle a refusé de faire. En outre, elle n'a pas établi en quoi l'exclusion de l'orientation sexuelle de la Loi s'harmonisait avec l'objectif de celle-ci. Il est curieux de constater que la législature, après avoir adopté une loi d'ensemble sur les droits de la personne qui s'applique à toutes les personnes dans la province, voudrait priver de la protection de la Loi certains groupes de personnes ciblés. Aucune explication n'a été fournie ni ne ressort de la preuve déposée par la province.

The inescapable conclusion is that there is no reason to exclude that group from s. 7 and I agree with Justices Cory and Iacobucci that to do so is discriminatory and offends their constitutional rights.

192 On doit inévitablement conclure qu'il n'existe aucune raison d'exclure de l'art. 7 le groupe visé, et je suis d'accord avec les juges Cory et Iacobucci qu'une telle exclusion est discriminatoire et porte atteinte aux droits constitutionnels des personnes faisant partie de ce groupe.

While a number of submissions related to the appellant's employment as a teacher this appeal will not be determinative of the matter between the appellant Vriend and his former employer, King's College. Extension of the legislation, either by the Court or by the Legislature, to include protection from discrimination based on sexual orientation will provide the first step in allowing the appellant to have his complaint heard by the Alberta Human Rights Commission. The ultimate success of that action, however, will depend in part on whether the College can demonstrate that its refusal to continue to employ Vriend was based on a *bona fide* occupational requirement, pursuant to s. 7(3) of the *IRPA*. The issue of whether a private fundamentalist Christian college can legitimately refuse to employ a homosexual teacher will be for the Alberta Human Rights Commission, and not this Court, to decide.

193 Même si certains des arguments avancés portaient sur l'emploi de l'appelant à titre d'enseignant, le présent pourvoi ne saurait trancher le litige opposant l'appelant Vriend et son ancien employeur, le King's College. La modification de la Loi, par la Cour ou la législature, de manière à ce qu'elle inclue la protection contre la discrimination fondée sur l'orientation sexuelle constituera une première étape permettant à l'appelant de présenter sa plainte à l'Alberta Human Rights Commission. En bout de ligne, cependant, le succès de cette action dépendra en partie de la question de savoir si le King's College peut établir que son refus de continuer de l'employer était fondé sur une exigence professionnelle justifiée, conformément au par. 7(3) de la Loi. Il appartiendra à l'Alberta Human Rights Commission, et non à notre Cour, de trancher la question de savoir si un collège chrétien privé fondamentaliste peut légitimement refuser d'employer un enseignant homosexuel.

With respect to remedy, Iacobucci J. relies on the reasoning in *Schachter v. Canada*, [1992] 2 S.C.R. 679, to support his conclusion that the

194 En ce qui concerne la réparation appropriée, le juge Iacobucci se fonde sur le raisonnement de la Cour dans l'arrêt *Schachter c. Canada*, [1992] 2

words "sexual orientation" ought to be read into the *IRPA*. In my view, the analysis in *Schachter* with respect to reading in is not compelling here. The Court there decided that the appropriate remedy was to strike down the relevant legislation but temporarily suspend the declaration of invalidity. The directions on "reading in" were not as the Chief Justice stated at p. 719, intended "as hard and fast rules to be applied regardless of factual context".

195 In my opinion, *Schachter* did not contemplate the circumstances that pertain here, that is, where the Legislature's opposition to including sexual orientation as a prohibited ground of discrimination is abundantly clear on the record. Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. That assumption cannot be made in this appeal.

196 The issue may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination, or the issue may be how the legislation ought to be amended to bring it into conformity with the *Charter*. That determination is best left to the Legislature. As was stated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. [Emphasis added.]

197 There are numerous ways in which the legislation could be amended to address the underinclusiveness. Sexual orientation may be added as a prohibited ground of discrimination to each of the

R.C.S. 679, pour étayer sa conclusion que la Loi devrait être interprétée comme si les mots «orientation sexuelle» y figuraient. À mon avis, l'analyse faite dans l'arrêt *Schachter* en ce qui concerne l'interprétation large ne s'impose pas en l'espèce. Dans cette affaire, la Cour avait conclu que la réparation appropriée consistait à annuler la disposition en cause, mais à suspendre temporairement l'effet de la déclaration d'invalidité. Comme l'a dit le Juge en chef à la p. 719, les instructions concernant l'«interprétation large» ne se voulaient pas «des règles rigides qui doivent être appliquées indépendamment des faits».

À mon avis, la Cour, dans l'arrêt *Schachter*, n'avait pas envisagé les circonstances de la présente affaire, soit le refus de la législature d'inclure l'orientation sexuelle comme motif de distinction illicite, comme en fait foi très clairement le dossier. L'interprétation large peut être appropriée lorsque l'on peut supposer sans risque d'erreur que la législature elle-même aurait remédié à la nature trop limitative de la Loi en étendant le bénéfice ou la protection en question au groupe antérieurement exclu. Une telle supposition ne peut être faite dans le présent pourvoi.

Il se peut que la législature préfère ne pas adopter de loi en matière de droits de la personne plutôt que d'en adopter une qui comprenne l'orientation sexuelle comme motif de distinction illicite, ou il s'agit peut-être de déterminer comment il faudrait modifier la Loi pour la rendre conforme à la *Charte*. Il vaut mieux laisser à la législature le soin de trancher cette question. Comme il a été dit dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 169:

> Même si les tribunaux sont les gardiens de la Constitution et des droits qu'elle confère aux particuliers, il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives. [Je souligne.]

Il existe de nombreuses façons de modifier la Loi afin de remédier à sa nature trop limitative. L'orientation sexuelle pourrait être ajoutée comme motif de distinction illicite à chacune des disposi-

impugned provisions. In so doing, the Legislature may choose to define the term "sexual orientation", or it may devise constitutional limitations on the scope of protection provided by the *IRPA*. As an alternative, the Legislature may choose to override the *Charter* breach by invoking s. 33 of the *Charter*, which enables Parliament or a legislature to enact a law that will operate notwithstanding the rights guaranteed in s. 2 and ss. 7 to 15 of the *Charter*. Given the persistent refusal of the Legislature to protect against discrimination on the basis of sexual orientation, it may be that it would choose to invoke s. 33 in these circumstances. In any event it should lie with the elected Legislature to determine this issue. They are answerable to the electorate of that province and it is for them to choose the remedy whether it is changing the legislation or using the notwithstanding clause. That decision in turn will be judged by the voters.

tions contestées. La législature pourrait alors décider de définir l'expression «orientation sexuelle», ou encore poser des limites constitutionnelles à la portée de la protection qu'accorde la Loi. Par ailleurs, la législature pourrait décider de protéger les dispositions qui portent atteinte à la *Charte*, en invoquant l'art. 33, lequel permet au Parlement ou à la législature d'une province d'adopter une loi qui aura effet indépendamment des droits garantis aux art. 2 et 7 à 15 de la *Charte*. Vu qu'elle persiste dans son refus d'accorder une protection contre la discrimination fondée sur l'orientation sexuelle, la législature pourrait décider d'invoquer l'art. 33. De toute façon, il incombe à la législature, dont les membres ont été élus, de trancher cette question. En effet, ces derniers sont responsables devant l'électorat de la province et c'est à eux de choisir quelle voie prendre, qu'ils décident de modifier la loi ou encore d'invoquer la disposition de dérogation. Leur décision sera ensuite évaluée par les électeurs.

The responsibility of enacting legislation that accords with the rights guaranteed by the *Charter* rests with the legislature. Except in the clearest of cases, courts should not dictate how underinclusive legislation must be amended. Obviously, the courts have a role to play in protecting *Charter* rights by deciding on the constitutionality of legislation. Deference and respect for the role of the legislature come into play in determining how unconstitutional legislation will be amended where various means are available.

198 La responsabilité d'adopter des dispositions législatives qui s'harmonisent avec les droits garantis par la *Charte* incombe à la législature. Sauf dans les cas les plus manifestes, les tribunaux ne devraient pas imposer la façon dont une disposition de nature trop limitative doit être modifiée. Il va de soi que les tribunaux ont un rôle à jouer dans la protection des droits garantis par la *Charte*, rôle qui consiste à déterminer si les dispositions législatives adoptées par la législature sont valides sur le plan constitutionnel. Cependant, ils doivent faire preuve de retenue et respecter le rôle de la législature lorsqu'il existe plusieurs façons de modifier une disposition législative inconstitutionnelle.

Given the apparent legislative opposition to including sexual orientation in the *IRPA*, I conclude that this is not an appropriate case for reading in. It is preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. I would restrict the declaration of invalidity to the employment-related provisions of the *IRPA*, that is ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, this Court has stated that *Charter* cases should not be considered

199 Étant donné que la législature refuse manifestement d'inclure l'orientation sexuelle dans la Loi, je conclus que la présente affaire ne se prête pas à l'application de l'interprétation large. Il est préférable de déclarer invalides les dispositions fautives et de permettre à la législature de les rectifier. Je limiterais la déclaration d'invalidité aux dispositions de la Loi en matière d'emploi, soit les par. 7(1) et 8(1) ainsi que l'art. 10. Bien que les mêmes conclusions puissent s'appliquer aux autres dispositions de la Loi, notre Cour a déjà dit que les

in a factual vacuum: see *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361.

200 The only remaining issue is whether the declaration of invalidity ought to be temporarily suspended. In *Schachter*, Lamer C.J. stated that a declaration of invalidity may be temporarily suspended where the legislation is deemed unconstitutional because of underinclusiveness rather than overbreadth, and striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

201 There is no intention to deprive individuals in Alberta of the protection afforded by the *IRPA*, but only to ensure that the legislation is brought into conformity with the *Charter* while simultaneously respecting the role of the legislature. I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

Conclusion

202 I agree with my colleagues that the exclusion of sexual orientation as a protected ground of discrimination from ss. 7(1), 8(1) and 10 of the *IRPA* violates s. 15 of the *Charter* and cannot be saved under s. 1. I would declare these sections unconstitutional but suspend the declaration of invalidity for a period of one year.

Appeal allowed with costs, MAJOR J. *dissenting in part. Cross-appeal dismissed with costs.*

Solicitors for the appellants: Chivers Greckol & Kanee, Edmonton.

Solicitors for the respondents: Miles Davison McCarthy, Calgary.

causes fondées sur la *Charte* ne doivent pas être examinées dans un vide factuel: voir *MacKay c. Manitoba*, [1989] 2 R.C.S. 357, à la p. 361.

La seule question litigieuse qui reste à trancher est de savoir si la déclaration d'invalidité devrait être temporairement suspendue. Dans l'arrêt *Schachter*, le juge en chef Lamer a dit que la déclaration d'invalidité pouvait être temporairement suspendue lorsque la loi est jugée inconstitutionnelle en raison de sa portée trop restreinte plutôt que trop large, et que l'annulation de la loi priverait de bénéfices les personnes admissibles sans profiter à la personne dont les droits ont été violés.

La Cour n'a pas l'intention de priver les personnes vivant en Alberta de la protection de la Loi; elle veut uniquement s'assurer que la Loi soit rendue conforme à la *Charte*, tout en respectant le rôle de la législature. Je suis donc d'avis de suspendre la déclaration d'invalidité pour une période d'un an afin de permettre à la législature de modifier les dispositions contestées de façon à les rendre conformes à ses obligations constitutionnelles.

Conclusion

Je suis d'accord avec mes collègues que l'exclusion de l'orientation sexuelle comme motif de distinction illicite des par. 7(1) et 8(1) ainsi que de l'art. 10 de la Loi viole l'art. 15 de la *Charte* et ne peut être justifiée conformément à l'article premier. Je suis d'avis de déclarer inconstitutionnelles ces dispositions, mais de suspendre la déclaration d'invalidité pour une période d'un an.

Pourvoi principal accueilli avec dépens, le juge MAJOR *est dissident en partie. Pourvoi incident rejeté avec dépens.*

Procureurs des appelants: Chivers Greckol & Kanee, Edmonton.

Procureurs des intimés: Miles Davison McCarthy, Calgary.

Solicitors for the intervener the Attorney General of Canada: Brian Saunders and James Hendry, Ottawa.

Procureurs de l'intervenant le procureur général du Canada: Brian Saunders et James Hendry, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Solicitors for the intervener the Alberta Civil Liberties Association: Pundit & Chotalia, Edmonton.

Procureurs de l'intervenante l'Alberta Civil Liberties Association: Pundit & Chotalia, Edmonton.

Solicitors for the intervener Equality for Gays and Lesbians Everywhere (EGALE): Nelligan Power, Ottawa.

Procureurs de l'intervenant Égalité pour les gais et les lesbiennes (EGALE): Nelligan Power, Ottawa.

Solicitor for the intervener Women's Legal Education and Action Fund (LEAF): Claire Klassen, Toronto.

Procureur de l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ): Claire Klassen, Toronto.

Solicitors for the intervener the Foundation for Equal Families: Scott & Aylen, Toronto.

Procureurs de l'intervenante la Foundation for Equal Families: Scott & Aylen, Toronto.

Solicitors for the intervener the Canadian Human Rights Commission: William F. Pentney and Patricia Lawrence, Ottawa.

Procureurs de l'intervenante la Commission canadienne des droits de la personne: William F. Pentney et Patricia Lawrence, Ottawa.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Bar Association — Alberta Branch: McCarthy Tétrault, Calgary.

Procureurs de l'intervenante l'Association du Barreau canadien — Division de l'Alberta: McCarthy Tétrault, Calgary.

Solicitor for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA): Thomas S. Kuttner, Fredericton.

Procureur de l'intervenante l'Association canadienne des commissions et conseils des droits de la personne (ACCDP): Thomas S. Kuttner, Fredericton.

Solicitors for the intervener the Canadian AIDS Society: Elliott, Rodrigues, Toronto.

Procureurs de l'intervenante la Société canadienne du SIDA: Elliott, Rodrigues, Toronto.

Solicitors for the intervener the Alberta and Northwest Conference of the United Church of Canada: Dale Gibson Associates, Edmonton.

Procureurs de l'intervenante l'Alberta and Northwest Conference of the United Church of Canada: Dale Gibson Associates, Edmonton.

Solicitors for the intervener the Canadian Jewish Congress: Witten Binder, Edmonton.

Procureurs de l'intervenant le Congrès juif canadien: Witten Binder, Edmonton.

Solicitors for the intervener Christian Legal Fellowship: Milner Fenerty, Calgary.

Solicitor for the intervener the Alberta Federation of Women United for Families: Dallas K. Miller Law Office, Medicine Hat.

Solicitors for the intervener the Evangelical Fellowship of Canada: Milner Fenerty, Calgary.

Solicitors for the intervener Focus on the Family (Canada) Association: Milner Fenerty, Calgary.

Procureurs de l'intervenant le Christian Legal Fellowship: Milner Fenerty, Calgary.

Procureur de l'intervenante l'Alberta Federation of Women United for Families: Dallas K. Miller Law Office, Medicine Hat.

Procureurs de l'intervenant l'Evangelical Fellowship of Canada: Milner Fenerty, Calgary.

Procureurs de l'intervenante la Focus on the Family (Canada) Association: Milner Fenerty, Calgary.

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KUTZ-BAUER

v

FREIE UND HANSESTADT HAMBURG

European Court of Justice, 20 March 2003

Equal treatment — Article 2 and 5 Council Directive 76/207/EEC — Scheme of part-time work for older employees — Relationship with retirement pension

Facts

- Ms Kutz-Bauer was entitled to take advantage of a provision under a collective agreement applicable to public servants which allowed male and female employees to access a scheme of part-time work for older employees.
- The problem was that the ability to continue in part-time employment of this type applied only until the date on which the person concerned first became eligible for retirement pension at the full rate under the statutory old-age insurance scheme.
- The class of persons eligible for a pension at the age of 60 consisted almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consisted almost exclusively of men. Accordingly, Ms Kutz-Bauer was restricted in the practical effect of the exercise of her right in a way that a man would not be.

Decision

- In the absence of any objective criteria unrelated to any discrimination on the grounds of sex the terms concerned were contrary to the relevant Directive. Accordingly, the relevant provisions of the collective agreement needed to be set aside by the national court (which would also have been the case had the agreement concerned been introduced by legislative provision as opposed to by collective agreement).

Cases referred to:

- *Amministrazione delle finanze dello Stato v Simmenthal* Case 106/77 [1978] ECR 629
- *De Weerd nee Roks & ors v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen & ors* Case C-343/92 [1994] ECR I-571
- *Foster & ors v British Gas* Case C-188/89 [1990] PLR 189
- *Hill & Stapleton v The Revenue Commissioners and Department of Finance* Case C-243/95 [1998] ECR I-3739
- *Jørgensen* Case C-226/98 [2000] ECR I-2447
- *Kowalska v Freie und Hansestadt Hamburg* Case C-33/89 [1990] ECR I-2591
- *Kuratorium für Dialyse und Nierentransplantation v Lewark* [1996] Case C-457/93 ECR I-243
- *Marshall v Southampton and South-West Hampshire Area Health Authority* Case 152/84 [1986] ECR 723
- *Nimz v Freie und Hansestadt Hamburg* Case C-184/89 [1991] ECR I-297
- *Rinner-Kühn v FWW Spezial-Gebäudereinigung* Case 171/88 [1989] ECR 2743
- *Secretary of State for Social Security v Thomas & ors* Case C-328/91 [1993] ECR I-1247
- *Seymour-Smith & Perez* Case C-167/97 [1999] ECR I-623

Legislation referred to:

- EC Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ 1976 L39).

Judgment

Language of the case: German

(Social policy – Equal treatment for men and women – Scheme of part-time work for older employees – Directive 76/207/EEC – Indirect discrimination – Objective justification)

In Case C-187/00,

REFERENCE to the Court under Article 234 EC by the Arbeitsgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Helga Kutz-Bauer

and

Freie und Hansestadt Hamburg,

on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p40),

THE COURT,

composed of: R Schintgen, *President of the Second Chamber, acting for the President of the Sixth*

Chamber, C Gulmann, V Skouris, F Macken (*Rapporteur*) and JN Cunha Rodrigues, *Judges*,

Advocate General: A Tizzano,

Registrar: L. Hewlett, *Principal Administrator*,

after considering the written observations submitted on behalf of:

Ms Kutz-Bauer, by K Bertelsmann, Rechtsanwalt,

Freie und Hansestadt Hamburg, by T Scholle, Rechtsanwalt,

the German Government, by W-D Plessing and T Jürgensen, acting as Agents,

the Commission of the European Communities, by J Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Kutz-Bauer, of Freie und Hansestadt Hamburg, of the German Government and of the Commission at the hearing on 23 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2002,

gives the following

JUDGMENT

1 By decision of 3 May 2000 and a further decision of 29 June 2000, received at the Court on 19 May and 4 July 2000 respectively, the Arbeitsgericht Hamburg (Labour Court, Hamburg) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p40).

2 Those questions were raised in proceedings between Ms Kutz-Bauer and Freie und Hansestadt Hamburg (**the City of Hamburg**) concerning Ms Kutz-Bauer's exclusion from a scheme of part-time work for older employees under a collective agreement applicable to the public service.

Community legislation

Directive 76/207

3 Article 1(1) of Directive 76/207 states that the purpose of that directive is to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in Article 1(2), social security.

4 Article 2(1) of Directive 76/207 provides:

> 1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

5 Article 5 of Directive 76/207 provides:

> 1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
>
> 2. To this end, member states shall take the measures necessary to ensure that:
>
> (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
>
> (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
>
> (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.

Directive 79/7/EEC

6 Article 3(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p24) provides:

> This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

- sickness,

- invalidity,

- old age,

- accidents at work and occupational diseases,

- unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).

7 Article 4(1) of Directive 79/7 provides that the principle of equal treatment means that there is to be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status.

8 Article 7(1)(a) of Directive 79/7 provides that that directive is to apply without prejudice to the right of member states to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

German legislation

9 In Germany, the retirement pensions scheme and the scheme of part-time work for older employees are regulated at federal and regional level. They are also covered by collective agreements.

German provisions on retirement

10 The conditions for the grant of a statutory old-age pension at the full rate are defined in Book VI of the Sozialgesetzbuch (German Social Code, **the SGB VI**).

11 Paragraph 35 of the SGB VI, on the ordinary old-age pension, provides:

> Insured persons shall be entitled to a retirement pension where:
>
> 1. they reach the age of 65 years; and
>
> 2. they have completed the normal qualifying period.

12 Paragraph 38 of the SGB VI, in the version in force until 31 December 1999, governed the old-age pension in the case of unemployment or following part-time work for older employees. It provided that insured persons were entitled to an old-age pension where, in particular, they had reached the age of 60, been employed under a scheme of part-time work for older employees for 24 calendar months and completed a qualifying period of 15 years.

13 Paragraph 39 of the SGB VI, in the version in force until 31 December 1999, provided that female insured persons were to be entitled to an old-age pension where, in particular, they had reached the age of 60.

14 Under the Hamburgisches Ruhegeldgesetz (Land of Hamburg Law on retirement pensions), male workers must work up to the age of 65 in order to be eligible for an occupational retirement pension under the statutory scheme, whereas female workers are entitled to such pension at the full rate from the age of 60.

15 The Hamburgisches Ruhegeldgesetz provides that the fact that a woman receives an old-age pension at the full rate as soon as she is entitled to do so does not entail a reduction in or suspension of her supplementary pension.

German provisions on part-time work for older employees

16 The scheme of part-time work for older employees is regulated by the Altersteilzeitgesetz (Law on part-time work for older employees) of 23 July 1996 (**the AltTZG**) (BGBl 1996 I, p1078).

17 It is apparent from para 1(1) of the AltTZG that the purpose of that law is to make it easier for workers who have reached a certain age to make a gradual transition from active life to retirement.

18 Under para 1(2) of the AltTZG, the Bundesanstalt für Arbeit (Federal Labour Authority) provides financial support, by means of the benefits provided for in that law, for part-time work for workers who, by no later than 31 July 2004, reduce their working hours once they have reached the age of 55 and thus make it possible to recruit workers who would otherwise be unemployed.

19 In accordance with the provisions of the AltTZG, part-time work for older employees may take the form of either a uniform reduction in working hours throughout the relevant period or 'block' working, where a period of full-time work is followed by a period during which the worker retains his status as an employee even though he ceases work.

20 Under para 2(1)(1) and (2) of the AltTZG, benefits are granted for workers who have reached the age of 55 and who have concluded an agreement with their employer covering at least the period up to the time when they are entitled to a retirement pension and under which their working hours are reduced.

21 Under para 3(1)(2) and (3) of the AltTZG, an employer is required to recruit an unemployed person to work either alongside the worker placed on the scheme of part-time work for older employees or, if the worker has taken advantage of the 'block' part-time working scheme, after the worker has retired.

22 Incentives to take up the scheme of part-time work for older employees are provided, first, in the form of enhanced remuneration, equal to at least 70 per cent of the net full-time salary, pursuant to para 3(1)(1)(a) of the AltTZG.

23 Furthermore, under para 4 of that law, the Bundesanstalt für Arbeit reimburses the expenditure which the employer has incurred in paying the enhanced remuneration for part-time work and the increased retirement insurance contributions.

24 However, these costs are not reimbursed if the employer does not fulfil the conditions relating to the recruitment of an unemployed person set out at para 3(1)(2) and (3) of the AltTZG. Furthermore, under para 8(2) of that law, an employer is not relieved of his obligation to pay the worker the enhanced remuneration provided for at para 3(1)(1)(a) of the AltTZG where the employer no longer satisfies the conditions for reimbursement by the Bundesanstalt für Arbeit.

25 It follows from para 5(1) of the AltTZG that the financial support provided by the Bundesanstalt für Arbeit ceases, *inter alia*, where the worker reaches the age of 65 or at the age at which he becomes entitled to an old-age pension at the full rate.

26 The Tarifvertrag zur Regelung der Altersteilzeit (collective agreement on part-time work for older employees) of 5 May 1998 (**the TV ATZ**) was the collective agreement on part-time work for older employees applicable to the public service at the material time. It was concluded in consideration of the opportunities provided by the AltTZG.

27 The preamble to the TV ATZ is worded as follows:

> The parties to the agreement intend, by means of that agreement, to allow employees who have reached a certain age to make a smooth transition from active life to retirement and thus to create opportunities for the recruitment of trainee employees (apprentices) and the unemployed.

28 Paragraph 2(1) and (2) of the TV ATZ provides:

> 1. The employer may agree with full-time employees who have reached the age of 55 and completed a period of employment ... of five years and who during the last five years have worked the normal weekly working hours on at least 1,080 calendar days to change the employment relationship to a relationship of part-time work for older employees on the basis of [the AltTZG] ...
>
> 2. Employees who have reached the age of 60 and who satisfy the other conditions laid down in subpara 1 shall be entitled to conclude a contract on part-time work for older employees ...

29 Under paras 4(1) and 5(1) and (2) of the TV ATZ, the remuneration payable is equal to the remuneration for part-time work plus 20 per cent of that amount. In any event, a person taking advantage of the scheme of part-time work for older employees is guaranteed to receive remuneration equal to 83 per cent of the net remuneration which would be payable if he worked full time.

30 Paragraph 9(1) and (2) of the TV ATZ provides:

> 1. The employment relationship shall terminate on the date stated in the agreement on part-time work for older employees.
>
> 2. Without prejudice to the other conditions of termination provided for in collective agreements ..., the employment relationship shall terminate:
>
> (a) at the end of the calendar month preceding

that from which the employee can claim a retirement pension on the ground of his age or, where he is exempt from obligatory membership of the general retirement scheme, a comparable payment provided by a retirement or insurance institution or by an insurance company; this rule shall not apply to pensions which can be claimed before the insured person reaches the relevant retirement age; or

(b) at the beginning of the calendar month from which the employee receives a retirement pension, a miner's compensation benefit, a similar benefit governed by public law or, where he is not subject to compulsory insurance under the statutory social security scheme, a comparable benefit provided by a retirement or insurance institution or by an insurance company.

Main proceedings and questions referred to the Court

31 Ms Kutz-Bauer was born on 21 August 1939 and is employed by the City of Hamburg as director of the Landeszentrale für politische Bildung (Public Office for Political Education).

32 She requested her employer to enter into an agreement under which she would be eligible for the scheme of part-time work for older employees in accordance with the 'block' working formula during the period 1 September 1999 to 31 August 2004, when she would have reached the age of 65. According to that formula, she would have worked full-time for two and a half years and not worked for the remainder of that five-year period.

33 The City of Hamburg considered her request and rejected it by letter of 21 December 1998. Ms Kutz-Bauer would have fulfilled the personal criteria granting entitlement to part-time work for older employees in accordance with para 2 of the TV ATZ; however, under para 9(2) of the TV ATZ, an agreement on part-time work for older employees between the parties to the main proceedings would have had the consequence of immediately terminating their employment relationship.

34 Ms Kutz-Bauer submitted a second request, which was rejected by letter from the City of Hamburg dated 6 July 1999, on the ground that although she would have been entitled to an agreement on part-time work for older employees once she had reached the age of 60, the employment relationship would automatically cease on the same date pursuant to para 9 of the TV ATZ, since, on the basis of the Hamburgisches Ruhegeldgesetz, her supplementary pension would not be reduced.

35 Before the national court, Ms Kutz-Bauer claimed that the refusal to recognise her entitlement to part-time work for older employees constituted indirect discrimination on grounds of sex, contrary to Directive 76/207.

36 Taking the view that the outcome of the dispute before it requires the interpretation of the provisions of Directive 76/207, the Arbeitsgericht Hamburg decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. **Does a provision of a collective agreement for the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees infringe Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, if under that provision the scheme of part-time work applies only until the time when the person concerned first becomes eligible for a full pension under the statutory old-age insurance scheme, and if the class of persons entitled to draw a full pension at the age of 60 consists almost exclusively of women, while the class entitled to draw a full pension only from the age of 65 consists almost exclusively of men?**

2. **Are national courts empowered, where provisions of collective agreements and legislative provisions are in breach of Directive 76/207/EEC or Directive 79/7/EEC, to apply the corresponding provisions in favour of the disadvantaged class, disregarding the restrictions which are contrary to Community law, until non-discriminatory rules are made by the parties to the collective agreement and/or the legislature?**

First question

37 By its first question, the national court is asking whether Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as meaning that they preclude a provision of a collective agreement

applicable to the public service which allows male and female employees to take advantage of the scheme of part-time work for older employees where under that provision the right to participate in the scheme of part-time work applies only until the date on which the person concerned first becomes eligible for a retirement pension at the full rate under the statutory old-age insurance scheme and where the class of persons eligible for such a pension at the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men.

Observations submitted to the Court

38 Both Ms Kutz-Bauer and the Commission maintain that the unequal treatment of male and female workers introduced by the TV ATZ into the scheme of part-time work for older employees falls within the scope of Directive 76/207, in particular Articles 2(1) and 5(1) of that directive, in so far as the scheme affects the working conditions referred to in Article 5(1).

39 The Commission submits that an agreement defining a scheme of part-time work for older employees does not form part of the statutory schemes which provide protection against the risk of old age and to which Directive 79/7 applies pursuant to Article 3. It therefore maintains that there is no need to consider whether the provisions of Directive 79/7 might restrict the scope of Article 2(1) of Directive 76/207.

40 The Commission further submits that Article 7(1) of Directive 79/7 can naturally apply only to social security benefits and that the arguments put forward by the City of Hamburg cannot prevent the application of Articles 2 and 5 of Directive 76/207. The first question must therefore be answered in the affirmative.

41 On the other hand, the German Government contends that, regard being had to the purpose and structure of the scheme of part-time work for older employees at issue in the main proceedings, the measure applicable to that scheme is Directive 79/7. The scheme is intended, first, to make it easier for older workers to make the gradual transition from work to retirement and, second, to provide young workers with recruitment opportunities by making posts available.

42 Furthermore, in the German Government's submission, the conditions laid down by the Court in Case C-328/91 *Thomas & ors* [1993] ECR I-1247 for the application of the derogation provided for in Article 7(1) of Directive 79/7 are fulfilled in the present case. The German rules on part-time work for older employees tend to ensure coherence between the scheme of financial support for such work and the retirement scheme. In order to avoid any overlap between the unemployment insurance and retirement insurance schemes, it is necessary to ensure that employees who are already entitled to a retirement pension at the full rate do not also benefit from financial support provided by the Bundesanstalt für Arbeit.

Reply of the Court

43 In order to provide an answer of use to the national court, it is necessary to ascertain at the outset whether the scheme of part-time work for older employees at issue in the main proceedings is governed by Directive 76/207 or whether, as the German Government submits, it is governed by Directive 79/7.

44 In that regard, the scheme of part-time work for older employees is intended to reduce the normal working time, either by reducing the working hours at a uniform rate throughout the entire period concerned, or by allowing the person concerned to cease work at an earlier date. In each case the scheme affects the exercise of the occupation of the workers concerned by adjusting their working time.

45 The Court therefore finds that the scheme at issue in the main proceedings established rules relating to working conditions for the purposes of Article 5(1) of Directive 76/207.

46 Contrary to the German Government's contention, that conclusion cannot be disturbed by the fact that the collective agreement at issue in the main proceedings was intended to allow employees who have reached a certain age to make a smooth transition from work to retirement and thus to create opportunities for the recruitment of trainee workers and the unemployed. The fact that the agreement pursued those two aims does not suffice to bring the scheme at issue in the main proceedings within the scope of Directive 79/7.

47 The first question therefore correctly refers to the interpretation of Articles 2(1) and 5(1) of Directive 76/207.

48 It is clear from the first question that the class of persons entitled to receive a full retirement pension at the age of 60 under the statutory old-age insurance scheme consists almost exclusively of women while the class of persons eligible for such a pension only from the age of 65 consists almost exclusively of men.

49 It follows from the documents in the file that while both female and male workers may benefit from the scheme of part-time working from the age of 55 with the employer's consent, the great majority of workers entitled to benefit from the scheme for a period of five years from the age of 60 are male.

50 In those circumstances, provisions of the kind at issue in the main proceedings result in discrimination against female workers by comparison with male workers and must in principle be treated as contrary to Articles 2(1) and 5(1) of Directive 76/207. It would be otherwise only if the difference of treatment found to exist between the two categories of worker were justified by objective factors unrelated to any discrimination based on sex (see, in that regard, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, para 12; Case C-457/93 *Lewark* [1996] ECR I-243, para 31; Case C-243/95 *Hill & Stapleton* [1998] ECR I-3739, para 34; and Case C-226/98 *Jørgensen* [2000] ECR I-2447, para 29).

51 It is for the national court, which alone has jurisdiction to assess the facts and to interpret the national legislation, to determine whether that is so. It is necessary in that regard to ascertain, in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether such aims appear to be unrelated to any discrimination based on sex and whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims (see, in that regard, Case C-167/97 *Seymour-Smith & Perez* [1999] ECR I-623, para 72).

52 However, although in preliminary ruling proceedings it is for the national court to establish whether such objective reasons exist in the particular case before it, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see *Hill & Stapleton*, cited above, para 36, and *Seymour-Smith & Perez*, cited above, para 68).

53 In that regard, the Court observes that, as pointed out at paras 9 and 26 of this judgment, part-time work for older employees is governed in Germany at federal and regional level and also by collective agreements and that the TV ATZ was concluded in consideration of the opportunities offered by the AltTZG.

54 The German Government submits that one of the aims pursued by a scheme such as the one at issue in the main proceedings is to combat unemployment by offering the maximum incentives for workers who are not yet eligible to retire to do so and thus making posts available. To allow a worker who has already acquired entitlement to a retirement pension at the full rate to benefit from the scheme of part-time work for older employees implies, first, that a post which the scheme intends to allocate to an unemployed person would continue to be occupied and, second, that the social security scheme would bear the additional costs, which would divert certain resources from other objectives.

55 As regards the argument which the German Government derives from the encouragement of recruitment, it is for the member states to choose the measures capable of achieving the aims which they pursue in employment matters. The Court has recognised that the member states have a broad margin of discretion in exercising that power (see *Seymour-Smith & Perez*, para 74).

56 Furthermore, as the Court stated at para 71 of its judgment in *Seymour-Smith & Perez*, it cannot be disputed that the encouragement of recruitment constitutes a legitimate aim of social policy.

57 However, the fact remains that the broad margin of discretion which the member states enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment for men and women (see *Seymour-Smith & Perez*, para 75).

58 It follows from the rule referred to at para 51 of this judgment that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed provisions is unrelated to any discrimination based on sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim.

59 As regards the German Government's argument concerning the additional burden associated with allowing female workers to take advantage of the scheme at issue in the main proceedings even where they have acquired entitlement to a retirement pension at the full rate, the Court observes that although budgetary considerations may underlie a member state's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes (Case C-343/92 *De Weerd & ors* [1994] ECR I-571, para 35).

60 Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of member states (*De Weerd & ors*, cited above, para 36, and *Jørgensen*, cited above, para 39).

61 Nor can the City of Hamburg, whether as a public authority or as an employer, justify discrimination arising from a scheme of part-time work for older employees solely because avoidance of such discrimination would involve increased costs (see, to that effect, *Hill & Stapleton*, para 40).

62 It is therefore for the City of Hamburg to prove to the national court that the difference in treatment arising from the scheme of part-time work for older employees at issue in the main proceedings is justified by objective reasons unrelated to any discrimination on grounds of sex. Should it succeed in doing so, the mere fact that the provisions of that scheme which preclude access by workers who have acquired entitlement to a retirement pension at the full rate affect a considerably higher percentage of female workers than of male workers could not be regarded as infringing Articles 2(1) and 5(1) of Directive 76/207.

63 In the light of the foregoing considerations, the answer to the first question must be that Articles 2(1) and 5(1) of Directive 76/207 must be interpreted as meaning that they preclude a provision of a collective agreement applicable to the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees where under that provision the right to participate in the scheme of part-time work applies only until the date on which the person concerned first becomes eligible for a retirement pension at the full rate under the statutory old-age insurance scheme and where the class of persons eligible for such a pension at the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men, unless that provision is justified by objective criteria unrelated to any discrimination on grounds of sex.

Second question

64 By its second question, the national court is essentially asking whether, in the case of a breach of Directive 76/207 by legislative provisions or by provisions of a collective agreement which introduce discrimination contrary to that directive, the national courts are required to set aside that discrimination by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the prior setting aside of those provisions by the legislature, by collective negotiation or otherwise.

Observations submitted to the Court

65 Ms Kutz-Bauer submits that a national court must apply the legislative provisions and the provisions arising under corresponding collective agreements by setting aside the restrictions contrary to Community law and unfavourable to female workers.

66 The Commission maintains that, under Article 5(2) of Directive 76/207, it is for the national legislature to draw the legal inferences from a breach of the principle of equal treatment with regard to working conditions and, in

particular, to provide effective measures in order to enable any person affected to rely on his rights in proceedings before a court. In the Commission's submission, this rule may mean that, in certain circumstances, it is necessary to confer retroactive effect on the abolition or amendment of discriminatory rules and even, should that not prove possible, to provide suitable compensation for workers who have suffered discrimination. Should the national legislature fail to take the appropriate steps, workers who have suffered discrimination could rely, as against the state in its capacity as employer, on Article 5 of Directive 76/207 in order to preclude the application of any national provision contrary to that article.

67 As regards the answer to the second question, the City of Hamburg merely refers to the judgment in Case C-184/89 *Nimz* [1991] ECR I-297, which also concerned the consequences of a finding by a national court that a collective agreement was incompatible with Community law, namely, in that case, Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

Reply of the Court

68 The Court recalls, first of all, that under Article 5(2)(a) and (b) of Directive 76/207, member states are to take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, ... shall be, or may be declared, null and void or may be amended.

69 Furthermore, the Court has consistently held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against the member state before the national court (see, in particular, Case C-188/89 *Foster & ors* [1990] ECR I-3313, para 16)(*sic*).

70 With regard to Article 5(1) of Directive 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, the Court has already held it to be sufficiently precise to be relied upon by an individual as against the state and applied by a national court in order to prevent the application of any national provision which is inconsistent with Article 5(1) (see Case 152/84 *Marshall* [1986] ECR 723, paras 52 and 56 (***Marshall I***), and *Seymour-Smith & Perez*, para 40).

71 Furthermore, a person such as Ms Kutz-Bauer would be able to rely on Article 5(1) of Directive 76/207 as against a public authority such as the City of Hamburg (see, in that regard, *Marshall I*, para 49, and Case C-188/89 *Foster & ors* [1990] ECR I-3133, paras 19 and 21)(*sic*).

72 The Court has also held that, in a case of indirect discrimination in a provision of a collective agreement, the members of the class of persons placed at a disadvantage must be treated in the same way as other workers (see, to that effect, Case C-33/89 *Kowalska* [1990] ECR I-2591, para 19, and *Nimz*, para 18).

73 According to the Court's case law (see, in particular, Case 106/77 *Simmenthal* [1978] ECR 629, para 24), a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

74 It is equally necessary to apply such considerations to the case where the provision at variance with Community law is derived from a collective agreement. It would be incompatible with the very nature of Community law if the court having jurisdiction to apply that law were to be precluded at the time of such application from being able to take all necessary steps to set aside the provisions of a collective agreement which might constitute an obstacle to the full effectiveness of Community rules (see *Nimz*, para 20).

75 In the light of those considerations, the answer to the second question must be that, in the case of a breach of Directive 76/207 by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means

at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise.

Costs

76 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Hamburg by decision of 3 May and 29 June 2000, hereby rules:

1. **Articles 2(1) and 5(1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, must be interpreted as meaning that they preclude a provision of a collective agreement applicable to the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees where under that provision the right to participate in the scheme of part-time work applies only until the date on which the person concerned first becomes eligible for a retirement pension at the full rate under the statutory old-age insurance scheme and where the class of persons eligible for such a pension at the age of 60 consists almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consists almost exclusively of men, unless that provision is justified by objective criteria unrelated to any discrimination on grounds of sex.**

2. **In the case of a breach of Directive 76/207 by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise.**

Comment

- This case may well illustrate the growing impatience of the European Court of Justice in dealing with exceptions to the general rule that discrimination between men and women should not be allowed unless objectively justified. In this case the possibility of the matter being justified as something needed to accommodate the relevant statutory retirement rules was given short shrift.

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.400 OF 2012

National Legal Services Authority ...

Petitioner

Versus

Union of India and others ...

Respondents

WITH

WRIT PETITION (CIVIL) NO.604 OF 2013

J U D G M E N T

K.S. Radhakrishnan, J.

1. Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender

community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

2. We are, in this case, concerned with the grievances of the members of Transgender Community (for short 'TG community') who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth and their prayer is that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.

3. The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide

free legal services to the weaker and other marginalized sections of the society, has come forward to advocate their cause, by filing Writ Petition No. 400 of 2012. Poojaya Mata Nasib Kaur Ji Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, a TG community.

4. Laxmi Narayan Tripathy, claimed to be a Hijra, has also got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathy says that non-recognition of the identity of Hijras, a TG community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.

5. Shri Raju Ramachandran, learned senior counsel appearing for the petitioner – the National Legal Services

Authority, highlighted the traumatic experiences faced by the members of the TG community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. Learned senior counsel has submitted that since the TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc. and, in effect, treated as an outcast and untouchable. Learned senior counsel also submitted that the State cannot discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

6. Shri Anand Grover, learned senior counsel appearing for the Intervener, traced the historical background of the third gender identity in India and the position accorded to them in the Hindu Mythology, Vedic and Puranic literatures, and the prominent role played by them in the royal courts of the Islamic world etc. Reference was also made to the repealed Criminal Tribes Act, 1871 and explained the inhuman manner by which they were treated at the time of the British Colonial rule. Learned senior counsel also submitted that various International Forums and U.N. Bodies have recognized their gender identity and referred to the Yogyakarta Principles and pointed out that those principles have been recognized by various countries around the world. Reference was also made to few legislations giving recognition to the trans-sexual persons in other countries. Learned senior counsel also submitted that non-recognition of gender identity of the transgender community violates the fundamental rights guaranteed to them, who are citizens of this country.

7. Shri T. Srinivasa Murthy, learned counsel appearing in I.A. No. 2 of 2013, submitted that transgender persons have to be declared as a socially and educationally backward classes of citizens and must be accorded all benefits available to that class of persons, which are being extended to male and female genders. Learned counsel also submitted that the right to choose one's gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by Article 21 of the Constitution of India. Learned counsel, therefore, submitted that, subject to such rules/regulations/protocols, transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender classification.

8. Shri Sanjeev Bhatnagar, learned counsel appearing for the petitioner in Writ Petition No.604 of 2013, highlighted the cause of the Kinnar community and submitted that they are the most deprived group of transgenders and calls for constitutional as well as legal protection for their identity and for other socio-economic

benefits, which are otherwise extended to the members of the male and female genders in the community.

9. Shri Rakesh K. Khanna, learned Additional Solicitor General, appearing for the Union of India, submitted that the problems highlighted by the transgender community is a sensitive human issue, which calls for serious attention. Learned ASG pointed out that, under the aegis of the Ministry of Social Justice and Empowerment (for short "MOSJE"), a Committee, called "Expert Committee on Issues relating to Transgender", has been constituted to conduct an in-depth study of the problems relating to transgender persons to make appropriate recommendations to MOSJE. Shri Khanna also submitted that due representation would also be given to the applicants, appeared before this Court in the Committee, so that their views also could be heard.

10. We also heard learned counsel appearing for various States and Union Territories who have explained the steps they have taken to improve the conditions and status of the members of TG community in their respective States

and Union Territories. Laxmi Narayan Tripathy, a Hijra, through a petition supported by an affidavit, highlighted the trauma undergone by Tripathy from Tripathy's birth. Rather than explaining the same by us, it would be appropriate to quote in Tripathy's own words:

> "That the Applicant has born as a male. Growing up as a child, she felt different from the boys of her age and was feminine in her ways. On account of her femininity, from an early age, she faced repeated sexual harassment, molestation and sexual abuse, both within and outside the family. Due to her being different, she was isolated and had no one to talk to or express her feelings while she was coming to terms with her identity. She was constantly abused by everyone as a *'chakka'* and *'hijra'.* Though she felt that there was no place for her in society, she did not succumb to the prejudice. She started to dress and appear in public in women's clothing in her late teens but she did not identify as a woman. Later, she joined the *Hijra* community in Mumbai as she identified with the other *hijras* and for the first time in her life, she felt at home.
>
> That being a *hijra*, the Applicant has faced serious discrimination throughout her life because of her gender identity. It has been clear to the Applicant that the complete non-recognition of the identity of *hijras*/transgender persons by the State has resulted in the violation of most of the fundamental rights guaranteed to them under the Constitution of India…."

Siddarth Narrain, eunuch, highlights Narrain's feeling, as follows:

”Ever since I can remember, I have always identified myself as a woman. I lived in Namakkal, a small town in Tamil Nadu. When I was in the 10th standard I realized that the only way for me to be comfortable was to join the hijra community. It was then that my family found out that I frequently met hijras who lived in the city. One day, when my father was away, my brother, encouraged by my mother, started beating me with a cricket bat. I locked myself in a room to escape from the beatings. My mother and brother then tried to break into the room to beat me up further. Some of my relatives intervened and brought me out of the room. I related my ordeal to an uncle of mine who gave me Rs.50 and asked me to go home. Instead, I took the money and went to live with a group of hijras in Erode.”

Sachin, a TG, expressed his experiences as follows:

“My name is Sachin and I am 23 years old. As a child I always enjoyed putting make-up like ‘vibhuti’ or ‘kum kum’ and my parents always saw me as a girl. I am male but I only have female feelings. I used to help my mother in all the housework like cooking, washing and cleaning. Over the years, I started assuming more of the domestic responsibilities at home. The neighbours starting teasing me. They would call out to me and ask: ‘Why don’t you go out and work like a man?’ or ‘Why are you staying at home like a girl?’ But I liked being a girl. I felt shy about going out and working. Relatives would also mock and scold me on this score. Every day I would go out of the house to bring water. And as I walked back with the water I would always be teased. I felt very ashamed. I even felt suicidal. How could I live like that? But my parents never protested. They were helpless.”

We have been told and informed of similar life experiences faced by various others who belong to the TG community.

11. Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. TG may also takes in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who, in this writ petition, describe themselves as “third gender” and they do not identify as either male or female. Hijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional “third gender”. Among Hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes

persons who intend to undergo Sex Re-Assignment Surgery (***SRS***) or have undergone ***SRS*** to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender, i.e transvestites. Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

HISTORICAL BACKGROUND OF TRANSGENDERS IN INDIA:

12. TG Community comprises of *Hijras,* eunuchs, *Kothis, Aravanis, Jogappas, Shiv-Shakthis* etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The Concept of *tritiya prakrti* or *napunsaka* has also been an

integral part of vedic and puranic literatures. The word '*napunsaka'* has been used to denote absence of procreative capability.

13. Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of *badhai* in which hijras sing, dance and confer blessings.

14. Aravan, the son of Arjuna and Nagakanya in Mahabharata, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna

assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.

15. Jain Texts also make a detailed reference to TG which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India. A detailed analysis of the historical background of the same finds a place in the book of Gayatri Reddy, "With Respect to Sex: Negotiating *Hijra* Identity in South India" – Yoda Press (2006).

16. We notice that even though historically, Hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. During the British rule, a legislation was enacted to supervise the deeds of *Hijras*/TG community, called the Criminal Tribes Act, 1871, which deemed the entire community of *Hijras* persons as innately 'criminal' and 'addicted to the systematic commission of non-bailable offences'. The Act

provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son. Act has, however, been repealed in August 1949.

17. Section 377 of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribles Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in ***Queen Empress v. Khairati*** (1884) ILR 6 All 204, wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows:

> "This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite – the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a

> manner which distinctly points to unnatural intercourse within the last few months."

18. Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including *Hijras* and was used as an instrument of harassment and physical abuse against *Hijras* and transgender persons. A Division Bench of this Court in ***Suresh Kumar Koushal and another*** v. ***Naz Foundation and others*** [(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.

GENDER IDENTITY AND SEXUAL ORIENTATION

19. Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person.

A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or

may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

20. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bysexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be

forced to undergo medical procedures, including ***SRS***, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES – ON GENDER IDENTITY AND SEXUAL ORIENTATION

21. United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right. Everyone shall have a right to recognition, everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference

or attacks. International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation gender identity. Reference to few Yogyakarta Principles would be useful.

YOGYAKARTA PRINCIPLES:

22. Principle 1 which deals with the right to the universal enjoyment of human rights, reads as follows :-

> "**1. THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS**
>
> All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.
>
> **States shall:**
>
> A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;
>
> B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;
>
> C. Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
>
> D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.
>
> **2. THE RIGHTS TO EQUALITY AND NON-DISCRIMINATION**

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

A. Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

B. Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent,

and ensure that an equal age of consent applies to both same-sex and different- sex sexual activity;

C. Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

D. Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

E. In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

F. Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. THE RIGHT TO RECOGNITION BEFORE THE LAW

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and

is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

C. Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;

D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

4. THE RIGHT TO LIFE

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

A. Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

B. Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

C. Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that,

where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

6. THE RIGHT TO PRIVACY

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

C. Ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;

D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others

9. THE RIGHT TO TREATMENT WITH HUMANITY WHILE IN DETENTION

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

A. Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;

C. Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

D. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

E. Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;

F. Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

G. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights

standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

18. PROTECTION FROM MEDICAL ABUSES

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

B. Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

C. Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

D. Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

E. Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

F. Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others,

without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

B. Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal

> access to information and ideas, as well as to participation in public debate."

23. UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, regardless of their gender identity. United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity as follows:-

> "**Sexual orientation and gender identity**
> 'Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

24. In this respect, reference may also be made to the General Comment No.2 of the Committee on Torture and

Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 and also the General Comment No.20 of the Committee on Elimination of Discrimination against Woman, responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979 and 2010 report.

SRS and Foreign Judgments

25. Various countries have given recognition to the gender identity of such persons, mostly, in cases where transsexual persons started asserting their rights after undergoing ***SRS*** of their re-assigned sex. In ***Corbett v. Corbett*** (1970) 2 All ER 33, the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod, J. in that case took the view that the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person's sex for the purpose of marriage. Learned Judge expressed the view that any operative intervention should be ignored and the

biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. Later, in ***R v. Tan*** (1983) QB 1053, 1063-1064, the Court of Appeal applied ***Corbett*** approach in the context of criminal law. The Court upheld convictions which were imposed on Gloria Greaves, a post-operative male to female transsexual, still being in law, a man.

26. ***Corbett*** principle was not found favour by various other countries, like New Zealand, Australia etc. and also attracted much criticism, from the medical profession. It was felt that the application of the ***Corbett*** approach would lead to a substantial different outcome in cases of a post operative inter-sexual person and a post operative transsexual person. In New Zealand in ***Attorney-General v. Otahuhu Family Court*** (1995) 1 NZLR 603, Justice Ellis noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. It was held that there is no

social advantage in the law for not recognizing the validity of the marriage of a transsexual in the sex of reassignment. The Court held that an adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. In ***Re Kevin (Validity of Marriage of Transsexual)*** (2001) Fam CA 1074, in an Australian case, Chisholm J., held that there is no 'formulaic solution' to determine the sex of an individual for the purpose of the law of marriage. It was held that all relevant matters need to be considered, including the person's life experiences and self-perception. Full Court of the Federal Family Court in the year 2003 approved the above-mentioned judgment holding that in the relevant Commonwealth marriage statute the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning and that the word 'man' includes a post operative female to male transsexual person. The Full Court also held that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the

relevant factors in determining sex and gender. The judgment ***Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission*** is reported in (2003) Fam CA 94***.***

27. Lockhart, J. in ***Secretary, Department of Social Security v. "SRA"***, (1993) 43 FCR 299 and Mathews, J. in ***R v. Harris & McGuiness*** (1988) 17 NSWLR 158, made an exhaustive review of the various decisions with regard to the question of recognition to be accorded by Courts to the gender of a transsexual person who had undertaken a surgical procedure. The Courts generally in New Zealand held that the decision in ***Corbett v. Corbett*** (supra) and ***R v. Tan*** (supra) which applied a purely biological test, should not be followed. In fact, Lockhart. J. in ***SRA*** observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally they should not be regarded merely as a matter

of chromosomes, which is purely a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

28. ***A.B. v. Western Australia*** (2011) HCA 42 was a case concerned with the Gender Reassignment Act, 2000. In that Act, a person who had undergone a reassignment procedure could apply to Gender Reassignment Board for the issue of a recognition certificate. Under Section 15 of that Act, before issuing the certificate, the Board had to be satisfied, inter alia, that the applicant believed his or her true gender was the person's reassigned gender and had adopted the lifestyle and gender characteristics of that gender. Majority of Judges agreed with Lockhart, J. in ***SRA*** that gender should not be regarded merely as a matter of chromosomes, but partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

29. The House of Lords in ***Bellinger v. Bellinger*** (2003) 2 All ER 593 was dealing with the question of a transsexual. In that case, Mrs. Bellinger was born on 7th

September, 1946. At birth, she was correctly classified and registered as male. However, she felt more inclined to be a female. Despite her inclinations, and under some pressure, in 1967 she married a woman and at that time she was 21 years old. Marriage broke down and parties separated in 1971 and got divorce in the year 1975. Mrs. Bellinger dressed and lived like a woman and when she married Mr. Bellinger, he was fully aware of her background and throughout had been supportive to her. Mr. and Mrs. Bellinger since marriage lived happily as husband and wife and presented themselves in that fashion to the outside world. Mrs. Bellinger's primary claim was for a declaration under Section 55 of the Family Law Act, 1986 that her marriage to Mr. Bellinger in 1981 was "at its inception valid marriage". The House of Lords rejected the claim and dismissed the appeal. Certainly, the "psychological factor" has not been given much prominence in determination of the claim of Mrs. Bellinger.

30. The High Court of Kuala Lumpur in ***Re JG, JG v. Pengarah Jabatan Pendaftaran Negara*** (2006) 1 MLJ

90, was considering the question as to whether an application to amend or correct gender status stated in National Registration Identity Card could be allowed after a person has undergone ***SRS***. It was a case where the plaintiff was born as a male, but felt more inclined to be a woman. In 1996 at Hospital Siroros she underwent a gender reassignment and got the surgery done for changing the sex from male to female and then she lived like a woman. She applied to authorities to change her name and also for a declaration of her gender as female, but her request was not favourably considered, but still treated as a male. She sought a declaration from the Court that she be declared as a female and that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender. The Malaysian Court basically applied the principle laid down in ***Corbett*** (supra), however, both the prayers sought for were granted, after noticing that the medical men have spoken that the plaintiff is a female and they have considered the sex change of the plaintiff as well as her "psychological aspect". The Court noticed

that she feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her "psychological thinking" is that of a woman.

31. The Court of Appeal, New South Wales was called upon to decide the question whether the Registrar of Births, Deaths and Marriages has the power under the Births, Deaths and Marriages Act, 1995 to register a change of sex of a person and the sex recorded on the register to "non-specific" or "non-specified". The appeal was allowed and the matter was remitted back to the Tribunal for a fresh consideration in accordance with law, after laying down the law on the subject. The judgment is reported as ***Norrie v. NSW Registrar of Births, Deaths and Marriages*** (2013) NSWCA 145. While disposing of the appeal, the Court held as follows:-

> "The consequence is that the Appeal Panel (and the Tribunal and the Registrar) were in error in construing the power in S.32DC(1) as limiting the Registrar to registering a person's change of sex as only male or female. An error in the construction of the statutory provision granting the power to register a person's

> change of sex is an error on a question of law. Collector of Customs v. Pozzolanic Enterprises Pty. Ltd. [1993] FCA 322; (1993) 43 FCR 280 at 287. This is so notwithstanding that the determination of the common understanding of a general word used in the statutory provision is a question of fact. The Appeal Panel (and the Tribunal and the Registrar) erred in determining that the current ordinary meaning of the word "sex" is limited to the character of being either male or female. That involved an error on a question of fact. But the Appeal Panel's error in arriving at the common understanding of the word "sex" was associated with its error in construction of the effect of the statutory provision of S.32DC (and also of S.32DA), and accordingly is of law: Hope v. Bathurst City Council [1980] HCA 16, (1980) 144 CLR 1 at 10."

32. In ***Christine Goodwin v. United Kingdom*** (Application No.28957/95 - Judgment dated 11th July, 2002), the European Court of Human Rights examined an application alleging violation of Articles 8, 12, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1997 in respect of the legal status of transsexuals in UK and particularly their treatment in the sphere of employment, social security, pensions and marriage. Applicant in that case had a

tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s she was diagnosed as a transsexual. Though she married a woman and they had four children, her inclination was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January, 1985, the applicant began treatment at the Gender Identity Clinic. In October, 1986, she underwent surgery to shorten her vocal chords. In August, 1987, she was accepted on the waiting list for gender re-assignment surgery and later underwent that surgery at a National Health Service hospital. The applicant later divorced her former wife. She claimed between 1990 and 1992 she was sexually harassed by colleagues at work, followed by other human rights violations. The Court after referring to various provisions and Conventions held as follows:-

> "Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees,

> protection is given to the personal sphere of each individuals, including the right to establish details of their identity as individual human beings (see, *inter alia, Pretty v. the United Kingdom* no.2346/02, judgment of 29 April 2002, 62, and *Mikulic v. Croatia*, no.53176/99, judgment of 7 February 2002, 53, both to be published in ECHR 2002...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

33. The European Court of Human Rights in the case of ***Van Kuck v. Germany*** (Application No.35968/97 – Judgment dated 12.9.2003) dealt with the application alleging that German Court's decisions refusing the applicant's claim for reimbursement of gender reassignment measures and the related proceedings were in breach of her rights to a fair trial and of her right to respect for her private life and that they amounted to discrimination on the ground of her particular "psychological situation". Reliance was placed on Articles 6, 8, 13 and 14 of the Convention for Protection of Human

Rights and Fundamental Freedoms, 1997. The Court held that the concept of "private life" covers the physical and psychological integrity of a person, which can sometimes embrace aspects of an individual's physical and social identity. For example, gender identifications, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. The Court also held that the notion of personal identity is an important principle underlying the interpretation of various guaranteed rights and the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.

34. Judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who

have undergone ***SRS***, the test to be applied is not the "Biological test", but the "Psychological test", because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognizing their rights.

LEGISLATIONS IN OTHER COUNTRIES ON TGs

35. We notice, following the trend, in the international human rights law, many countries have enacted laws for

recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc. United Kingdom has passed the General Recommendation Act, 2004, following the judgment in ***Christine Goodwin*** (supra) passed by the European Courts of Human Rights. The Act is all encompassing as not only does it provide legal recognition to the acquired gender of a person, but it also lays down provisions highlighting the consequences of the newly acquired gender status on their legal rights and entitlements in various aspects such as marriage, parentage, succession, social security and pensions etc. One of the notable features of the Act is that it is not necessary that a person needs to have undergone or in the process of undergoing a ***SRS*** to apply under the Act. Reference in this connection may be made to the Equality Act, 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. The Act defines certain characteristics to be “protected characteristics” and no

one shall be discriminated or treated less favourably on grounds that the person possesses one or more of the "protected characteristics". The Act also imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

36. In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). Act 2013 amends the Sex Discrimination Act, 1984. Act 2013 defines gender identity as the appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person's designated sex at birth.

Sections 5(A), (B) and (C) of the 2013 Act have some relevance and the same are extracted hereinbelow:-

> "**5A Discrimination on the ground of sexual orientation**
>
> (1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's sexual orientation if, by reason of:
>
> (a) the aggrieved person's sexual orientation; or
> (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
> (c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;
>
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.
>
> (2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.
>
> (3) This section has effect subject to sections 7B and 7D.

5B Discrimination on the ground of gender identity

(1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if, by reason of:

(a) the aggrieved person's gender identity; or

(b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or

(c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

5C Discrimination on the ground of intersex status

(1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground

of the aggrieved person's intersex status if, by reason of:

(a) the aggrieved person's intersex status; or

(b) a characteristic that appertains generally to persons of intersex status; or

(c) a characteristic that is generally imputed to persons of intersex status;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's intersex status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of intersex status.

(3) This section has effect subject to sections 7B and 7D."

Various other precautions have also been provided under the Act.

37. We may in this respect also refer to the European Union Legislations on transsexuals. Recital 3 of the Preamble to the Directive 2006/54/EC of European Parliament and the Council of 5 July 2006 makes an explicit reference to discrimination based on gender

reassignment for the first time in European Union Law. Recital 3 reads as under :-

> "The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of this purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."

38. European Parliament also adopted a resolution on discrimination against transsexuals on 12th September, 1989 and called upon the Member States to take steps for the protection of transsexual persons and to pass legislation to further that end. Following that Hungary has enacted Equal Treatment and the Promotion of Equal Opportunities Act, 2003, which includes sexual identity as one of the grounds of discrimination. 2010 paper on 'Transgender Persons' Rights in the EU Member States prepared by the Policy Department of the European Parliament presents the specific situation of transgender people in 27 Member States of the European Union. In the United States of America some of the laws enacted by the

States are inconsistent with each other. The Federal Law which provides protection to transgenders is The Matthew Shepard and James Byrd. Jr. Hate Crimes Prevention Act, 2009, which expands the scope of the 1969 United States Federal Hate-crime Law by including offences motivated by actual or perceived gender identity. Around 15 States and District of Colombia in the United States have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.

39. The Parliament of South Africa in the year 2003, enacted Alteration of Sex Description and Sex Status Act, 2003, which permits transgender persons who have undergone gender reassignment or people whose sexual characteristics have evolved naturally or an intersexed person to apply to the Director General of the National Department of Home Affairs for alteration of his/her sex description in the birth register, though the legislation does not contemplate a more inclusive definition of transgenders.

40. The Senate of Argentina in the year 2012 passed a law on Gender Identity that recognizes right by all persons to the recognition of their gender identity as well as free development of their person according to their gender identity and can also request that their recorded sex be amended along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity. Not necessary that they seemed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment had taken place. Article 12 deals with dignified treatment, respecting the gender identity adopted by the individual, even though the first name is different from the one recorded in their national identity documents. Further laws also provide that whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

41. In Germany, a new law has come into force on 5th November, 2013, which allows the parents to register the sex of the children as 'not specified' in the case of children with intersex variation. According to Article 22, Section 3 of the German Civil Statutes Act reads as follows:-

> "If a child can be assigned to neither the female nor the male sex then the child has to be named without a specification"

42. The law has also added a category of X, apart from "M" and "F" under the classification of gender in the passports.

Indian Scenario

43. We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of "sex identity gender" of persons, and "guarantee to equality and non-discrimination" on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.

44. Historical background of Transgenders in India has already been dealth in the earlier part of this Judgment indicating that they were once treated with great respect, at least in the past, though not in the present. We can perceive a wide range of transgender related identities, cultures or experiences which are generally as follows:

> "**Hijras:** Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman". Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but Hijras have a long tradition/culture and have strong social ties formalized through a ritual called "reet" (becoming a member of Hijra community). There are regional variations in the use of terms referred to Hijras. For example, Kinnars (Delhi) and Aravanis (Tamil Nadu). Hijras may earn through their traditional work: 'Badhai' (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies. Some proportion of Hijras engage in sex work for lack of other job opportunities, while some may be self-employed or work for non-governmental organisations." (See UNDP India Report (December, 2010).
>
> **Eunuch:** Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the

male sex, would be recategorized as intesexexd – as a Hijra.

"**Aravanis and 'Thirunangi' –** Hijras in Tamil Nadu identify as "Aravani". Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.

Kothi – Kothis are a heterogeneous group. 'Kothis' can be described as biological males who show varying degrees of 'femininity' – which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman. Kothis are generally of lower socioeconomic status and some engage in sex work for survival. Some proportion of Hijra-identified people may also identify themselves as 'Kothis'. But not all Kothi identified people identify themselves as transgender or Hijras.

Jogtas/Jogappas: Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. 'Jogta' refers to male servant of that Goddess and 'Jogti' refers to female servant (who is also sometimes referred to as 'Devadasi'). One can become a 'Jogta' (or Jogti) if it is part of their family tradition or if one finds a 'Guru' (or 'Pujari') who accepts him/her as a 'Chela' or 'Shishya' (disciple). Sometimes, the term 'Jogti Hijras' is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the Hijra communities. This term is used to differentiate them from 'Jogtas' who are heterosexuals and who may or may not dress in

woman's attire when they worship the Goddess. Also, that term differentiates them from 'Jogtis' who are biological females dedicated to the Goddess. However, 'Jogti Hijras' may refer to themselves as 'Jogti' (female pronoun) or Hijras, and even sometimes as 'Jogtas'.

Shiv-Shakthis: Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv-Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, Shiv-Shakthis are married to a sword that represents male power or Shiva (deity). Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross-dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms." (**See Serena Nanda, Wadsworth Publishing Company, Second Edition (1999**)

45. Transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leave aside social exclusion. A detailed study was conducted by the United Nations Development Programme (UNDP – India) and submitted a report in December, 2010 on Hijras/transgenders in India:

"HIV Human Rights and Social Exclusion". The Report states that the HIV Human Immunodeficiency Virus and Sexually Transmitted Infections (STI) is now increasingly seen in Hijras/transgenders population. The estimated size of men who have sex with men (MSM) and male sex workers population in India (latter presumably includes Hijras/TG communities) is 2,352,133 and 235,213 respectively. It was stated that no reliable estimates are available for Hijras/TG women. HIV prevalence among MSM population was 7.4% against the overall adult HIV prevalence of 0.36%. It was stated recently Hijras/TG people were included under the category of MSM in HIV sentinel serosurveillance. It is also reported in recent studies that Hijras/TG women have indicated a very high HIV prevalence (17.5% to 41%) among them. Study conducted by NACO also highlights a pathetic situation. Report submitted by NACI, NACP IV Working Group Hijras TG dated 5.5.2011 would indicate that transgenders are extremely vulnerable to HIV. Both the reports highlight the extreme necessity of taking emergent steps to improve their sexual health, mental health and also

address the issue of social exclusion. The UNDP in its report has made the following recommendations, which are as under:

> "Multiple problems are faced by Hijras/TG, which necessitate a variety of solutions and actions. While some actions require immediate implementation such as introducing Hijra/TG-specific social welfare schemes, some actions need to be taken on a long-term basis changing the negative attitude of the general public and increasing accurate knowledge about Hijra/TG communities. The required changes need to be reflected in policies and laws; attitude of the government, general public and health care providers; and health care systems and practice. Key recommendations include the following:
>
> 1. **Address the gape in NACP-III:** establish HIV sentinel serosurveillance sites for Hijras/TG at strategic locations; conduct operations research to design and fine-tune culturally-relevant package of HIV prevention and care interventions for Hijras/TG; provide financial support for the formation of CBOs run by Hijras/TG; and build the capacity of CBOs to implement effective rogrammes.
>
> 2. Move beyond focusing on individual-level HIV prevention activities to **address the structural determinants of risks and mitigate the impact of risks**. For example, mental health counseling, crisis intervention (crisis in relation to suicidal tendencies, police harassment and arrests, support following sexual and physical violence), addressing alcohol and drug abuse, and connecting to livelihood programs all need to be part of the HIV interventions.

3. **Train health care providers to be competent and sensitive** in providing health care services (including STI and HIV-related services) to Hijras/TG as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).

4. Clarify the ambiguous legal status of sex reassignment surgery and provide **gender transition and SRS services** (with proper pre- and post-operation/transition counseling) for free in public hospitals in various parts in India.

5. Implement **stigma and discrimination reduction measures** at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.

6. Develop action steps toward taking a position on **legal recognition of gender identity of Hijras/TG** need to be taken in consultation with Hijras/TG and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/TGs are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.

7. Open up the existing **Social Welfare Schemes** for needy Hijras/TG and create specific welfare schemes to address the basic needs of Hijras/TG including housing and employment needs.

8. Ensure **greater involvement of vulnerable communities including Hijras/TG** women in policy formulation and program development."

46. Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Discussion on gender identity including self-identification of gender of male/female or as transgender mostly focuses on those persons who are assigned male sex at birth, whether one talks of Hijra transgender, woman or male or male to female transgender persons, while concern voiced by those who are identified as female to male trans-sexual persons often not properly addressed. Female to male unlike Hijra/transgender persons are not quite visible in public unlike Hijra/transgender persons. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

INDIA TO FOLLOW INTERNATIONAL CONVENTIONS

47. International Conventions and norms are significant for the purpose of interpretation of gender equality.

Article 1 of the Universal declaration on Human Rights, 1948, states that all human-beings are born free and equal in dignity and rights. Article 3 of the Universal Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights provide that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (dated 24th January, 2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para 21 of the Convention states that States are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for

torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence".

48. Above-mentioned International Human Rights instruments which are being followed by various countries in the world are aimed to protect the human rights of transgender people since it has been noticed that transgenders/transsexuals often face serious human rights violations, such as harassment in work place, hospitals, places of public conveniences, market places, theaters, railway stations, bus stands, and so on.

49. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. We have exhaustively referred to various

articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard

those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.

50. Article 253 of the Constitution of India states that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. Generally, therefore, a legislation is required for implementing the international conventions, unlike the position in the United States of America where the rules of international law are applied by the municipal courts on the theory of their implied adoption by the State, as a part of its own municipal law. Article VI, Cl. (2) of the U.S. Constitution reads as follows:

> ".....all treaties made, or which shall be made, under the authority of the united States, shall be the *supreme law of the land*, and the judges in every State shall be bound thereby, *anything in the Constitution or laws of any State to the contrary not-withstanding.*"

51. In the United States, however, it is open to the courts to supersede or modify international law in its application or it may be controlled by the treaties entered into by the United States. But, till an Act of Congress is passed, the

Court is bound by the law of nations, which is part of the law of the land. Such a 'supremacy clause' is absent in our Constitution. Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. See: ***Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*** (1984) 2 SCC 534 and ***Tractor Export v. Tarapore & Co.*** (1969) 3 SCC 562, ***Mirza Ali Akbar Kashani v. United Arab Republic*** (1966) 1 SCR 391. In the case of ***Jolly George Varghese v. Bank of Cochin*** (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those

principles in the Indian conditions. The Interpretation of International Conventions is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

52. Article 51 of the Directive Principles of State Policy, which falls under Part IV of the Indian Constitution, reads as under:

> "**Art. 51.** The State shall endeavour to –
>
> (a) promote international peace and security;
>
> (b) maintain just and honourable relations between nations;
>
> (c) Foster respect for international law and treaty obligation in the dealings of organised peoples with one another; and
>
> (d) Encourage settlement of international disputes by arbitration."

53. Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If the parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation,

municipal courts in India would respect the rules of international law. In ***His Holiness Kesavananda Bharati Sripadavalvaru v. State of Kerala*** (1973) 4 SCC 225, it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of United Nations Charter and the solemn declaration subscribed to it by India. In ***Apparel Export Promotion Council v. A. K. Chopra*** (1999) 1 SCC 759, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Reference may also be made to the Judgments of this Court in ***Githa Hariharan (Ms) and another*** v. ***Reserve Bank of India and another*** (1999) 2 SCC 228, ***R.D. Upadhyay*** v. ***State of Andhra Pradesh and others*** (2007) 15 SCC 337 and ***People's Union for Civil Liberties*** v. ***Union of India and another*** (2005) 2 SCC 436. In ***Vishaka and others v. State of Rajasthan and Others*** (1997) 6 SCC 241, this

Court under Article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the International Conventions, including *Yogyakarta principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

ARTICLE 14 AND TRANSGENDERS

54. Article 14 of the Constitution of India states that the State shall not deny to “any person” equality before the

law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

55. Petitioners have asserted as well as demonstrated on facts and figures supported by relevant materials that despite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for

Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

ARTICLES 15 & 16 AND TRANSGENDERS

56. Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender based discrimination.

57. Article 15 states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The requirement of taking affirmative action for the advancement of any socially and educationally backward classes of citizens is also provided in this Article.

58. Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. Article 16 (2) of the Constitution of India reads as follows :

> "16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State."

Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

59. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to

prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.

60. TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the

advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

61. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities

and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

ARTICLE 19(1)(a) AND TRANSGENDERS

62. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

63. We may, in this connection, refer to few judgments of the US Supreme Courts on the rights of TG's freedom of expression. The Supreme Court of the State of Illinois in the ***City of Chicago v. Wilson et al.,*** 75 Ill.2d 525(1978) struck down the municipal law prohibiting cross-dressing, and held as follows "-

> "the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with "values of privacy, self-identity, autonomy and personal integrity that ..... the Constitution was designed to protect."

64. In ***Doe v. Yunits et al.,*** 2000 WL33162199 (Mass. Super.), the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows :-

> "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity."

65. Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

66. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the

Constitution of India and the State is bound to protect and recognize those rights.

ARTICLE 21 AND THE TRANSGENDERS

67. Article 21 of the Constitution of India reads as follows:

> "**21. Protection of life and personal liberty** – No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi*** (1981) 1 SCC

608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

68. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

69. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In ***Anuj Garg v. Hotel Association of India*** (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express

themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

LEGAL RECOGNITION OF THIRD/TRANSGENDER IDENTITY

70. Self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender". Hijras, therefore, belong to a distinct socio-religious and cultural group and have, therefore, to be considered as a "third gender", apart from male and female. State of Punjab has treated

all TGs as male which is not legally sustainable. State of Tamil Nadu has taken lot of welfare measures to safeguard the rights of TGs, which we have to acknowledge. Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Certain States recognize them as "third category". Few benefits have also been extended by certain other States. Our neighbouring countries have also upheld their fundamental rights and right to live with dignity.

71. The Supreme Court of Nepal in ***Sunil Babu Pant & Ors. v. Nepal Government*** (Writ Petition No.917 of 2007 decided on 21st December, 2007), spoke on the rights of Transgenders as follows:-

> "the fundamental rights comprised under Part II of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the State. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.... Thus, the people other than 'men' and 'women', including the people of 'third gender' cannot be discriminated. The

> State should recognize the existence of all natural persons including the people of third gender other than the men and women. And it cannot deprive the people of third gender from enjoying the fundamental rights provided by Part III of the Constitution."

72. The Supreme Court of Pakistan in ***Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police (Operation) Rawalpindi & Ors.*** (Constitution Petition No.43 of 2009) decided on 22nd March, 2011, had occasion to consider the rights of eunuchs and held as follows:-

> "Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them protection of life and property and secure their dignity as well, as is done in case of other citizens."

73. We may remind ourselves of the historical presence of the third gender in this country as well as in the neighbouring countries.

74. Article 21, as already indicated, protects one's right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination". Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

75. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett principle of "Biological Test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and

also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.

76. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

77. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

.....J
(**K.S. Radhakrishnan**)

A.K. SIKRI,J.

78. I have carefully, and with lot of interest, gone through the perspicuous opinion of my brother Radhakrishnan,J. I am entirely in agreement with the discussion contained in the said judgment on all the cardinal issues that have arisen for consideration in these proceedings. At the same time, having regard to the fact that the issues involved are of seminal importance, I am also inclined to pen down my thoughts.

79. As is clear, these petitions essentially raise an issue of "Gender Identity", which is the core issue. It has two facets, viz.:

> "(a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice moreso, when such a person after having undergone operational procedure, changes his/her sex as well;
> (b) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a "third gender"?

80. We would hasten to add that it is the second issue with which we are primarily concerned in these petitions though in the process of discussion, first issue which is somewhat inter-related, has also popped up.

81. Indubitably, the issue of choice of gender identify has all the trappings of a human rights. That apart, as it becomes clear from the reading of the judgment of my esteemed Brother Radhakrishnan,J., the issue is not limited to the exercise of choice of gender/sex. Many

rights which flow from this choice also come into play, inasmuch not giving them the status of a third gender results in depriving the community of TGs of many of their valuable rights and privileges which other persons enjoy as citizens of this Country. There is also deprivation of social and cultural participation which results into eclipsing their access to education and health services. Radhakrishnan,J. has exhaustively described the term 'Transgender' as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre-operative/post-operative trans sexual people who strongly identify with the gender opposite to their biological sex i.e. male/ female. Therein, the history of transgenders in India is also traced and while doing so, there is mention of upon the draconian legislation enacted during the British Rule, known as Criminal Tribes Act, 1871 which treated, per se, the entire community of Hizra persons as innately 'criminals', 'addicted to the systematic commission of non-bailable offences'.

82. With these introductory remarks, I revert to the two facets of pivotal importance mentioned above. Before embarking on the discussion, I may clarify that my endeavour would be not to repeat the discussion contained in the judgment of my Brother Radhakrishnan, J., as I agree with every word written therein. However, at times, if some of the observations are re-narrated, that would be only with a view to bring continuity in the thought process.

(1) Re: Right of a person to have the gender of his/her choice.

When a child is born, at the time of birth itself, sex is assigned to him/her. A child would be treated with that sex thereafter, i.e. either a male or a female. However, as explained in detail in the accompanying judgment, some persons, though relatively very small in number, may born with bodies which incorporate both or certain aspects of both male or female physiology. It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female

oriented. The position may be exactly the opposite wherein a person born as female may behave like a male person.

83. In earlier times though one could observe such characteristics, at the same time the underlying rationale or reason behind such a behavior was not known. Over a period of time, with in depth study and research of such physical and psychological factors bevaviour, the causes of this behaviour have become discernable which in turn, has led to some changes in societal norms. Society has starting accepting, though slowly, these have accepted the behavioral norms of such persons without treating it as abnormal. Further, medical science has leaped forward to such an extent that even physiology appearance of a person can be changed through surgical procedures, from male to female and vice-versa. In this way, such persons are able to acquire the body which is in conformity with the perception of their gender/gender characteristics. In order to ensure that law also keeps pace with the aforesaid progress in medical science, various countries

have come out with Legislation conferring rights on such persons to recognize their gender identity based on reassigned sex after undergoing Sex Re-Assignment Surgery (SRS). Law and judgments given by the courts in other countries have been exhaustively and grandiloquently traversed by my learned Brother in his judgment, discussing amongst others, the Yogyakarta principles, the relevant provisions of the Universal Declaration of Human Rights 1948 and highlighting the statutory framework operating in those countries.

84. The genesis of this recognition lies in the acknowledgment of another fundamental and universal principal viz. “right of choice” given to an individual which is the inseparable part of human rights. It is a matter of historical significance that the 20th Century is often described as “the age of rights”.

85. The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is

for this reason that in the U.N.Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

86. The underlined message in the aforesaid documents is the acknowledgment that human rights are individual and have a definite linkage of human development, both sharing common vision and with a common purpose. Respect for human rights is the root for human development and realization of full potential of each individual, which in turn leads to the augmentation of human resources with progress of the nation. Empowerment of the people through human development is the aim of human rights.

87. There is thus a universal recognition that human rights are rights that “belong” to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Moreover, human rights exist irrespective of the

question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

88. In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti- discrimination laws), but goes beyond in remedying discrimination

against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

89. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. Moreover, the requirement contained in Article 2 of the Covenant that the rights enunciated will be exercised without discrimination of any kind based on certain specified grounds or other status clearly applies to cover persons with disabilities.

90. India attained independence within two years of adoption of the aforesaid U.N.Charter and it was but natural that such a Bill of Rights would assume prime importance insofar as thinking of the members of the Constituent Assembly goes. It in fact did and we found

chapter on fundamental rights in Part-III of the Constitution. It is not necessary for me, keeping in view the topic of today's discussion, to embark on detailed discussion on Chapter-III. Some of the provisions relevant for our purposes would be Article 14, 15,16 and 21 of the Constitution which have already been adverted to in detail in the accompanying judgment. At this juncture it also needs to be emphasized simultaneously is that in addition to the fundamental rights, Constitution makers also deemed it proper to impose certain obligations on the State in the form of "Directive Principles of State Policy" (Part-IV) as a mark of good governance. It is this part which provides an ideal and purpose to our Constitution and delineates certain principles which are fundamental in the governance of the country. Dr.Ambedkar had explained the purpose of these Directive Principles in the following manner (See Constituent Assembly debates):

> "The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of Colonies, and to those of India by the British Government under the 1935 Government of India Act. What is called

> "Directive Principles" is merely another name for the Instrument of Instructions. The only difference is that they are instructions to the legislature and the executive. Whoever capture power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles".

91. The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Granville Austin while analyzing the functioning of Indian Constitution in first 50 years ha described three distinguished strands of Indian Constitution: (i)protecting national unity and integrity, (ii)establishing the institution and spirit of democracy; and (iii) fostering social reforms. The Strands are mutually dependent, and inextricably intertwined in what he elegantly describes as "a seamless web". And there cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum. The Constitution, although drafted by the Constituent Assembly, was meant for the

people of India and that is why it is given by the people to themselves as expressed in the opening words “We the People”. What is the most important gift to the common person given by this Constitution is “fundamental rights” which may be called Human Rights as well.

92. The concept of equality in Article 14 so also the meaning of the words ‘life’, ‘liberty’ and ‘law’ in Article 21 have been considerably enlarged by judicial decisions. Anything which is not ‘reasonable, just and fair’ is not treated to be equal and is, therefore, violative of Article 14.

93. Speaking for the vision of our founding fathers, in ***State of Karnataka*** v. ***Rangnatha Reddy*** (AIR 1978 SC 215), this Court speaking through Justice Krishna Iyer observed:

> “The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy *sans* which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere,

> ensouls such a value system, and the debate in this case puts precisely this soul in peril....Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. A judge is a social scientist in his role as constitutional invigilator and fails functionally if he forgets this dimension in his complex duties."

94. While interpreting Art. 21, this Court has comprehended such diverse aspects as children in jail entitled to special treatment (***Sheela Barse*** vs. ***Union of India*** [(1986)3 SCC 596], health hazard due to pollution (***Mehta M.C***. v. ***Union of India*** [(1987) 4 SCC 463], beggars interest in housing (***Kalidas*** Vs. ***State of J&K*** [(1987) 3 SCC 430] health hazard from harmful drugs (***Vincent Panikurlangara*** Vs. ***Union of India*** AIR 1987 SC 990), right of speedy trial (***Reghubir Singh*** Vs. ***State of Bihar***, AIR 1987 SC 149), handcuffing of prisoners(***Aeltemesh Rein*** Vs. ***Union of India***, AIR 1988

SC 1768), delay in execution of death sentence, immediate medical aid to injured persons(***Parmanand Katara*** Vs. ***Union of India***, AIR 1989 SC 2039), starvation deaths(***Kishen Vs. State of Orissa***, AIR 1989 SC 677), the right to know(***Reliance Petrochemicals Ltd.*** Vs. ***Indian Express Newspapers Bombay Pvt. Ltd.*** AIR 1989 SC 190), right to open trial(***Kehar Singh*** Vs. ***State (Delhi Admn.)*** AIR 1988 SC 1883), inhuman conditions an after-care home(***Vikram Deo Singh Tomar*** Vs. ***State of Bihar***, AIR 1988 SC 1782).

95. A most remarkable feature of this expansion of Art.21 is that many of the non-justiciable Directive Principles embodied in Part IV of the Constitution have now been resurrected as enforceable fundamental rights by the magic wand of judicial activism, playing on Art.21 e.g.

(a) Right to pollution-free water and air (***Subhash Kumar*** Vs. ***State of Bihar***, AIR 1991 SC 420).

(b) Right to a reasonable residence (***Shantistar Builders*** Vs. ***Narayan Khimalal Totame*** AIR 1990 SC 630).

(c) Right to food (Supra note 14), clothing, decent environment (supra note 20) and even protection of cultural heritage (***Ram Sharan Autyanuprasi*** Vs. ***UOI***, AIR 1989 SC 549) .

(d) Right of every child to a full development (***Shantistar Builders*** Vs. ***Narayan Khimalal Totame*** AIR 1990 SC 630).

(e) Right of residents of hilly-areas to access to roads(***State of H.P***. Vs. ***Umed Ram Sharma***, AIR 1986 SC 847).

(f) Right to education (***Mohini Jain*** Vs. ***State of Karnataka***, AIR 1992 SC 1858), but not for a professional degree (***Unni Krishnan J.P.*** Vs. ***State of A.P.***, AIR 1993 SC 2178).

96. A corollary of this development is that while so long the negative language of Art.21 and use of the word ‘deprived’ was supposed to impose upon the State the negative duty not to interfere with the life or liberty of an individual without the sanction of law, the width and amplitude of this provision has now imposed a positive

obligation (***Vincent Panikurlangara*** Vs. ***UOI*** AIR 1987 SC 990) upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity, e.g. –

(i) Maintenance and improvement of public health (***Vincent Panikurlangara*** Vs. ***UOI*** AIR 1987 SC 990).

(ii) Elimination of water and air pollution (***Mehta M.C***. Vs. ***UOI*** (1987) 4 SCC 463).

(iii) Improvement of means of communication (***State of H.P.*** Vs. ***Umed Ram Sharma*** AIR 1986 SC 847).

(iv) Rehabilitation of bonded labourers (***Bandhuva Mukti Morcha*** Vs. ***UOI***, AIR 1984 SC 802).

(v) Providing human conditions if prisons (***Sher Singh*** Vs. ***State of Punjab*** AIR 1983 SC 465) and protective homes (***Sheela Barse*** Vs. ***UOI*** (1986) 3 SCC 596).

(vi) Providing hygienic condition in a slaughter-house (***Buffalo Traders Welfare Ass.*** Vs. ***Maneka Gandhi*** (1994) Suppl (3) SCC 448) .

97. The common golden thread which passes through all these pronouncements is that Art.21 guarantees

enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development.

98. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognize the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

99. Thus, the emphasis is on the development of an individual in all respects. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and

cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.

100. More than 225 years ago, Immanuel Kant propounded the doctrine of free will, namely the free willing individual as a natural law ideal. Without going into the detail analysis of his aforesaid theory of justice (as we are not concerned with the analysis of his jurisprudence) what we want to point out is his emphasis on the "freedom" of human volition. The concepts of volition and freedom are "pure", that is not drawn from experience. They are independent of any particular body of moral or legal rules. They are presuppositions of all such rules, valid and necessary for all of them.

101. Over a period of time, two divergent interpretations of the Kantian criterion of justice came to be discussed. One trend was an increasing stress on the maximum of individual freedom of action as the end of law. This may not be accepted and was criticized by the protagonist of 'hedonist utilitarianism', notably Benthem. This school of thoughts laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the contrary, granting the right to choose gender leads to public good. The second tendency of Kantian criterion of justice was found in re-interpreting "freedom" in terms not merely of absence of restraint but in terms of attainment of individual perfection. It is this latter trend with which we are concerned in the present case and this holds good even today. As pointed out above, after the Second World War, in the form of U.N.Charter and thereafter there is more emphasis on the attainment of individual perfection. In that united sense at

least there is a revival of natural law theory of justice. Blackstone, in the opening pages in his 'Vattelian Fashion' said that the principal aim of society "is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature……"

102. In fact, the recognition that every individual has fundamental right to achieve the fullest potential, is founded on the principle that all round growth of an individual leads to common public good. After all, human beings are also valuable asset of any country who contribute to the growth and welfare of their nation and the society. A person who is born with a particular sex and his forced to grow up identifying with that sex, and not a sex that his/her psychological behavior identifies with, faces innumerable obstacles in growing up. In an article appeared in the magazine "Eye" of the Sunday Indian Express (March 9-15, 2014) a person born as a boy but with trappings of female (who is now a female after SRS) has narrated these difficulties in the following manner:

> "The other children treated me as a boy, but I preferred playing with girls. Unfortunately, grown-ups consider that okay only as long as you are a small child. The constant inner conflict made things difficult for me and, as I grew up, I began to dread social interactions".

103. Such a person, carrying dual entity simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not even easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behavior, it facilitates spending the life smoothly. Even the process of transition is not smooth. The transition from a man to a woman is not an overnight process. It is a "painfully" long procedure that requires a lot of patience. A person must first undergo hormone therapy and, if possible, live as a member of the desired sex for a while. To be eligible for hormone therapy, the person needs at least two psychiatrists to certify that he or she is mentally sound, and schizophrenia, depression and transvestism

have to be ruled out first. The psychiatric evaluation involved a serious a questions on how Sunaina felt, when she got to know of her confusion and need for sex change, whether she is a recluse, her socio-economic condition, among other things.

104. In the same article appearing in the "Eye" referred to above, the person who had undergone the operation and became a complete girl, Sunaina (name changed) narrates the benefit which ensued because of change in sex, in harmony with her emotional and psychological character, as is clear from the following passage in that article:

> "Like many other single people in the city, she can spend hours watching Friends, and reading thrillers and Harry Potter. A new happiness has taken seed in her and she says it does not feel that she ever had a male body. "I am a person who likes to laugh. Till my surgery, behind every smile of mine, there was a struggle. Now it's about time that I laughed for real. I have never had a relationship in my life, because somewhere, I always wanted to be treated as a girl. Now, that I am a woman, I am open to a new life, new relationships. I don't have to hide anymore, I don't feel trapped anymore. I love coding and my job. I love cooking. I

> am learning French and when my left foot recovers fully, I plan to learn dancing. And, for the first time this year, I will vote with my new name. I am looking forward to that," she says.

105. If a person has changed his/her sex in tune with his/her gender characteristics and perception ,which has become possible because of the advancement in medical science, and when that is permitted by in medical ethics with no legal embargo, we do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassign sex after undergoing SRS.

106. For these reasons, we are of the opinion that even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well.

(2) Re: Right of TG to be identified and categorized as "third gender".

107. At the outset, it may be clarified that the term ‘transgender’ is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor ‘transgender’. Etymologically, the term ‘transgender’ is derived from two words, namely ‘trans’ and ‘gender’. Former is a Latin word which means ‘across’ or ‘beyond’. The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.

108. It is to be emphasized that Transgender in India have assumed distinct and separate class/category which is not prevalent in other parts of the World except in some neighbouring countries . In this country, TG community comprise of Hijaras, enunch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. In Indian community transgender are referred as Hizra or the third gendered people. There

exists wide range of transgender-related identities, cultures, or experience –including Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis (Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or 'not men'. Aravanis: Hijras in Tamil Nadu identify as 'Aravani'. Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of 'feminity'. Jogtas/Jogappas: They are those who are dedicated to serve as servant of Goddess Renukha Devi whose temples are present in Maharashtra and Karnataka. Sometimes, Jogti Hijras are used to denote such male-to-female transgender persons who are devotees of Goddess Renukha and are also from the Hijra community. Shiv-Shakthis: They are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression). The way they behave and acts differs from the normative gender role of a men and women. For them, furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society's vast

majority. Endeavour to live a life with dignity is even worse. Obviously transvestites, the hijra beg from merchants who quickly, under threat of obscene abuse, respond to the silent demands of such detested individuals. On occasion, especially festival days, they press their claims with boisterous and ribald singing and dancing.(A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol.21,No.2 (1987), pp.371-387).

109. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above.

110. Their historical background and individual scenario has been stated in detail in the accompanying judgment rendered by my learned Brother. Few things which follow from this discussion are summed up below:

> "(a) Though in the past TG in India was treated with great respect, that does not remain the scenario any longer. Attrition in their status was

triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of Hijara persons as innately ‘criminal’ and ‘adapted to the systematic commission of non-bailable offences’. This dogmatism and indoctrination of Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal Legislation during British Regime with the vicious and savage this mind set. To add insult to the irreparable injury caused, Section 377 of the Indian Penal Code was misused and abused as there was a tendency, in British period, to arrest and prosecute TG persons under Section 377 merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence.

(b) There may have been marginal improvement in the social and economic condition of TGs in India. It is still far from satisfactory and these TGs continue to face different kinds of economic blockade and social degradation. They still face multiple forms of oppression in this country. Discrimination qua them is clearly discernable in various fields including health care, employment, education, social cohesion etc.

(c) The TGs are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. The discussion above while dealing with the first issue, therefore, equally applies to this issue as well.

111. We are of the firm opinion that by recognizing such TGs as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition. As mentioned above, the issue of transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgenders which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them. TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical and mental disability. Up till recently they were subjected to cruelty, pity or charity.

Fortunately, there is a paradigm shift in thinking from the aforesaid approach to a rights based approach. Though, this may be the thinking of human rights activist, the society has not kept pace with this shift. There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of the society and they are denied equal access to those fundamental rights and freedoms that the other people enjoy freely.(See, Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion, UNDP report on India Issue: December, 2010).

112. Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places et.al. The other major problems that the transgender people face in their daily life are discrimination, lack of

educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. In spite of the adoption of Universal Declaration of Human Rights (UDHR) in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgender are denied basic human rights. This denial is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e., whether a person is anatomically male or female), rather than gender (i.e., whether a person has qualities that society consider masculine or feminine (Katherine M.Franke, The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender, 144 U.Pa.Rev.1,3 (1995) (arguing that by defining sex in biological terms, the law has failed to distinguish sex from gender, and sexual differentiation from sex discrimination). Transgender people are generally excluded from the society and people think transgenderism as a medical disease. Much like the disability, which in earlier times was considered as an

illness but later on looked upon as a right based approach. The question whether transgenderism is a disease is hotly debated in both the transgender and medical-psychiatric communities. But a prevalent view regarding this is that transgenderism is not a disease at all, but a benign normal variant of the human experience akin to left-handedness.

113. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.

114. Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against

Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender.

115. In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. As is stated earlier, at the time of birth of a child itself, sex is assigned. However, it is either male or female. In the process, the society as well as law, has completely ignored the basic human right of TGs to give them their appropriate sex categorization. Up to now, they have either been treated as male or female. This is not only improper as it is far from truth, but indignified to these TGs and violates their human rights.

116. Though there may not be any statutory regime recognizing 'third gender' for these TGs. However, we find enough justification to recognize this right of theirs in

natural law sphere. Further, such a justification can be traced to the various provisions contained in Part III of the Constitution relating to 'Fundamental Rights'. In addition to the powerful justification accomplished in the accompanying opinion of my esteemed Brother, additional raison d'etre for this conclusion is stated hereinafter.

117. We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representatives' namely formal democracy. It also has other percepts like Rule of Law, human rights, independence of judiciary, separation of powers etc.

118. There is a recognition to the hard realty that without protection for human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is not only to decide the dispute before the Court, but to uphold the rule of law and ensure access to justice to the marginalized section of the society. It cannot

be denied that TGs belong to the unprivileged class which is a marginalized section.

119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social realty that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social realty. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

120. In ***Dattatraya Govind Mahajan*** vs. ***State of Maharashtra*** (AIR 1977 SC 915) this Court observed:

> "Our Constitution is a tryst with destiny, preamble with luscent solemnity in the words 'Justice – social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their fundamental role and forget it at their peril, for to do so will be a betrayal of chose high values and goals which this nation set for itself in its objective Resolution and whose elaborate summation appears in Part IV of the Paramount Parchment. The history of our country's struggle for independence was the story of a battle between the forces of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation.....Once we grasp the dharma of the Constitution, the new orientation of the karma of adjudication becomes clear. Our founding fathers, aware of our social realities, forged our fighting faith and integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice."

121. Oliver Wendlle Holmes said: "the life of law has been logical; it has been experience". It may be added that 'the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which

adapted law to the new social realty'. Recognizing this fact, the aforesaid provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. In this process, the first and foremost right is to recognize TGs as 'third gender' in law as well. This is a recognition of their right of equality enshrined in Art.14 as well as their human right to life with dignity, which is the mandate of the Art.21 of the Constitution. This interpretation is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. It only amounts to giving purposive interpretation to the aforesaid provisions of the Constitution so that it can adapt to the changes in realty. Law without purpose has no raison d'etre. The purpose of law is the evolution of a happy society. As Justice Iyer has aptly put:

> "The purpose of law is the establishment of the welfare of society "and a society whose members enjoy welfare and happiness may be described as a just society. It is a negation of

> justice to say that some members, some groups, some minorities, some individuals do not have welfare: on the other hand they suffer from ill-fare. So it is axiomatic that law, if it is to fulfil itself, must produce a contented, dynamic society which is at once meting out justice to its members."

122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

123. As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed

to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights.

124. In National Human Rights Commission vs. State of Arunachal Pradesh (AIR 1996 SC 1234), This Court observed:

> "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws."

125. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to life in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper

law, which balances the needs of society and the individual." This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.

126. By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.

127. Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the

conception of 'Justice as Fairness'. In his 'Theory of Justice', Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ('considered judgments'), which he assumes most members of democratic societies would accept. "[Justice as fairness [….] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition. Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception of justice is called 'justice as fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted

that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

128. The aforesaid, thus, are my reasons for treating TGs as 'third gender' for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. These are my reasons in support of our Constitution to the two issues in these petitions.

.....J.
(A.K.Sikri)

129. We, therefore, declare:

(1) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

(4) Centre and State Governments are directed to operate separate HIV Sero-survellance Centres since Hijras/ Transgenders face several sexual health issues.

(5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

(6) Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

(9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

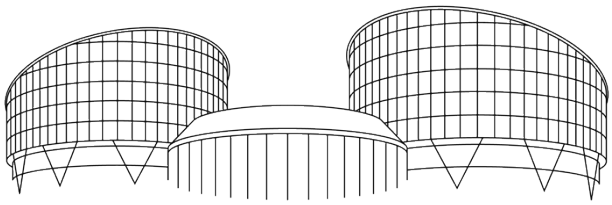
130. We are informed an Expert Committee has already been constituted to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this Judgment and implemented within six months.

131. Writ Petitions are, accordingly, allowed, as above.

.....J.
(**K.S. Radhakrishnan**)

.....J.
(**A.K. Sikri**)

New Delhi,
April 15, 2014.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF B.S. v. SPAIN

(Application no. 47159/08)

JUDGMENT
[Extracts]

STRASBOURG

24 July 2012

FINAL

24/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

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In the case of B.S. v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Nona Tsotsoria, *judges,*
and Marialena Tsirli, *Section Deputy Registrar,*

Having deliberated in private on 3 July 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47159/08) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms B.S. ("the applicant"), on 29 September 2008.

2. The President of the Chamber decided, of his own motion, not to disclose the identity of the applicant (Rule 47 § 3 of the Rules of Court).

3. The applicant was represented by Ms V. Waisman, a lawyer practising in Madrid. The Spanish Government ("the Government") were represented by their Agent, Mr F. Irurzun Montoro, State Counsel.

4. On 25 May 2010 the Court decided to give notice of the application to the Government. It was also decided that the Chamber would rule on the admissibility and merits at the same time (Article 29 § 1 of the Convention).

5. Both the applicant and the Government filed written observations. Observations were also received from the European Social Research Unit (ESRH) at the Research Group on Exclusion and Social Control (GRECS) at the University of Barcelona and from the AIRE Centre, which had been given leave by the President to take part in the proceedings as third-party interveners (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, who is of Nigerian origin, was born in 1977 and has been lawfully resident in Spain since 2003.

A. 1st episode: events of 15 and 21 July 2005

7. On 15 July 2005 the applicant was on the public highway in the El Arenal district near Palma de Mallorca, where she worked as a prostitute, when two officers of the national police force asked to see her identity and then ordered her to leave the premises, which she did immediately.

8. The applicant alleged that later the same day, after returning to the same place, she had noticed the same police officers coming towards her and had attempted to flee. The police officers had caught up with her, struck her on the left thigh and on her wrists with a truncheon and again demanded to see her identity papers. She alleged that during the altercation, which had been witnessed by a number of people including two taxi drivers and the security guards of a nearby discotheque, one of the police officers had insulted her, saying things like "get out of here you black whore". She was released after presenting her papers to the police officers.

9. Again according to the applicant, on 21 July 2005 the same police officers stopped her again and one of them hit her on the left hand with his truncheon.

10. That day the applicant lodged a formal verbal complaint with Palma de Mallorca investigating judge no. 8 and went to hospital to have her injuries treated. The doctors observed inflammation and mild bruising of the left hand.

11. The file was allocated to Palma de Mallorca investigating judge no. 9, who decided to open a judicial investigation and requested an incident report from the police headquarters. In his report of 11 October 2005 the chief of police of the Balearic Islands explained that police patrols were common in the district concerned on account of the numerous complaints of theft or physical attacks regularly received from the local residents and the resulting damage done to the district's image. He added that foreign female citizens present in the area often attempted to escape from the police because the latter's presence hindered them in their work. In the present case the applicant had attempted to avoid inspection by the police but had been stopped by the officers, who had asked her to show her papers without at any time making any humiliating remarks or using physical force. With regard to the identity of the officers, the head of police indicated that the ones who had stopped and questioned the applicant the first time were from

the patrol formed by the police officers *Rayo 98* and *Rayo 93* (code names given to the officers). Contrary to the applicant's assertions, those who had stopped her on 21 July 2005 belonged to a different patrol, called *Luna 10*.

12. In a decision of 17 October 2005 Palma de Mallorca investigating judge no. 9 issued a provisional discharge order and decided to discontinue the proceedings on the ground that there was insufficient evidence that an offence had been committed.

13. That decision was served on the applicant or her representative on 23 April 2007, at the latter's request.

14. The applicant applied to Palma de Mallorca investigating judge no. 9 to have the decision reversed, and subsequently appealed. She complained of the discriminatory attitude of the police officers and requested that various evidence-gathering measures be taken, such as identification of the officers in question and taking witness statements from the persons who had been present during the incidents. In a decision of 10 June 2007, investigating judge no. 9 refused to reverse his decision on the grounds that the applicant's allegations had not been corroborated by objective evidence in the file. The judge observed that

> "the medical report [provided by the applicant] contains no date and, in any event ... mentions only inflammation and bruising of the hand, with no mention of any injury to the thigh.
>
> [The facts submitted] merely show that the applicant repeatedly failed to obey police orders given in the course of their duties, designed to prevent the shameful spectacle of prostitution on the public highway."

15. An appeal by the applicant was examined by the Balearic Islands *Audiencia Provincial*, which gave a decision on 16 October 2007 allowing the appeal in part, setting aside the discharge order and ordering proceedings for a minor criminal offence to be instituted before the investigating judge against the two police officers, who had been identified on the basis of the information contained in the report drawn up by the police headquarters.

16. In the context of those proceedings the applicant asked to be able to identify the officers through a two-way mirror. Her request was rejected on the grounds that this was an unreliable method of identification given the length of time that had already elapsed since the incidents and the fact that the officers in question had been wearing helmets throughout, as the applicant had acknowledged. No evidence against the accused was taken during the trial.

17. On 11 March 2008 investigating judge no. 9 gave judgment at the end of a public hearing during which evidence was heard from the police officers charged, who were not formally identified by the applicant. In his judgment the judge observed that during the judicial investigation an incident report had been requested from the police headquarters according

to which the officers involved had stated that no incident had occurred when they had stopped and questioned the applicant. The judge drew attention to the fact that the medical report provided by the applicant did not specify the date on which it had been drawn up. Furthermore, the findings in the report were not conclusive as to the cause of the injuries. Lastly, the judge reproduced verbatim the grounds of the decision of 10 June 2007 relating to the applicant's conduct and the purpose of the intervention by the police and concluded that her allegations were not objectively corroborated. In the light of those arguments, the judge acquitted the police officers.

18. The applicant appealed. She challenged the refusal to allow her to identify the perpetrators through a two-way mirror and criticised the fact that the only investigative measure taken by the investigating judge in response to her complaint had been to request a report from the police headquarters.

19. In a judgment of 6 April 2009, the Palma de Mallorca *Audiencia Provincial* dismissed her appeal and upheld the investigating judge's judgment. It pointed out that the right to use a range of evidence-gathering measures did not include the right to have each and every proposed measure accepted by a court. In the instant case identification through a two-way mirror would not have added anything to the evidence on the file.

20. Relying on Articles 14 (prohibition of discrimination), 15 (protection of physical integrity) and 24 (right to a fair trial) of the Constitution, the applicant lodged an *amparo* appeal with the Constitutional Court. In a decision of 22 December 2009, the Constitutional Court dismissed the appeal on grounds of a lack of constitutional basis for the complaints raised.

B. 2nd episode: events of 23 July 2005

21. The applicant was stopped and questioned again on 23 July 2005. On the same day she went to the casualty department of a public medical centre, where the doctor observed abdominal pain and bruising on the hand and knee.

22. On 25 July 2005 she lodged a criminal complaint with Palma de Mallorca investigating judge no. 2, alleging that one of the police officers had struck her on the hand and knee with a truncheon and that the officers had singled her out on account of her racial origin and had not stopped and questioned other women carrying on the same activity. She also stated that she had subsequently been taken to the police station, where she had refused to sign a statement drawn up by the police saying that she admitted having resisted police orders. Referring to the incidents that had occurred during the first episode, the applicant requested the removal of the police officer who had assaulted her and that her complaint be joined to the one previously lodged with investigating judge no. 8. Neither of her requests was granted.

23. The case was allocated to Palma de Mallorca investigating judge no. 11, who decided to open a judicial investigation. The applicant requested certain evidence-gathering measures, including obtaining from the police the identification numbers of the officers who had been on duty on 15 and 23 July. In the alternative, should that information not permit identification of the police officers responsible, the applicant requested that all the police officers who had patrolled the area during those days be summoned so that they could be identified through a two-way mirror. Her request was rejected.

24. In the course of the judicial investigation, investigating judge no. 11 requested an incident report from the police headquarters.

25. A report by the Balearic Islands chief of police dated 28 December 2005 explained, firstly, that the applicant had admitted working as a prostitute in the area in question, which was an activity that had given rise to numerous complaints from local residents. In that connection he considered that the sole purpose of the applicant's complaints (including the one of 15 July) had been to allow her to pursue her occupation unhindered by the police. With regard to the identity of the officers in question, the chief of police observed that the computer records had not registered any intervention on 23 July; only those of 15 and 21 July had been recorded in respect of that area.

26. On 22 February 2006 investigating judge no.11 issued a provisional discharge order and decided to discontinue the proceedings on the grounds that there was insufficient evidence that an offence had been committed.

27. The applicant sought to have that decision reversed by the judge and subsequently appealed. The judge dismissed her request by a decision of 31 July 2006. Subsequently, the Palma de Mallorca *Audiencia Provincial* dismissed her appeal on 7 March 2007. The *Audiencia* referred both to the report of the police headquarters in which there was no record of an intervention by the police on the alleged date and the statements in the report regarding the applicant's true motives in lodging her complaints. It also considered that the medical report supplied by the applicant did not enable the cause of the injuries to be unequivocally established.

28. Relying on Articles 10 (right to dignity), 14 (prohibition of discrimination), 15 (right to physical and mental integrity) and 24 (right to a fair trial) of the Constitution, the applicant lodged an *amparo* appeal with the Constitutional Court. In a decision of 14 April 2008, the Constitutional Court dismissed the appeal on grounds of a lack of constitutional basis for the complaints raised.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

29. The applicant complained, firstly, that the national police had both verbally and physically abused her when they had stopped and questioned her. She alleged that she had been discriminated against on account of her skin colour and her gender, whereas other women with a "European phenotype" carrying on the same activity in the same area had not been approached by police. The applicant also complained about the language used by Palma de Mallorca investigating judge no. 9, who, in his decision of 10 June 2007, had referred to the "shameful spectacle of prostitution on the public highway". Relying on the provisions of Article 3, the applicant alleged that the domestic courts' investigation of the events had been inadequate.

30. The provisions relied on are worded as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

...

B. The merits

1. Effectiveness of the investigations carried out by the national authorities

a) The parties' submissions

i. The Government

31. The Government disputed, at the outset, the seriousness of the injuries sustained by the applicant and pointed out that their cause had not been proved.

32. The Government also submitted that the police interventions in the area in question had not in any way targeted the applicant personally or discriminated against her, but had been preventive security measures designed to respond to public alarm caused by prostitution and to combat networks operating in the Balearic Islands which exploited immigrant women, in particular in the El Arenal district in which the applicant carried on her activity. The Ministry of the Interior had already implemented measures to combat such networks under Institutional Law no. 1/1992 on the protection of urban security. The Government observed in that connection that whilst prostitution was not in itself a criminal offence in Spain, forced prostitution was an offence under the Criminal Code.

33. With regard to the incidents of 15 and 21 July 2005, the Government noted that the applicant's allegations had been the subject of a judicial investigation by Palma de Mallorca investigating judge no. 9, during which the only investigative measure requested by the applicant had been an identity parade of the police officers behind a two-way mirror. Besides the fact that the applicant had not lodged a complaint against the officers, the rejection of her request was justified, in the Government's submission, on the grounds that the officers had already been identified by the police authorities. Those proceedings had been concluded by the judgment of 11 March 2008, delivered after a public hearing, acquitting the officers in question.

34. With regard to the second episode – of 23 July 2005 – the Government observed that this had been examined by Palma de Mallorca investigating judge no. 11. After assessing the police and medical reports provided, the judge had decided to discontinue the proceedings for want of sufficient evidence. That decision had been upheld by the *Audiencia Provincial*.

35. The Government pointed out that the procedural obligation imposed on the States with regard to Article 3 of the Convention was an obligation of means and not of result. In their submission, the investigative procedures brought before the two investigating judges were sufficient to consider that the Spanish State had fulfilled its obligations, irrespective of the fact that the police officers were ultimately not convicted.

ii. The applicant

36. The applicant considered that the manner in which the investigation had been carried out before the domestic courts amounted to a breach of the State's procedural obligations under Article 3. In her submission, the courts had not adequately dealt with her request for certain investigative measures regarding the incidents she had alleged, such as an identity parade of the officers behind a two-way mirror which would have enabled her to recognise the police officers involved. The applicant complained that the State shifted the obligation to investigate on to her and imposed the burden

of proving the alleged offence on her, whereas according to the Strasbourg Court's case-law, it was incumbent on the State to prove that particular treatment was not discriminatory.

37. The applicant added that she had not lodged a complaint against the police officers who had appeared before the courts because they were not the officers who had stopped and questioned her; this showed that the investigation had been ineffective as it had not enabled the officers responsible to be identified and, if appropriate, punished. In that connection she complained that she had not been informed of the means used to identify the officers in question. Further confirmation of the lack of an effective investigation could be seen in the fact that the only measure taken by the domestic courts to identify the perpetrators had been a request for a report from the Balearic Islands chief of police, who was the immediate superior of the persons involved. That had clearly been insufficient.

38. Lastly, the applicant pointed out that the United Nations Human Rights Committee had already found a violation by Spain on grounds of discrimination, which was proof that discrimination against immigrant black women was a structural problem in the country. In the present case she considered that the attitude and conduct of both the police and the courts had clearly been motivated by their prejudices and complained about the comments of Palma de Mallorca investigating judge no. 9, which she regarded as clearly discriminatory in their reference to the "shameful spectacle of prostitution" and to the fact that the applicant's complaint was based on "fallacious" grounds in that her conduct had merely reflected her repeated failure to obey orders given by the police in the course of their duties.

b) The Court's assessment

39. The Court considers that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with one under Article 2, should be capable of leading to the identification and punishment of those responsible (see, regarding Article 2 of the Convention, *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, *Reports of Judgments and Decisions* 1998-I; *Yasa v. Turkey*, 2 September 1998, § 98, *Reports* 1998-VI; and *Dikme v. Turkey*, no. 20869/92, § 101, ECHR 2000-VIII). Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases

for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII).

40. The Court considers it necessary to rule first on the question of the applicability of Article 3 of the Convention to the facts of the case and in particular to address the Government's argument debating the severity of the injuries in the present case. The Court reiterates that the assessment of the minimum level of severity is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). In that connection the Court notes that the presence of injuries was recorded on the applicant's person. The medical reports revealed the presence of a number of bruises and inflammation of the hands and knee. Those findings are consistent with the allegations made by the applicant to the police in her complaints of 21 and 23 July 2005. Added to this are the alleged racist and degrading remarks made to her. Accordingly, the Court is of the view that the conduct in question falls within the scope of Article 3 of the Convention.

41. With regard to the investigation procedure before the domestic courts, the Court notes that in the present case the applicant complained twice of having suffered ill-treatment: firstly on 21 July 2005, when she lodged a formal verbal complaint with Palma de Mallorca investigating judge no. 8, and secondly on 25 July 2005, when she complained to Palma de Mallorca investigating judge no. 2 of being hit on the hand and knee with a truncheon by one of the police officers during the incidents of 23 July 2005.

42. The Court observes that the applicant's complaints were indeed investigated. It remains to be assessed whether the investigation was carried out diligently and whether it was "effective". With regard to the investigations carried out by the authorities following the allegations of ill-treatment, the Court observes that, according to the information provided, the applicant requested a number of evidence-gathering measures, namely, organisation of an identity parade of the officers responsible using a two-way mirror or obtaining from the police the identification numbers of the officers who had been on duty on 15 and 23 July. When examining those requests, investigating judges nos. 9 and 11, who had jurisdiction to examine the criminal complaints lodged by the applicant, merely requested incident reports from the police headquarters and based themselves exclusively on the report by the headquarters when issuing a discharge order. The Court observes in that connection that the report had been prepared by the Balearic Islands chief of police, who was the immediate superior of the officers in question.

43. The Court also refers to the proceedings for a minor criminal offence instituted before Palma de Mallorca investigating judge no. 9 against the two police officers who, according to the information contained in the report of the police headquarters, had stopped and questioned the applicant on 15 and 21 July 2005 (see paragraphs 14 and 15 above). In that connection it notes that during the public hearing on 11 March 2008 the defendants were not formally identified by the applicant. In the Court's view, that hearing cannot be regarded as sufficient to satisfy the requirements of Article 3 of the Convention, as it did not succeed in identifying the officers involved. The domestic courts dismissed the applicant's requests for an identity parade to be held behind a two-way mirror on account of the time that had elapsed since the altercations and the fact that it would be very difficult to recognise the officers because they had been wearing helmets at the time. In the Court's opinion, the applicant's request was not a superfluous one in identifying the police involved in the incidents and establishing who was responsible, as required by the Court's case-law (see, among other authorities, *Krastanov v. Bulgaria*, no. 50222/99, § 48, 30 September 2004; *Çamdereli v. Turkey*, no. 28433/02, §§ 28-29, 17 July 2008; and *Vladimir Romanov v. Russia*, no. 41461/02, §§ 79 and 81, 24 July 2008)

44. The Court notes, further, that the medical reports provided by the applicant refer to inflammation and bruising on the left hand following the first incident and to abdominal pain and bruising to the hand and knee regarding the incident of 23 July 2005. Neither investigating judge no. 9 nor no. 11 nor the *Audiencia Provincial* investigated that point further, but simply disregarded the reports on the grounds that they were undated or not conclusive as to the cause of the injuries. The Court considers that the information contained in those reports called for investigative measures to be carried out by the judicial authorities.

45. Furthermore, the investigating judges did not take any measures to identify or hear evidence from witnesses who had been present during the altercations; nor did they investigate the applicant's allegations regarding her transfer to the police station, where the police had allegedly attempted to make her sign a statement admitting that she had resisted orders.

46. The Court also considers that the Government's submission that the incidents had taken place in the context of the implementation of preventive measures designed to combat networks trafficking in immigrant women in the area cannot justify treatment contrary to Article 3 of the Convention.

47. In the light of the foregoing factors, the Court is not satisfied that the investigations carried out in the present case were sufficiently thorough and effective to satisfy the aforementioned requirements of Article 3. In conclusion, the Court considers that there has been a violation of Article 3 of the Convention under its procedural limb.

...

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

48. The applicant also alleged that she had been discriminated against as evidenced by the racist remarks made by the police officers, namely, "get out of here you black whore". She submitted that other women in the same area carrying on the same activity but with a "European phenotype" had not been stopped by the police. Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

49. The Government disputed that submission.

A. Admissibility

50. The Court observes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It finds, moreover, that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The Government

51. The Government disputed that submission, arguing that the applicant had not provided a shred of evidence to support her allegation that she had been discriminated against on account of being a prostitute or the fact that she was of African origin. They observed that the police operations in the district in question targeted, without distinction, all prostitutes working in the area, extending equally to women of European origin.

b) The applicant

52. The applicant, for her part, submitted that her position as a black woman working as a prostitute made her particularly vulnerable to discriminatory attacks and that those factors could not be considered separately but should be taken into account in their entirety, their interaction being essential for an examination of the facts of the case.

53. In the applicant's submission, it was clear that the repeated inspections to which she had been subjected and the racist and sexist insults made against her and the response of the domestic courts to her complaints

proved that there had been discrimination and a failure by the State to comply with its positive obligation to carry out an effective investigation.

54. The applicant considered that the State had exercised its public-security powers improperly and degradingly and that their actions had been disproportionate in nature. Both their actions and the decisions of the domestic courts had been discriminatory.

55. In conclusion, the applicant considered that she had been the victim of structural problems of discrimination present in the Spanish judicial system, as a result of which there had been no effective investigation of her complaints.

c) The third-party interveners

56. The European Social Research Unit (ESRH) at the Research Group on Exclusion and Social Control (GRECS) at the University of Barcelona referred to studies that had been carried out into intersectional discrimination, that is, discrimination based on several different grounds such as race, gender or social origin. Those studies showed that an analysis of the facts taking account of only one of the grounds was approximate and failed to reflect the reality of the situation. The ESRH gave examples of a number of initiatives taken at European level to obtain recognition of multiple discrimination; however, a binding legal text – though strongly recommended – did not yet exist.

57. The AIRE Centre, for their part, invited the Court to recognise the phenomenon of intersectional discrimination, which required a multiple-grounds approach that did not examine each factor separately. It gave an overview of the innovations in this area in the European Union and in various States such as the United Kingdom, the United States and Canada.

2. The Court's assessment

58. The Court considers that where the State authorities investigate violent incidents, they have an additional obligation to take all reasonable measures to identify whether there were racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII). Lastly, the Court reiterates that the onus is on the Government to produce evidence establishing facts that cast doubt on the victim's account (see

Turan Cakir v. Belgium, no. 44256/06, § 54, 10 March 2009, and *Sonkaya v. Turkey*, no. 11261/03, § 25, 12 February 2008).

59. Furthermore, the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made (see *Nachova and Others*, cited above, § 161).

60. In the instant case the Court has already observed that the Spanish authorities violated Article 3 of the Convention by failing to carry out an effective investigation into the incident. It considers that it must examine separately the complaint that there was also a failure to investigate a possible causal link between the alleged racist attitudes and the violent acts allegedly perpetrated by the police against the applicant (see, *mutatis mutandis*, *Turan Cakir v. Belgium*, cited above, § 79).

61. The Court notes that in her complaints of 21 and 25 July 2005 the applicant mentioned the racist remarks allegedly made to her by the police, such as "get out of here you black whore", and submitted that the officers had not stopped and questioned other women carrying on the same activity but having a "European phenotype". Those submissions were not examined by the courts dealing with the case, which merely adopted the contents of the reports by the Balearic Islands chief of police without carrying out a more thorough investigation into the alleged racist attitudes.

62. In the light of the evidence submitted in the present case, the Court considers that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.

63. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural aspect.

...

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

65. The applicant claimed 30,000 euros (EUR) for the non-pecuniary damage which she had sustained as a result of being humiliated by the ill-treatment she had complained of. The applicant also asked the Court to compel the Government to draw up a check-list that the domestic courts would be obliged to follow in the event of allegations of discrimination such as hers. Lastly, in accordance with the principle of *restitutio in integrum*, she requested that the proceedings be reopened before the Spanish courts.

66. The Government challenged that claim on the grounds that a finding of a violation was sufficient. With regard to drawing up a check-list, the Government reiterated that, in accordance with the Court's case-law, the member States were free to choose the measures they considered the most appropriate to redress a finding of a violation.

67. With regard to the specific measures requested by the applicant, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001). The Court considers that the present case is not one of those in which, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist and in which it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V).

68. With regard to the claim in respect of non-pecuniary damage, the Court considers that, having regard to the violations found in the present case, the applicant should be awarded compensation for non-pecuniary damage. Ruling on an equitable basis, as required by Article 41 of the Convention, it decides to award the sum claimed, namely, EUR 30,000.

B. Costs and expenses

69. The applicant also claimed EUR 31,840.50 for the total costs and expenses incurred before the domestic courts and before the Court. The supporting documents submitted accounted for only EUR 1,840.50.

70. The Government asked the Court to reject the claim.

71. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. In the instant case, and having regard to the documents available to it and to its case-law, the Court considers the sum of EUR 1,840.50 in respect of all costs and expenses to be reasonable and awards that amount to the applicant.

C. Default interest

72. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

2. *Holds* that there has been a violation of Article 3 under its procedural limb;

...

4. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 3 of the Convention;

...

6. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 30,000. (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,840.50 (one thousand eight hundred and forty euros and fifty centimes), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 24 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marielena Tsirli
Deputy Registrar

Josep Casadevall
President

Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color

Kimberle Crenshaw*

INTRODUCTION

Over the last two decades, women have organized against the almost routine violence that shapes their lives.[1] Drawing from the strength of shared experience, women have recognized that the political demands of millions speak more powerfully than the pleas of a few isolated voices. This politicization in turn has transformed the way we understand violence against women. For example, battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.[2] This process of recognizing as social and systemic what was for-

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This article is dedicated to the memory of Denise Carty-Bennia and Mary Joe Frug.

1. Feminist academics and activists have played a central role in forwarding an ideological and institutional challenge to the practices that condone and perpetuate violence against women. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); LORENNE M.G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979); NANCY GAGER & CATHLEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA (1976); DIANA E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1974); ELIZABETH ANNE STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE (1985); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE E. WALKER, THE BATTERED WOMAN (1979).

2. *See, e.g.*, SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982) (arguing that battering is a means of maintaining women's subordinate position); S. BROWNMILLER, *supra* note 1 (arguing that rape is a

merly perceived as isolated and individual has also characterized the identity politics of African Americans, other people of color, and gays and lesbians, among others. For all these groups, identity-based politics has been a source of strength, community, and intellectual development.

The embrace of identity politics, however, has been in tension with dominant conceptions of social justice. Race, gender, and other identity categories are most often treated in mainstream liberal discourse as vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different. According to this understanding, our liberatory objective should be to empty such categories of any social significance. Yet implicit in certain strands of feminist and racial liberation movements, for example is the view that the social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.

The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences. In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring difference *within* groups contributes to tension *among* groups, another problem of identity politics that bears on efforts to politicize violence against women. Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as woman or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.

My objective in this article is to advance the telling of that location by exploring the race and gender dimensions of violence against women of color.[3] Contemporary feminist and antiracist discourses have failed to con-

patriarchal practice that subordinates women to men); Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) (discussing how "concepts of privacy permit, encourage and reinforce violence against women"); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (analyzing rape law as one illustration of sexism in criminal law); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 143-213 (1979) (arguing that sexual harassment should be redefined as sexual discrimination actionable under Title VII, rather than viewed as misplaced sexuality in the workplace).

3. This article arises out of and is inspired by two emerging scholarly discourses. The first is critical race theory. For a cross-section of what is now a substantial body of literature, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King*, 103 HARV. L. REV. 985 (1990); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard

sider intersectional identities such as women of color.[4] Focusing on two dimensions of male violence against women—battering and rape—I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism,[5] and how these experiences tend not

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Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1 (1991) Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991). For a useful overview of critical race theory, see Calmore, *supra*, at 2160-2168.

A second, less formally linked body of legal scholarship investigates the connections between race and gender. *See, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Crenshaw, *supra*; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989) (student author); Peggie R. Smith, *Separate Identities: Black Women, Work and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R-C.L. L. REV. 9 (1989); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991). This work in turn has been informed by a broader literature examining the interactions of race and gender in other contexts. *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (1990); ANGELA DAVIS, WOMEN, RACE AND CLASS (1981); BELL HOOKS, AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM (1981); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Frances Beale, *Double Jeopardy: To Be Black and Female*, in THE BLACK WOMAN 90 (Toni Cade ed. 1970); Kink-Kok Cheung, *The Woman Warrior versus The Chinaman Pacific: Must a Chinese American Critic Choose between Feminism and Heroism?*, in CONFLICTS IN FEMINISM 234 (Marianne Hirsch & Evelyn Fox Keller eds. 1990); Deborah H. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988); Diane K. Lewis, *A Response to Inequality: Black Women, Racism and Sexism*, 3 SIGNS 339 (1977); Deborah E. McDowell, *New Directions for Black Feminist Criticism*, in THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE AND THEORY 186 (Elaine Showalter ed. 1985); Valerie Smith, *Black Feminist Theory and the Representation of the "Other"*, in CHANGING OUR OWN WORDS: ESSAYS ON CRITICISM, THEORY AND WRITING BY BLACK WOMEN 38 (Cheryl A. Wall ed. 1989).

4. Although the objective of this article is to describe the intersectional location of women of color and their marginalization within dominant resistance discourses, I do not mean to imply that the disempowerment of women of color is singularly or even primarily caused by feminist and antiracist theorists or activists. Indeed, I hope to dispell any such simplistic interpretations by capturing, at least in part, the way that prevailing structures of domination shape various discourses of resistance. As I have noted elsewhere, "People can only demand change in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect . . . dominant ideology . . . will probably be ineffective." Crenshaw, *supra* note 3, at 1367. Although there are significant political and conceptual obstacles to moving against structures of domination with an intersectional sensibility, my point is that the effort to do so should be a central theoretical and political objective of both antiracism and feminism.

5. Although this article deals with violent assault perpetrated by men against women, women are also subject to violent assault by women. Violence among lesbians is a hidden but significant problem. One expert reported that in a study of 90 lesbian couples, roughly 46% of lesbians have been physically abused by their partners. Jane Garcia, *The Cost of Escaping Domestic Violence: Fear of Treatment in a Largely Homophobic Society May Keep Lesbian Abuse Victims from Calling for Help*, L.A. Times, May 6, 1991, at 2; *see also* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESIBIAN BATTERING (Kerry Lobel ed. 1986); Ruthann Robson, *Lavender Bruises: Intralesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U.L. REV. 567 (1990). There are clear parallels between violence against women in the lesbian community and violence against women in

to be represented within the discourses of either feminism or antiracism. Because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.

In an earlier article, I used the concept of intersectionality to denote the various ways in which race and gender interact to shape the multiple dimensions of Black[6] women's employment experiences.[7] My objective there was to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately. I build on those observations here by exploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color.[8]

I should say at the outset that intersectionality is not being offered here as some new, totalizing theory of identity. Nor do I mean to suggest that violence against women of color can be explained only through the specific frameworks of race and gender considered here.[9] Indeed, factors I address

communities of color. Lesbian violence is often shrouded in secrecy for similar reasons that have suppressed the exposure of heterosexual violence in communities of color—fear of embarassing other members of the community, which is already stereotyped as deviant, and fear of being ostracized from the community. Despite these similarities, there are nonetheless distinctions between male abuse of women and female abuse of women that in the context of patriarchy, racism and homophobia, warrants more focused analysis than is possible here.

6. I use "Black" and "African American" interchangeably throughout this article. I capitalize "Black" because "Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Crenshaw, *supra* note 3, at 1332 n.2 (citing Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982)). By the same token, I do not capitalize "white," which is not a proper noun, since whites do not constitute a specific cultural group. For the same reason I do not capitalize "women of color."

7. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139.

8. I explicitly adopt a Black feminist stance in this survey of violence against women of color. I do this cognizant of several tensions that such a position entails. The most significant one stems from the criticism that while feminism purports to speak *for* women of color through its invocation of the term "woman," the feminist perspective excludes women of color because it is based upon the experiences and interests of a certain subset of women. On the other hand, when white feminists attempt to include other women, they often add our experiences into an otherwise unaltered framework. It is important to name the perspective from which one constructs her analysis; and for me, that is as a Black feminist. Moreover, it is important to acknowledge that the materials that I incorporate in my analysis are drawn heavily from research on Black women. On the other hand, I see my own work as part of a broader collective effort among feminists of color to expand feminism to include analyses of race and other factors such as class, sexuality, and age. I have attempted therefore to offer my sense of the tentative connections between my analysis of the intersectional experiences of Black women and the intersectional experiences of other women of color. I stress that this analysis is not intended to include falsely nor to exclude unnecessarily other women of color.

9. I consider intersectionality a provisional concept linking contemporary politics with postmodern theory. In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are

only in part or not at all, such as class or sexuality, are often as critical in shaping the experiences of women of color. My focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed.[10]

I have divided the issues presented in this article into three categories. In Part I, I discuss structural intersectionality, the ways in which the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women. I shift the focus in Part II to political intersectionality, where I analyze how both feminist and antiracist politics have, paradoxically, often helped to marginalize the issue of violence against women of color. Then in Part III, I discuss representational intersectionality, by which I mean the cultural construction of women of color. I consider how controversies over the representation of women of color in popular culture can also elide the particular location of women of color, and thus become yet another source of intersectional disempowerment. Finally, I address the implications of the intersectional approach within the broader scope of contemporary identity politics.

I. STRUCTURAL INTERSECTIONALITY

A. *Structural Intersectionality and Battering*

I observed the dynamics of structural intersectionality during a brief field study of battered women's shelters located in minority communities in Los Angeles.[11] In most cases, the physical assault that leads women to these shelters is merely the most immediate manifestation of the subordination they experience. Many women who seek protection are unemployed or underemployed, and a good number of them are poor. Shelters serving these women cannot afford to address only the violence inflicted by the batterer; they must also confront the other multilayered and routinized forms of domination that often converge in these women's lives, hindering their ability to create alternatives to the abusive relationships that brought them to shelters in the first place. Many women of color, for example, are burdened by poverty, child care responsibilities, and the lack of job skills.[12] These burdens,

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between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.

10. Professor Mari Matsuda calls this inquiry "asking the other question." Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991). For example, we should look at an issue or condition traditionally regarded as a gender issue and ask, "Where's the racism in this?"

11. During my research in Los Angeles, California, I visited Jenessee Battered Women's Shelter, the only shelter in the Western states primarily serving Black women, and Everywoman's Shelter, which primarily serves Asian women. I also visited Estelle Chueng at the Asian Pacific Law Foundation, and I spoke with a representative of La Casa, a shelter in the predominantly Latino community of East L.A.

12. One researcher has noted, in reference to a survey taken of battered women's shelters, that "many Caucasian women were probably excluded from the sample, since they are more likely to have available resources that enable them to avoid going to a shelter. Many shelters admit only women with few or no resources or alternatives." MILDRED DALEY PAGELOW, WOMAN-BAT-

largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face,[13] as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.[14]

Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.[15] Such was the case in 1990 when Congress amended the marriage fraud provisions of the Immigration and Nationality Act to protect immigrant women who were battered or exposed to extreme cruelty by the United States citizens or permanent residents these women

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TERING: VICTIMS AND THEIR EXPERIENCES 97 (1981). On the other hand, many middle- and upper-class women are financially dependent upon their husbands and thus experience a diminution in their standard of living when they leave their husbands.

13. Together they make securing even the most basic necessities beyond the reach of many. Indeed one shelter provider reported that nearly 85 percent of her clients returned to the battering relationships, largely because of difficulties in finding employment and housing. African Americans are more segregated than any other racial group, and this segregation exists across class lines. Recent studies in Washington, D.C., and its suburbs show that 64% of Blacks trying to rent apartments in white neighborhoods encountered discrimination. Tracy Thompson, *Study Finds 'Persistent' Racial Bias in Area's Rental Housing,* Wash. Post, Jan. 31, 1991, at D1. Had these studies factored gender and family status into the equation, the statistics might have been worse.

14. More specifically, African Americans suffer from high unemployment rates, low incomes, and high poverty rates. According to Dr. David Swinton, Dean of the School of Business at Jackson State University in Mississippi, African Americans "receive three-fifths as much income per person as whites and are three times as likely to have annual incomes below the Federally defined poverty level of $12,675 for a family of four." *Urban League Urges Action,* N.Y. Times, Jan. 9, 1991, at A14. In fact, recent statistics indicate that racial economic inequality is "higher as we begin the 1990s than at any other time in the last 20 years." David Swinton, *The Economic Status of African Americans: "Permanent" Poverty and Inequality,* in THE STATE OF BLACK AMERICA 1991, at 25 (1991).

The economic situation of minority women is, expectedly, worse than that of their male counterparts. Black women, who earn a median of $7,875 a year, make considerably less than Black men, who earn a median income of $12,609 a year, and white women, who earn a median income of $9,812 a year. *Id.* at 32 (Table 3). Additionally, the percentage of Black female-headed families living in poverty (46.5%) is almost twice that of white female-headed families (25.4%). *Id.* at 43 (Table 8). Latino households also earn considerably less than white households. In 1988, the median income of Latino households was $20,359 and for white households, $28,340—a difference of almost $8,000. HISPANIC AMERICANS: A STATISTICAL SOURCEBOOK 149 (1991). Analyzing by origin, in 1988, Puerto Rican households were the worst off, with 34.1% earning below $10,000 a year and a median income for all Puerto Rican households of $15,447 per year. *Id.* at 155. 1989 statistics for Latino men and women show that women earned an average of $7,000 less than men. *Id.* at 169.

15. *See* text accompanying notes 61-66 (discussing shelter's refusal to house a Spanish-speaking woman in crisis even though her son could interpret for her because it would contribute to her disempowerment). Racial differences marked an interesting contrast between Jenesee's policies and those of other shelters situated outside the Black community. Unlike some other shelters in Los Angeles, Jenessee welcomed the assistance of men. According to the Director, the shelter's policy was premised on a belief that given African American's need to maintain healthy relations to pursue a common struggle against racism, anti-violence programs within the African American community cannot afford to be antagonistic to men. For a discussion of the different needs of Black women who are battered, see Beth Richie, *Battered Black Women: A Challenge for the Black Community,* BLACK SCHOLAR, Mar./Apr. 1985, at 40.

immigrated to the United States to marry. Under the marriage fraud provisions of the Act, a person who immigrated to the United States to marry a United States citizen or permanent resident had to remain "properly" married for two years before even applying for permanent resident status,[16] at which time applications for the immigrant's permanent status were required of both spouses.[17] Predictably, under these circumstances, many immigrant women were reluctant to leave even the most abusive of partners for fear of being deported.[18] When faced with the choice between protection from their batterers and protection against deportation, many immigrant women chose the latter.[19] Reports of the tragic consequences of this double subordination put pressure on Congress to include in the Immigration Act of 1990 a provision amending the marriage fraud rules to allow for an explicit waiver for hardship caused by domestic violence.[20] Yet many immigrant women, par-

16. 8 U.S.C. § 1186a (1988). The Marriage Fraud Amendments provide that an alien spouse "shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section." § 1186a(a)(1). An alien spouse with permanent resident status under this conditional basis may have her status terminated if the Attorney General finds that the marriage was "improper," § 1186a(b)(1), or if she fails to file a petition or fails to appear at the personal interview. § 1186a(c)(2)(A).

17. The Marriage Fraud Amendments provided that for the conditional resident status to be removed, "the alien spouse and the petitioning spouse (if not deceased) *jointly* must submit to the Attorney General . . . a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information." § 1186a(b)(1)(A) (emphasis added). The Amendments provided for a waiver, at the Attorney General's discretion, if the alien spouse was able to demonstrate that deportation would result in extreme hardship, or that the qualifying marriage was terminated for good cause. § 1186a(c)(4). However, the terms of this hardship waiver have not adequately protected battered spouses. For example, the requirement that the marriage be terminated for good cause may be difficult to satisfy in states with no-fault divorces. Eileen P. Lynsky, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part,* 41 U. MIAMI L. REV. 1087, 1095 n.47 (1987) (student author) (citing Jerome B. Ingber & R. Leo Prischet, *The Marriage Fraud Amendments,* in THE NEW SIMPSON-RODINO IMMIGRATION LAW OF 1986, at 564-65 (Stanley Mailman ed. 1986)).

18. Immigration activists have pointed out that "[t]he 1986 Immigration Reform Act and the Immigration Marriage Fraud Amendment have combined to give the spouse applying for permanent residence a powerful tool to control his partner." Jorge Banales, *Abuse Among Immigrants; As Their Numbers Grow So Does the Need for Services,* Wash. Post, Oct. 16, 1990, at E5. Dean Ito Taylor, executive director of Nihonmachi Legal Outreach in San Francisco, explained that the Marriage Fraud Amendments "bound these immigrant women to their abusers." Deanna Hodgin, *'Mail-Order' Brides Marry Pain to Get Green Cards,* Wash. Times, Apr. 16, 1991, at E1. In one egregious instance described by Beckie Masaki, executive director of the Asian Women's Shelter in San Francisco, the closer the Chinese bride came to getting her permanent residency in the United States, the more harshly her Asian-American husband beat her. Her husband, kicking her in the neck and face, warned her that she needed him, and if she did not do as he told her, he would call immigration officials. *Id.*

19. As Alice Fernandez, head of the Victim Services Agency at the Bronx Criminal Court, explained, " 'Women are being held hostage by their landlords, their boyfriends, their bosses, their husbands. . . . The message is: If you tell anybody what I'm doing to you, they are going to ship your ass back home. And for these women, there is nothing more terrible than that . . . . Sometimes their response is: I would rather be dead in this country than go back home.' " Vivienne Walt, *Immigrant Abuse: Nowhere to Hide; Women Fear Deportation, Experts Say,* Newsday, Dec. 2, 1990, at 8.

20. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The Act, introduced by Representative Louise Slaughter (D-N.Y.), provides that a battered spouse who has conditional permanent resident status can be granted a waiver for failure to meet the requirements if she can show that "the marriage was entered into in good faith and that after the marriage the alien spouse was

ticularly immigrant women of color, have remained vulnerable to battering because they are unable to meet the conditions established for a waiver. The evidence required to support a waiver "can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies."[21] For many immigrant women, limited access to these resources can make it difficult for them to obtain the evidence needed for a waiver. And cultural barriers often further discourage immigrant women from reporting or escaping battering situations. Tina Shum, a family counselor at a social service agency, points out that "[t]his law sounds so easy to apply, but there are cultural complications in the Asian community that make even these requirements difficult. . . . Just to find the opportunity and courage to call us is an accomplishment for many."[22] The typical immigrant spouse, she suggests, may live "[i]n an extended family where several generations live together, there may be no privacy on the telephone, no opportunity to leave the house and no understanding of public phones."[23] As a consequence, many immigrant women are wholly dependent on their husbands as their link to the world outside their homes.[24]

Immigrant women are also vulnerable to spousal violence because so many of them depend on their husbands for information regarding their legal status.[25] Many women who are now permanent residents continue to suffer abuse under threats of deportation by their husbands. Even if the threats are unfounded, women who have no independent access to information will still be intimidated by such threats.[26] And even though the domes-

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battered by or was subjected to extreme mental cruelty by the U.S. citizen or permanent resident spouse." H.R. REP. No. 723(I), 101st Cong., 2d Sess. 78 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6758; *see also* 8 C.F.R. § 216.5(3) (1992) (regulations for application for waiver based on claim of having been battered or subjected to extreme mental cruelty).

21. H.R. REP. No. 723(I), *supra* note 20, at 79, *reprinted in* 1990 U.S.C.C.A.N. 6710, 6759.

22. Hodgin, *supra* note 18.

23. *Id.*

24. One survey conducted of battered women "hypothesized that if a person is a member of a discriminated minority group, the fewer the opportunities for socioeconomic status above the poverty level and the weaker the English language skills, the greater the disadvantage." M. PAGELOW, *supra* note 12, at 96. The 70 minority women in the study "had a double disadvantage in this society that serves to tie them more strongly to their spouses." *Id.*

25. A citizen or permanent resident spouse can exercise power over an alien spouse by threatening not to file a petition for permanent residency. If he fails to file a petition for permanent residency, the alien spouse continues to be undocumented and is considered to be in the country illegally. These constraints often restrict an alien spouse from leaving. Dean Ito Taylor tells the story of "one client who has been hospitalized—she's had him arrested for beating her—but she keeps coming back to him because he promises he will file for her . . . . He holds that green card over her head." Hodgin, *supra* note 18. Other stories of domestic abuse abound. Maria, a 50-year-old Dominican woman, explains that " 'One time I had eight stitches in my head and a gash on the other side of my head, and he broke my ribs . . . . He would bash my head against the wall while we had sex. He kept threatening to kill me if I told the doctor what happened.' " Maria had a "powerful reason for staying with Juan through years of abuse: a ticket to permanent residence in the United States." Walt, *supra* note 19.

26. One reporter explained that "Third-world women must deal with additional fears, however. In many cases, they are afraid of authority, government institutions and their abusers' threat of being turned over to immigration officials to be deported." Banales, *supra* note 18.

tic violence waiver focuses on immigrant women whose husbands are United States citizens or permanent residents, there are countless women married to undocumented workers (or who are themselves undocumented) who suffer in silence for fear that the security of their entire families will be jeopardized should they seek help or otherwise call attention to themselves.[27]

Language barriers present another structural problem that often limits opportunities of non-English-speaking women to take advantage of existing support services.[28] Such barriers not only limit access to information about shelters, but also limit access to the security shelters provide. Some shelters turn non-English-speaking women away for lack of bilingual personnel and resources.[29]

These examples illustrate how patterns of subordination intersect in women's experience of domestic violence. Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment. In the case of the marriage fraud provisions of the Immigration and Nationality Act, the imposition of a policy specifically designed to burden one class—immigrant spouses seeking permanent resident status—exacerbated the disempowerment of those already subordinated by other structures of domination. By failing to take into account the vulnerability of immigrant spouses to domestic vio-

27. Incidents of sexual abuse of undocumented women abound. Marta Rivera, director of the Hostos College Center for Women's and Immigrant's Rights, tells of how a 19-year-old Dominican woman had "arrived shaken . . . after her boss raped her in the women's restroom at work." The woman told Rivera that "70 to 80 percent of the workers [in a Brooklyn garment factory] were undocumented, and they all accepted sex as part of the job . . . . She said a 13-year-old girl had been raped there a short while before her, and the family sent her back to the Dominican Republic." Walt, *supra* note 19. In another example, a "Latin American woman, whose husband's latest attack left her with two broken fingers, a swollen face and bruises on her neck and chest, refused to report the beating to police." She returned to her home after a short stay in a shelter. She did not leave the abusive situation because she was "an undocumented, illiterate laborer whose children, passport and money are tightly controlled by her husband." Although she was informed of her rights, she was not able to hurdle the structural obstacles in her path. Banales, *supra* note 18.

28. For example, in a region with a large number of Third-World immigrants, "the first hurdle these [battered women's shelters] must overcome is the language barrier." Banales, *supra* note 18.

29.

> There can be little question that women unable to communicate in English are severely handicapped in seeking independence. Some women thus excluded were even further disadvantaged because they were not U.S. citizens and some were in this country illegally. For a few of these, the only assistance shelter staff could render was to help reunite them with their families of origin.

M. PAGELOW, *supra* note 12, at 96-97. Non-English speaking women are often excluded even from studies of battered women because of their language and other difficulties. A researcher qualified the statistics of one survey by pointing out that "an unknown number of minority group women were excluded from this survey sample because of language difficulties." *Id.* at 96. To combat this lack of appropriate services for women of color at many shelters, special programs have been created specifically for women from particular communities. A few examples of such programs include the Victim Intervention Project in East Harlem for Latina women, Jenesee Shelter for African American women in Los Angeles, Apna Gar in Chicago for South Asian women, and, for Asian women generally, the Asian Women's Shelter in San Francisco, the New York Asian Women's Center, and the Center for the Pacific Asian Family in Los Angeles. Programs with hotlines include Sakhi for South Asian Women in New York, and Manavi in Jersey City, also for South Asian women, as well as programs for Korean women in Philadelphia and Chicago.

lence, Congress positioned these women to absorb the simultaneous impact of its anti-immigration policy and their spouses' abuse.

The enactment of the domestic violence waiver of the marriage fraud provisions similarly illustrates how modest attempts to respond to certain problems can be ineffective when the intersectional location of women of color is not considered in fashioning the remedy. Cultural identity and class affect the likelihood that a battered spouse could take advantage of the waiver. Although the waiver is formally available to all women, the terms of the waiver make it inaccessible to some. Immigrant women who are socially, culturally, or economically privileged are more likely to be able to marshall the resources needed to satisfy the waiver requirements. Those immigrant women least able to take advantage of the waiver—women who are socially or economically the most marginal—are the ones most likely to be women of color.

B. *Structural Intersectionality and Rape*

Women of color are differently situated in the economic, social, and political worlds. When reform efforts undertaken on behalf of women neglect this fact, women of color are less likely to have their needs met than women who are racially privileged. For example, counselors who provide rape crisis services to women of color report that a significant proportion of the resources allocated to them must be spent handling problems other than rape itself. Meeting these needs often places these counselors at odds with their funding agencies, which allocate funds according to standards of need that are largely white and middle-class.[30] These uniform standards of need ignore the fact that different needs often demand different priorities in terms of resource allocation, and consequently, these standards hinder the ability of counselors to address the needs of nonwhite and poor women.[31] A case in point: women of color occupy positions both physically and culturally marginalized within dominant society, and so information must be targeted directly to them in order to reach them.[32] Accordingly, rape crisis centers

30. For example, the Rosa Parks Shelter and the Compton Rape Crisis Hotline, two shelters that serve the African-American community, are in constant conflict with funding sources over the ratio of dollars and hours to women served. Interview with Joan Greer, Executive Director of Rosa Parks Shelter, in Los Angeles, California (April 1990).

31. One worker explained:

> For example, a woman may come in or call in for various reasons. She has no place to go, she has no job, she has no support, she has no money, she has no food, she's been beaten, and after you finish meeting all those needs, or try to meet all those needs, then she may say, by the way, during all this, I was being raped. So that makes our community different than other communities. A person wants their basic needs first. It's a lot easier to discuss things when you are full.

Nancy Anne Matthews, Stopping Rape or Managing its Consequences? State Intervention and Feminist Resistance in the Los Angeles Anti-Rape Movement, 1972-1987, at 287 (1989) (Ph.D dissertation, University of California, Los Angeles) (chronicling the history of the rape crisis movement, and highlighting the different histories and dilemmas of rape crisis hotlines run by white feminists and those situated in the minority communities).

32.

> Typically, more time must be spent with a survivor who has fewer personal resources.

must earmark more resources for basic information dissemination in communities of color than in white ones.

Increased costs are but one consequence of serving people who cannot be reached by mainstream channels of information. As noted earlier, counselors in minority communities report spending hours locating resources and contacts to meet the housing and other immediate needs of women who have been assualted. Yet this work is only considered "information and referral" by funding agencies and as such, is typically underfunded, notwithstanding the magnitude of need for these services in minority communities.[33] The problem is compounded by expectations that rape crisis centers will use a significant portion of resources allocated to them on counselors to accompany victims to court,[34] even though women of color are less likely to have their cases pursued in the criminal justice system.[35] The resources expected to be set aside for court services are misdirected in these communities.

The fact that minority women suffer from the effects of multiple subordination, coupled with institutional expectations based on inappropriate nonintersectional contexts, shapes and ultimately limits the opportunities for meaningful intervention on their behalf. Recognizing the failure to consider intersectional dynamics may go far toward explaining the high levels of failure, frustration, and burn-out experienced by counselors who attempt to meet the needs of minority women victims.

II. POLITICAL INTERSECTIONALITY

The concept of political intersectionality highlights the fact that women

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These survivors tend to be ethnic minority women. Often, a non-assimilated ethnic minority survivor requires translating and interpreting, transportation, overnight shelter for herself and possibly children, and counseling to significant others in addition to the usual counseling and advocacy services. So, if a rape crisis center serves a predominantly ethnic minority population, the "average" number of hours of service provided to each survivor is much higher than for a center that serves a predominantly white population.

Id. at 275 (quoting position paper of the Southern California Rape Hotline Alliance).

33. *Id.* at 287-88.

34. The Director of Rosa Parks reported that she often runs into trouble with her funding sources over the Center's lower than average number of counselors accompanying victims to court. Interview with Joan Greer, *supra* note 30.

35.

Even though current statistics indicate that Black women are more likely to be victimized than white women, Black women are less likely to report their rapes, less likely to have their cases come to trial, less likely to have their trials result in convictions, and, most disturbing, less likely to seek counseling and other support services.

PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 178-79 (1990); *accord* HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 141 (1980) (data obtained from 1,056 citizens serving as jurors in simulated legal rape cases generally showed that "the assailant of the black woman was given a more lenient sentence than the white woman's assailant"). According to Fern Ferguson, an Illinois sex abuse worker, speaking at a Women of Color Institute conference in Knoxville, Tennessee, 10% of rapes involving white victims end in conviction, compared with 4.2% for rapes involving non-white victims (and 2.3% for the less-inclusive group of Black rape victims). UPI, July 30, 1985. Ferguson argues that myths about women of color being promiscuous and wanting to be raped encourage the criminal justice system and medical professionals as well to treat women of color differently than they treat white women after a rape has occurred. *Id.*

of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one's political energies between two sometimes opposing groups is a dimension of intersectional disempowerment that men of color and white women seldom confront. Indeed, their specific raced *and* gendered experiences, although intersectional, often define as well as confine the interests of the entire group. For example, racism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement. The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.

Among the most troubling political consequences of the failure of antiracist and feminist discourses to address the intersections of race and gender is the fact that, to the extent they can forward the interest of "people of color" and "women," respectively, one analysis often implicitly denies the validity of the other. The failure of feminism to interrogate race means that the resistance strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color. Adopting either analysis constitutes a denial of a fundamental dimension of our subordination and precludes the development of a political discourse that more fully empowers women of color.

A. *The Politicization of Domestic Violence*

That the political interests of women of color are obscured and sometimes jeopardized by political strategies that ignore or suppress intersectional issues is illustrated by my experiences in gathering information for this article. I attempted to review Los Angeles Police Department statistics reflecting the rate of domestic violence interventions by precinct because such statistics can provide a rough picture of arrests by racial group, given the degree of racial segregation in Los Angeles.[36] L.A.P.D., however, would not release the statistics. A representative explained that one reason the statistics were not released was that domestic violence activists both within and

36. Most crime statistics are classified by sex or race but none are classified by sex *and* race. Because we know that most rape victims are women, the racial breakdown reveals, at best, rape rates for Black women. Yet, even given this head start, rates for other non-white women are difficult to collect. While there are some statistics for Latinas, statistics for Asian and Native American women are virtually non-existent. *Cf.* G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301 (1993).

outside the Department feared that statistics reflecting the extent of domestic violence in minority communities might be selectively interpreted and publicized so as to undermine long-term efforts to force the Department to address domestic violence as a serious problem. I was told that activists were worried that the statistics might permit opponents to dismiss domestic violence as a minoirty problem and, therefore, not deserving of aggressive action.

The informant also claimed that representatives from various minority communities opposed the release of these statistics. They were concerned, apparently, that the data would unfairly represent Black and Brown communities as unusually violent, potentially reinforcing stereotypes that might be used in attempts to justify oppressive police tactics and other discriminatory practices. These misgivings are based on the familiar and not unfounded premise that certain minority groups—especially Black men—have already been stereotyped as uncontrollably violent. Some worry that attempts to make domestic violence an object of political action may only serve to confirm such stereotypes and undermine efforts to combat negative beliefs about the Black community.

This account sharply illustrates how women of color can be erased by the strategic silences of antiracism and feminism. The political priorities of both were defined in ways that suppressed information that could have facilitated attempts to confront the problem of domestic violence in communities of color.

1. *Domestic violence and antiracist politics.*

Within communities of color, efforts to stem the politicization of domestic violence are often grounded in attempts to maintain the integrity of the community. The articulation of this perspective takes different forms. Some critics allege that feminism has no place within communities of color, that the issues are internally divisive, and that they represent the migration of white women's concerns into a context in which they are not only irrelevant but also harmful. At its most extreme, this rhetoric denies that gender violence is a problem in the community and characterizes any effort to politicize gender subordination as itself a community problem. This is the position taken by Shahrazad Ali in her controversial book, *The Blackman's Guide to Understanding the Blackwoman.*[37] In this stridently antifeminist tract, Ali draws a positive correlation between domestic violence and the

37. SHAHRAZAD ALI, THE BLACKMAN'S GUIDE TO UNDERSTANDING THE BLACKWOMAN (1989). Ali's book sold quite well for an independently published title, an accomplishment no doubt due in part to her appearances on the Phil Donahue, Oprah Winfrey, and Sally Jesse Raphael television talk shows. For public and press reaction, see Dorothy Gilliam, *Sick, Distorted Thinking,* Wash. Post, Oct. 11, 1990, at D3; Lena Williams, *Black Woman's Book Starts a Predictable Storm,* N.Y. Times, Oct. 2, 1990, at C11; *see also* PEARL CLEAGUE, MAD AT MILES: A BLACK WOMAN'S GUIDE TO TRUTH (1990). The title clearly styled after Ali's, *Mad at Miles* responds not only to issues raised by Ali's book, but also to Miles Davis's admission in his autobiography, *Miles: The Autobiography* (1989), that he had physically abused, among other women, his former wife, actress Cicely Tyson.

liberation of African Americans. Ali blames the deteriorating conditions within the Black community on the insubordination of Black women and on the failure of Black men to control them.[38] Ali goes so far as to advise Black men to physically chastise Black women when they are "disrespectful."[39] While she cautions that Black men must use moderation in disciplining "their" women, she argues that Black men must sometimes resort to physical force to reestablish the authority over Black women that racism has disrupted.[40]

Ali's premise is that patriarchy is beneficial for the Black community,[41] and that it must be strengthened through coercive means if necessary.[42] Yet

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38. Shahrazad Ali suggests that the "[Blackwoman] certainly does not believe that her disrepect for the Blackman is destructive, *nor* that her opposition to him has deteriorated the Black nation." S. ALI, *supra* note 37, at viii. Blaming the problems of the community on the failure of the Black woman to accept her "real definition," Ali explains that "[n]o nation can rise when the natural order of the behavior of the male and the female have been altered against their wishes by force. No species can survive if the female of the genus disturbs the balance of her nature by acting other than herself." *Id.* at 76.

39. Ali advises the Blackman to hit the Blackwoman in the mouth, "[b]ecause it is from that hole, in the lower part of her face, that all her rebellion culminates into words. Her unbridled tongue is a main reason she cannot get along with the Blackman. She often needs a reminder." *Id.* at 169. Ali warns that "if [the Blackwoman] ignores the authority and superiority of the Blackman, there is a penalty. When she crosses this line and becomes viciously insulting it is time for the Blackman to soundly slap her in the mouth." *Id.*

40. Ali explains that, "[r]egretfully some Blackwomen want to be physically controlled by the Blackman." *Id.* at 174. "The Blackwoman, deep inside her heart," Ali reveals, "wants to surrender but she wants to be coerced." *Id.* at 72. "[The Blackwoman] wants [the Blackman] to stand up and defend himself even if it means he has to knock her out of the way to do so. This is necessary whenever the Blackwoman steps out of the protection of womanly behavior and enters the dangerous domain of masculine challenge." *Id.* at 174.

41. Ali points out that "[t]he Blackman being number 1 and the Blackwoman being number 2 is another absolute law of nature. The Blackman was created first, he has seniority. And the Blackwoman was created 2nd. He is first. She is second. The Blackman is the beginning and all others come from him. Everyone on earth knows this except the Blackwoman." *Id.* at 67.

42. In this regard, Ali's arguments bear much in common with those of neoconservatives who attribute many of the social ills plaguing Black America to the breakdown of patriarchal family values. *See, e.g.*, William Raspberry, *If We Are to Rescue American Families, We Have to Save the Boys,* Chicago Trib., July 19, 1989, at C15; George F. Will, *Voting Rights Won't Fix It,* Wash. Post, Jan. 23, 1986, at A23; George F. Will, *"White Racism" Doesn't Make Blacks Mere Victims of Fate,* Milwaukee J., Feb. 21, 1986, at 9. Ali's argument shares remarkable similarities to the controversial "Moynihan Report" on the Black family, so called because its principal author was now-Senator Daniel P. Moynihan (D-N.Y.). In the infamous chapter entitled "The Tangle of Pathology," Moynihan argued that

> the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.

OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEPARTMENT OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29 (1965), *reprinted in* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 75 (1967). A storm of controversy developed over the book, although few commentators challenged the patriarchy embedded in the analysis. Bill Moyers, then a young minister and speechwriter for President Johnson, firmly believed that the criticism directed at Moynihan was unfair. Some 20 years later, Moyers resurrected the Moynihan thesis in a special television program, *The Vanishing Family: Crisis in Black America* (CBS television broadcast, Jan. 25, 1986). The show first aired in January 1986 and featured several African-American men and women who had become parents but were unwilling to marry. Arthur Unger, *Hardhitting Special About Black Families,* Christian Sci. Mon., Jan. 23, 1986,

the violence that accompanies this will to control is devastating, not only for the Black women who are victimized, but also for the entire Black community.[43] The recourse to violence to resolve conflicts establishes a dangerous pattern for children raised in such environments and contributes to many other pressing problems.[44] It has been estimated that nearly forty percent of all homeless women and children have fled violence in the home,[45] and an estimated sixty-three percent of young men between the ages of eleven and twenty who are imprisoned for homicide have killed their mothers' batterers.[46] And yet, while gang violence, homicide, and other forms of Black-on-Black crime have increasingly been discussed within African-American politics, patriarchal ideas about gender and power preclude the recognition of domestic violence as yet another compelling incidence of Black-on-Black crime.

Efforts such as Ali's to justify violence against women in the name of Black liberation are indeed extreme.[47] The more common problem is that

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at 23. Many saw the Moyers show as a vindication of Moynihan. President Reagan took the opportunity to introduce an initiative to revamp the welfare system a week after the program aired. Michael Barone, *Poor Children and Politics,* Wash. Post, Feb. 10, 1986, at A1. Said one official, "Bill Moyers has made it safe for people to talk about this issue, the disintegrating black family structure." Robert Pear, *President Reported Ready to Propose Overhaul of Social Welfare System,* N.Y. Times, Feb. 1, 1986, at A12. Critics of the Moynihan/Moyers thesis have argued that it scapegoats the Black family generally and Black women in particular. For a series of responses, see *Scapegoating the Black Family,* NATION, July 24, 1989 (special issue, edited by Jewell Handy Gresham and Margaret B. Wilkerson, with contributions from Margaret Burnham, Constance Clayton, Dorothy Height, Faye Wattleton, and Marian Wright Edelman). For an analysis of the media's endorsement of the Moynihan/Moyers thesis, see CARL GINSBURG, RACE AND MEDIA: THE ENDURING LIFE OF THE MOYNIHAN REPORT (1989).

43. Domestic violence relates directly to issues that even those who subscribe to Ali's position must also be concerned about. The socioeconomic condition of Black males has been one such central concern. Recent statistics estimate that 25% of Black males in their twenties are involved in the criminal justice systems. *See* David G. Savage, *Young Black Males in Jail or in Court Control Study Says,* L.A. Times, Feb. 27, 1990, at A1; Newsday, Feb. 27, 1990, at 15; *Study Shows Racial Imbalance in Penal System,* N.Y. Times, Feb. 27, 1990, at A18. One would think that the linkages between violence in the home and the violence on the streets would alone persuade those like Ali to conclude that the African-American community cannot afford domestic violence and the patriarchal values that support it.

44. A pressing problem is the way domestic violence reproduces itself in subsequent generations. It is estimated that boys who witness violence against women are ten times more likely to batter female partners as adults. *Women and Violence: Hearings Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime Against Women,* 101st Cong., 2d Sess., pt. 2, at 89 (1991) [hereinafter *Hearings on Violent Crime Against Women*] (testimony of Charlotte Fedders). Other associated problems for boys who witness violence against women include higher rates of suicide, violent assault, sexual assault, and alcohol and drug use. *Id.*, pt. 2, at 131 (statement of Sarah M. Buel, Assistant District Attorney, Massachusetts, and Supervisor, Harvard Law School Battered Women's Advocacy Project).

45. *Id.* at 142 (statement of Susan Kelly-Dreiss) (discussing several studies in Pennsylvania linking homelessness to domestic violence).

46. *Id.* at 143 (statement of Susan Kelly-Dreiss).

47. Another historical example includes Eldridge Cleaver, who argued that he raped white women as an assault upon the white community. Cleaver "practiced" on Black women first. ELDRIDGE CLEAVER, SOUL ON ICE 14-15 (1968). Despite the appearance of misogyny in both works, each professes to worship Black women as "queens" of the Black community. This "queenly subservience" parallels closely the image of the "woman on a pedestal" against which white feminists have railed. Because Black women have been denied pedestal status within dominant society, the image of the African queen has some appeal to many African-American women. Although it is not a

the political or cultural interests of the community are interpreted in a way that precludes full public recognition of the problem of domestic violence. While it would be misleading to suggest that white Americans have come to terms with the degree of violence in their own homes, it is nonetheless the case that race adds yet another dimension to why the problem of domestic violence is suppressed within nonwhite communities. People of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems. Yet the cost of suppression is seldom recognized in part because the failure to discuss the issue shapes perceptions of how serious the problem is in the first place.

The controversy over Alice Walker's novel *The Color Purple* can be understood as an intracommunity debate about the political costs of exposing gender violence within the Black community.[48] Some critics chastised Walker for portraying Black men as violent brutes.[49] One critic lambasted Walker's portrayal of Celie, the emotionally and physically abused protagonist who finally triumphs in the end. Walker, the critic contended, had created in Celie a Black woman whom she couldn't imagine existing in any Black community she knew or could conceive of.[50]

The claim that Celie was somehow an unauthentic character might be read as a consequence of silencing discussion of intracommunity violence. Celie may be unlike any Black woman we know because the real terror experienced daily by minority women is routinely concealed in a misguided (though perhaps understandable) attempt to forestall racial stereotyping. Of course, it is true that representations of Black violence—whether statistical or fictional—are often written into a larger script that consistently portrays Black and other minority communities as pathologically violent. The problem, however, is not so much the portrayal of violence itself as it is the absence of other narratives and images portraying a fuller range of Black experience. Suppression of some of these issues in the name of antiracism imposes real costs. Where information about violence in minority communi-

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feminist position, there are significant ways in which the promulgation of the image directly counters the intersectional effects of racism and sexism that have denied African-American women a perch in the "gilded cage."

48. ALICE WALKER, THE COLOR PURPLE (1982). The most severe criticism of Walker developed after the book was filmed as a movie. Donald Bogle, a film historian, argued that part of the criticism of the movie stemmed from the one-dimensional portrayal of Mister, the abusive man. *See* Jacqueline Trescott, *Passions Over Purple; Anger and Unease Over Film's Depiction of Black Men,* Wash. Post, Feb. 5, 1986, at C1. Bogle argues that in the novel, Walker linked Mister's abusive conduct to his oppression in the white world—since Mister "can't be himself, he has to assert himself with the black woman." The movie failed to make any connection between Mister's abusive treatment of Black women and racism, and thereby presented Mister only as an "insensitive, callous man." *Id.*

49. *See, e.g.,* Gerald Early, *Her Picture in the Papers: Remembering Some Black Women,* ANTAEUS, Spring 1988, at 9; Daryl Pinckney, *Black Victims, Black Villains,* N.Y. REVIEW OF BOOKS, Jan. 29, 1987, at 17; Trescott, *supra* note 48.

50. Trudier Harris, *On the Color Purple, Stereotypes, and Silence,* 18 BLACK AM. LIT. F. 155, 155 (1984).

ties is not available, domestic violence is unlikely to be addressed as a serious issue.

The political imperatives of a narrowly focused antiracist strategy support other practices that isolate women of color. For example, activists who have attempted to provide support services to Asian- and African-American women report intense resistance from those communities.[51] At other times, cultural and social factors contribute to suppression. Nilda Rimonte, director of Everywoman's Shelter in Los Angeles, points out that in the Asian community, saving the honor of the family from shame is a priority.[52] Unfortunately, this priority tends to be interpreted as obliging women not to scream rather than obliging men not to hit.

Race and culture contribute to the suppression of domestic violence in other ways as well. Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society. However, but for this "safe haven" in many cases, women of color victimized by violence might otherwise seek help.

There is also a general tendency within antiracist discourse to regard the problem of violence against women of color as just another manifestation of racism. In this sense, the relevance of gender domination within the community is reconfigured as a consequence of discrimination against men. Of

51. The source of the resistance reveals an interesting difference between the Asian-American and African-American communities. In the African-American community, the resistance is usually grounded in efforts to avoid confirming negative stereotypes of African-Americans as violent; the concern of members in some Asian-American communities is to avoid tarnishing the model minority myth. Interview with Nilda Rimonte, Director of the Everywoman Shelter, in Los Angeles, California (April 19, 1991).

52. Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense,* 43 STAN. L. REV. 1311 (1991); *see also* Nilda Rimonte, *Domestic Violence Against Pacific Asians,* in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 327, 328 (Asian Women United of California ed. 1989) ("Traditionally Pacific Asians conceal and deny problems that threaten group pride and may bring on shame. Because of the strong emphasis on obligations to the family, a Pacific Asian woman will often remain silent rather than admit to a problem that might disgrace her family."). Additionally, the possibility of ending the marriage may inhibit an immigrant woman from seeking help. Tina Shum, a family counselor, explains that a " 'divorce is a shame on the whole family. . . . The Asian woman who divorces feels tremendous guilt.' " Of course, one could, in an attempt to be sensitive to cultural difference, stereotype a culture or defer to it in ways that abandon women to abuse. When—or, more importantly, how—to take culture into account when addressing the needs of women of color is a complicated issue. Testimony as to the particularities of Asian "culture" has increasingly been used in trials to determine the culpability of both Asian immigrant women and men who are charged with crimes of interpersonal violence. A position on the use of the "cultural defense" in these instances depends on how "culture" is being defined as well as on whether and to what extent the "cultural defense" has been used differently for Asian men and Asian women. See Leti Volpp, (Mis)Identifying Culture: Asian Women and the "Cultural Defense," (unpublished manuscript) (on file with the *Stanford Law Review*).

course, it is probably true that racism contributes to the cycle of violence, given the stress that men of color experience in dominant society. It is therefore more than reasonable to explore the links between racism and domestic violence. But the chain of violence is more complex and extends beyond this single link. Racism is linked to patriarchy to the extent that racism denies men of color the power and privilege that dominant men enjoy. When violence is understood as an acting-out of being denied male power in other spheres, it seems counterproductive to embrace constructs that implicitly link the solution to domestic violence to the acquisition of greater male power. The more promising political imperative is to challenge the legitimacy of such power expectations by exposing their dysfunctional and debilitating effect on families and communities of color. Moreover, while understanding links between racism and domestic violence is an important component of any effective intervention strategy, it is also clear that women of color need not await the ultimate triumph over racism before they can expect to live violence-free lives.

2. *Race and the domestic violence lobby.*

Not only do race-based priorities function to obscure the problem of violence suffered by women of color; feminist concerns often suppress minority experiences as well. Strategies for increasing awareness of domestic violence within the white community tend to begin by citing the commonly shared assumption that battering is a minority problem. The strategy then focuses on demolishing this strawman, stressing that spousal abuse also occurs in the white community. Countless first-person stories begin with a statement like, "I was not supposed to be a battered wife." That battering occurs in families of all races and all classes seems to be an ever-present theme of anti-abuse campaigns.[53] First-person anecdotes and studies, for example, consistently assert that battering cuts across racial, ethnic, economic, educational, and religious lines.[54] Such disclaimers seem relevant only in the presence of an

53. *See, e.g., Hearings on Violent Crime Against Women, supra* note 44, pt. 1, at 101 (testimony of Roni Young, Director of Domestic Violence Unit, Office of the State's Attorney for Baltimore City, Baltimore, Maryland) ("The victims do not fit a mold by any means."); *Id.* pt. 2, at 89 (testimony of Charlotte Fedders) ("Domestic violence occurs in all economic, cultural, racial, and religious groups. There is not a typical woman to be abused."); *Id.* pt. 2 at 139 (statement of Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition Against Domestic Violence) ("Victims come from a wide spectrum of life experiences and backgrounds. Women can be beaten in any neighborhood and in any town.").

54. *See, e.g.,* LENORE F. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 101-02 (1989) ("Battered women come from all types of economic, cultural, religious, and racial backgrounds. . . . They are women like you. Like me. Like those whom you know and love."); MURRAY A. STRAUS, RICHARD J. GELLES, SUZANNE K. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 31 (1980) ("Wife-beating is found in every class, at every income level."); Natalie Loder Clark, *Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence,* 28 WM. & MARY L. REV. 263, 282 n.74 (1987) ("The problem of domestic violence cuts across all social lines and affects 'families regardless of their economic class, race, national origin, or educational background.' Commentators have indicated that domestic violence is prevalent among upper middle-class families.") (citations omitted); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions,* 60 WASH. L. REV. 267, 276 (1985) ("It is important to emphasize that wife abuse is prevalent

initial, widely held belief that domestic violence occurs primarily in minority or poor families. Indeed some authorities explicitly renounce the "stereotypical myths" about battered women.[55] A few commentators have even transformed the message that battering is not *exclusively* a problem of the poor or minority communities into a claim that it *equally* affects all races and classes.[56] Yet these comments seem less concerned with exploring domestic abuse within "stereotyped" communities than with removing the stereotype as an obstacle to exposing battering within white middle- and upper-class communities.[57]

Efforts to politicize the issue of violence against women challenge beliefs that violence occurs only in homes of "others." While it is unlikely that advocates and others who adopt this rhetorical strategy intend to exclude or ignore the needs of poor and colored women, the underlying premise of this seemingly univeralistic appeal is to keep the sensibilities of dominant social

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throughout our society. Recently collected data merely confirm what people working with victims have long known: battering occurs in all social and economic groups.") (citations omitted); Liza G. Lerman, *Mediation of Wife Abuse Cases: The adverse Impact of Informal Dispute Resolution on Women,* 7 HARV. WOMEN'S L.J. 57, 63 (1984) ("Battering occurs in all racial, economic, and religious groups, in rural, urban, and suburban settings.") (citation omitted); Steven M. Cook, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform,* 1983 U. ILL. L. REV. 261, 262 (1983) (student author) ("Although domestic violence is difficult to measure, several studies suggest that spouse abuse is an extensive problem, one which strikes families regardless of their economic class, race, national origin, or educational background.") (citations omitted).

55. For example, Susan Kelly-Dreiss states:

> The public holds many myths about battered women—they are poor, they are women of color, they are uneducated, they are on welfare, they deserve to be beaten and they even like it. However, contrary to common misperceptions, domestic violence is not confined to any one socioeconomic, ethnic, religious, racial or age group.

Hearings on Violent Crime Against Women, supra note 44, pt. 2, at 139 (testimony of Susan Kelly-Dreiss, Executive Director, Pa. Coalition Against Domestic Violence). Kathleen Waits offers a possible explanation for this misperception:

> It is true that battered women who are also poor are more likely to come to the attention of governmental officials than are their middle- and upper-class counterparts. However, this phenomenon is caused more by the lack of alternative resources and the intrusiveness of the welfare state than by any significantly higher incidence of violence among lower-class families.

Waits, *supra* note 54, at 276-77 (citations omitted).

56. However, no reliable statistics support such a claim. In fact, some statistics suggest that there is a greater frequency of violence among the working classes and the poor. *See* M. STRAUS, R. GELLES, & S. STEINMETZ, *supra* note 54, at 31. Yet these statistics are also unreliable because, to follow Waits's observation, violence in middle- and upper-class homes remains hidden from the view of statisticians and governmental officials alike. *See* note 55 *supra*. I would suggest that assertions that the problem is the same across race and class are driven less by actual knowledge about the prevalence of domestic violence in different communities than by advocates' recognition that the image of domestic violence as an issue involving primarily the poor and minorities complicates efforts to mobilize against it.

57. On January 14, 1991, Senator Joseph Biden (D-Del.) introduced Senate Bill 15, the Violence Against Women Act of 1991, comprehensive legislation addressing violent crime confronting women. S. 15, 102d Cong., 1st Sess. (1991). The bill consists of several measures designed to create safe streets, safe homes, and safe campuses for women. More specifically, Title III of the bill creates a civil rights remedy for crimes of violence motivated by the victim's gender. *Id.* § 301. Among the findings supporting the bill were "(1) crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender" and "(2) current law [does not provide a civil rights remedy] for gender crimes committed on the street or in the home." S. REP. NO. 197, 102d Cong., 1st Sess. 27 (1991).

groups focused on the experiences of those groups. Indeed, as subtly suggested by the opening comments of Senator David Boren (D-Okla.) in support of the Violence Against Women Act of 1991, the displacement of the "other" as the presumed victim of domestic violence works primarily as a political appeal to rally white elites. Boren said,

> Violent crimes against women are not limited to the streets of the inner cities, but also occur in homes in the urban and rural areas across the country.
>
> Violence against women affects not only those who are actually beaten and brutalized, but indirectly affects all women. Today, our wives, mothers, daughters, sisters, and colleagues are held captive by fear generated from these violent crimes—held captive not for what they do or who they are, but solely because of gender.[58]

Rather than focusing on and illuminating how violence is disregarded when the home is "othered," the strategy implicit in Senator Boren's remarks functions instead to politicize the problem only in the dominant community. This strategy permits white women victims to come into focus, but does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem. The experience of violence by minority women is ignored, except to the extent it gains white support for domestic violence programs in the white community.

Senator Boren and his colleagues no doubt believe that they have provided legislation and resources that will address the problems of all women victimized by domestic violence. Yet despite their universalizing rhetoric of "all" women, they were able to empathize with female victims of domestic violence only by looking past the plight of "other" women and by recognizing the familiar faces of their own. The strength of the appeal to "protect our women" must be its race and class specificity. After all, it has always been someone's wife, mother, sister, or daughter that has been abused, even when the violence was stereotypically Black or Brown, and poor. The point here is not that the Violence Against Women Act is particularistic on its own terms, but that unless the Senators and other policymakers ask why violence remained insignificant as long as it was understood as a minority problem, it is unlikely that women of color will share equally in the distribution of resources and concern. It is even more unlikely, however, that those in power will be forced to confront this issue. As long as attempts to politicize domestic violence focus on convincing whites that this is not a "minority" problem but *their* problem, any authentic and sensitive attention to the

58. 137 Cong. Rec. S611 (daily ed. Jan. 14, 1991) (statement of Sen. Boren). Senator William Cohen (D-Me.) followed with a similar statement, noting that rapes and domestic assaults

> are not limited to the streets of our inner cities or to those few highly publicized cases that we read about in the newspapers or see on the evening news. Women throughout the country, in our Nation's urban areas and rural communities, are being beaten and brutalized in the streets and in their homes. It is our mothers, wives, daughters, sisters, friends, neighbors, and coworkers who are being victimized; and in many cases, they are being victimized by family members, friends, and acquaintances.

Id. (statement of Sen. Cohen).

experiences of Black and other minority women probably will continue to be regarded as jeopardizing the movement.

While Senator Boren's statement reflects a self-consciously political presentation of domestic violence, an episode of the CBS news program *48 Hours*[59] shows how similar patterns of othering nonwhite women are apparent in journalistic accounts of domestic violence as well. The program presented seven women who were victims of abuse. Six were interviewed at some length along with their family members, friends, supporters, and even detractors. The viewer got to know something about each of these women. These victims were humanized. Yet the seventh woman, the only nonwhite one, never came into focus. She was literally unrecognizable throughout the segment, first introduced by photographs showing her face badly beaten and later shown with her face electronically altered in the videotape of a hearing at which she was forced to testify. Other images associated with this woman included shots of a bloodstained room and blood-soaked pillows. Her boyfriend was pictured handcuffed while the camera zoomed in for a close-up of his bloodied sneakers. Of all the presentations in the episode, hers was the most graphic and impersonal. The overall point of the segment "featuring" this woman was that battering might not escalate into homicide if battered women would only cooperate with prosecutors. In focusing on its own agenda and failing to explore why this woman refused to cooperate, the program diminished this woman, communicating, however subtly, that she was responsible for her own victimization.

Unlike the other women, all of whom, again, were white, this Black woman had no name, no family, no context. The viewer sees her only as victimized and uncooperative. She cries when shown pictures. She pleads not to be forced to view the bloodstained room and her disfigured face. The program does not help the viewer to understand her predicament. The possible reasons she did not want to testify—fear, love, or possibly both—are never suggested.[60] Most unfortunately, she, unlike the other six, is given no epilogue. While the fates of the other women are revealed at the end of the episode, we discover nothing about the Black woman. She, like the "others" she represents, is simply left to herself and soon forgotten.

I offer this description to suggest that "other" women are silenced as much by being relegated to the margin of experience as by total exclusion. Tokenistic, objectifying, voyeuristic inclusion is at least as disempowering as complete exclusion. The effort to politicize violence against women will do little to address Black and other minority women if their images are retained simply to magnify the problem rather than to humanize their experiences. Similarly, the antiracist agenda will not be advanced significantly by forcibly suppressing the reality of battering in minority communities. As the *48 Hours* episode makes clear, the images and stereotypes we fear are readily

59. *48 Hours: Till Death Do Us Part* (CBS television broadcast, Feb. 6, 1991).

60. *See* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23.

available and are frequently deployed in ways that do not generate sensitive understanding of the nature of domestic violence in minority communities.

3. *Race and domestic violence support services.*

Women working in the field of domestic violence have sometimes reproduced the subordination and marginalization of women of color by adopting policies, priorities, or strategies of empowerment that either elide or wholly disregard the particular intersectional needs of women of color. While gender, race, and class intersect to create the particular context in which women of color experience violence, certain choices made by "allies" can reproduce intersectional subordination within the very resistance strategies designed to respond to the problem.

This problem is starkly illustrated by the inaccessibility of domestic violence support services to many non-English-speaking women. In a letter written to the deputy commissioner of the New York State Department of Social Services, Diana Campos, Director of Human Services for Programas de Ocupaciones y Desarrollo Económico Real, Inc. (PODER), detailed the case of a Latina in crisis who was repeatedly denied accomodation at a shelter because she could not prove that she was English-proficient. The woman had fled her home with her teenaged son, believing her husband's threats to kill them both. She called the domestic violence hotline administered by PODER seeking shelter for herself and her son. Because most shelters would not accommodate the woman with her son, they were forced to live on the streets for two days. The hotline counselor was finally able to find an agency that would take both the mother and the son, but when the counselor told the intake coordinator at the shelter that the woman spoke limited English, the coordinator told her that they could not take anyone who was not English-proficient. When the woman in crisis called back and was told of the shelter's "rule," she replied that she could understand English if spoken to her slowly. As Campos explains, Mildred, the hotline counselor, told Wendy, the intake coordinator

> that the woman said that she could communicate a little in English. Wendy told Mildred that they could not provide services to this woman because they have house rules that the woman must agree to follow. Mildred asked her, "What if the woman agrees to follow your rules? Will you still not take her?" Wendy responded that all of the women at the shelter are required to attend [a] support group and they would not be able to have her in the group if she could not communicate. Mildred mentioned the severity of this woman's case. She told Wendy that the woman had been wandering the streets at night while her husband is home, and she had been mugged twice. She also reiterated the fact that this woman was in danger of being killed by either her husband or a mugger. Mildred expressed that the woman's safety was a priority at this point, and that once in a safe place, receiving counseling in a support group could be dealt with.[61]

61. Letter of Diana M. Campos, Director of Human Services, PODER, to Joseph Semidei,

The intake coordinator restated the shelter's policy of taking only English-speaking women, and stated further that the woman would have to call the shelter herself for screening. If the woman could communicate with them in English, she might be accepted. When the woman called the PODER hotline later that day, she was in such a state of fear that the hotline counselor who had been working with her had difficulty understanding her in Spanish.[62] Campos directly intervened at this point, calling the executive director of the shelter. A counselor called back from the shelter. As Campos reports,

> Marie [the counselor] told me that they did not want to take the woman in the shelter because they felt that the woman would feel isolated. I explained that the son agreed to translate for his mother during the intake process. Furthermore, that we would assist them in locating a Spanish-speaking battered women's advocate to assist in counseling her. Marie stated that utilizing the son was not an acceptable means of communication for them, *since it further victimized the victim.* In addition, she stated that they had similar experiences with women who were non-English-speaking, and that the women eventually just left because they were not able to communicate with anyone. I expressed my extreme concern for her safety and reiterated that we would assist them in providing her with the necessary services until we could get her placed someplace where they had bilingual staff.[63]

After several more calls, the shelter finally agreed to take the woman. The woman called once more during the negotiation; however, after a plan was in place, the woman never called back. Said Campos, "After so many calls, we are now left to wonder if she is alive and well, and if she will ever have enough faith in our ability to help her to call us again the next time she is in crisis."[64]

Despite this woman's desperate need, she was unable to receive the protection afforded English-speaking women, due to the shelter's rigid commitment to exclusionary policies. Perhaps even more troubling than the shelter's lack of bilingual resources was its refusal to allow a friend or relative to translate for the woman. This story illustrates the absurdity of a feminist approach that would make the ability to attend a support group without a translator a more significant consideration in the distribution of resources than the risk of physical harm on the street. The point is not that the shelter's image of empowerment is empty, but rather that it was imposed without regard to the disempowering consequences for women who didn't match the kind of client the shelter's administrators imagined. And thus they failed to accomplish the basic priority of the shelter movement—to get the woman out of danger.

Deputy Commissioner, New York State Department of Social Services (Mar. 26, 1992) [hereinafter *PODER Letter*].

62. The woman had been slipping back into her home during the day when her husband was at work. She remained in a heightened state of anxiety because he was returning shortly and she would be forced to go back out into the streets for yet another night.

63. *PODER Letter, supra* note 61 (emphasis added).

64. *Id.*

Here the woman in crisis was made to bear the burden of the shelter's refusal to anticipate and provide for the needs of non-English-speaking women. Said Campos, "It is unfair to impose more stress on victims by placing them in the position of having to demonstrate their proficiency in English in order to receive services that are readily available to other battered women."[65] The problem is not easily dismissed as one of well-intentioned ignorance. The specific issue of monolingualism and the monistic view of women's experience that set the stage for this tragedy were not new issues in New York. Indeed, several women of color reported that they had repeatedly struggled with the New York State Coalition Against Domestic Violence over language exclusion and other practices that marginalized the interests of women of color.[66] Yet despite repeated lobbying, the Coalition did not act to incorporate the specific needs of nonwhite women into its central organizing vision.

Some critics have linked the Coalition's failure to address these issues to the narrow vision of coalition that animated its interaction with women of color in the first place. The very location of the Coalition's headquarters in Woodstock, New York—an area where few people of color live—seemed to guarantee that women of color would play a limited role in formulating policy. Moreover, efforts to include women of color came, it seems, as something of an afterthought. Many were invited to participate only after the Coalition was awarded a grant by the state to recruit women of color. However, as one "recruit" said, "they were not really prepared to deal with us or our issues. They thought that they could simply incorporate us into their organization without rethinking any of their beliefs or priorities and that we would be happy."[67] Even the most formal gestures of inclusion were not to be taken for granted. On one occasion when several women of color attended a meeting to discuss a special task force on women of color, the group debated all day over including the issue on the agenda.[68]

The relationship between the white women and the women of color on the Board was a rocky one from beginning to end. Other conflicts developed over differing definitions of feminism. For example, the Board decided to hire a Latina staffperson to manage outreach programs to the Latino community, but the white members of the hiring committee rejected candidates favored by Latina committee members who did not have recognized feminist

65. *Id.*

66. Roundtable Discussion on Racism and the Domestic Violence Movement (April 2, 1992) (transcript on file with the *Stanford Law Review*). The participants in the discussion—Diana Campos, Director, Bilingual Outreach Project of the New York State Coalition Against Domestic Violence; Elsa A. Rios, Project Director, Victim Intervention Project (a community-based project in East Harlem, New York, serving battered women); and Haydee Rosario, a social worker with the East Harlem Council for Human Services and a Victim Intervention Project volunteer—recounted conflicts relating to race and culture during their association with the New York State Coalition Against Domestic Violence, a state oversight group that distributed resources to battered women's shelters throughout the state and generally set policy priorities for the shelters that were part of the Coalition.

67. *Id.*

68. *Id.*

credentials. As Campos pointed out, by measuring Latinas against their own biographies, the white members of the Board failed to recognize the different circumstances under which feminist consciousness develops and manifests itself within minority communities. Many of the women who interviewed for the position were established activists and leaders within their own community, a fact in itself suggesting that these women were probably familiar with the specific gender dynamics in their communities and were accordingly better qualified to handle outreach than other candidates with more conventional feminist credentials.[69]

The Coalition ended a few months later when the women of color walked out.[70] Many of these women returned to community-based organizations, preferring to struggle over women's issues within their communities rather than struggle over race and class issues with white middle-class women. Yet as illustrated by the case of the Latina who could find no shelter, the dominance of a particular perspective and set of priorities within the shelter community continues to marginalize the needs of women of color.

The struggle over which differences matter and which do not is neither an abstract nor an insignificant debate among women. Indeed, these conflicts are about more than difference as such; they raise critical issues of power. The problem is not simply that women who dominate the antiviolence movement are different from women of color but that they frequently have power to determine, either through material or rhetorical resources, whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy. Thus, the struggle over incorporating these differences is not a petty or superficial conflict about who gets to sit at the head of the table. In the context of violence, it is sometimes a deadly serious matter of who will survive—and who will not.[71]

B. *Political Intersectionalities in Rape*

In the previous sections, I have used intersectionality to describe or frame various relationships between race and gender. I have used intersectionality as a way to articulate the interaction of racism and patriarchy generally. I have also used intersectionality to describe the location of women of color both within overlapping systems of subordination and at the margins of feminism and antiracism. When race and gender factors are examined in the context of rape, intersectionality can be used to map the ways in which racism and patriarchy have shaped conceptualizations of rape, to describe the unique vulnerability of women of color to these converging sys-

69. *Id.*

70. Ironically, the specific dispute that led to the walk-out concerned the housing of the Spanish-language domestic violence hotline. The hotline was initially housed at the Coalition's headquarters, but languished after a succession of coordinators left the organization. Latinas on the Coalition board argued that the hotline should be housed at one of the community service agencies, while the board insisted on maintaining control of it. The hotline is now housed at PODER. *Id.*

71. Said Campos, "It would be a shame that in New York state a battered woman's life or death were dependent upon her English language skills." *PODER Letter, supra* note 61.

tems of domination, and to track the marginalization of women of color within antiracist and antirape discourses.[72]

1. *Racism and sexism in dominant conceptualizations of rape.*

Generations of critics and activists have criticized dominant conceptualizations of rape as racist and sexist. These efforts have been important in revealing the way in which representations of rape both reflect and reproduce race and gender hierarchies in American society.[73] Black women, as both women and people of color, are situated within both groups, each of which has benefitted from challenges to sexism and racism, respectively, and yet the particular dynamics of gender and race relating to the rape of Black women have received scant attention. Although antiracist and antisexist assaults on rape have been politically useful to Black women, at some level, the monofocal antiracist and feminist critiques have also produced a political discourse that disserves Black women.

Historically, the dominant conceptualization of rape as quintessentially Black offender/white victim has left Black men subject to legal and extralegal violence. The use of rape to legitimize efforts to control and discipline the Black community is well established, and the casting of all Black men as potential threats to the sanctity of white womanhood was a familiar construct that antiracists confronted and attempted to dispel over a century ago.

Feminists have attacked other dominant, essentially patriarchal, conceptions of rape, particularly as represented through law. The early emphasis of rape law on the property-like aspect of women's chastity resulted in less solicitude for rape victims whose chastity had been in some way devalued. Some of the most insidious assumptions were written into the law, including the early common-law notion that a woman alleging rape must be able to show that she resisted to the utmost in order to prove that she was raped, rather than seduced. Women themselves were put on trial, as judge and jury scrutinized their lives to determine whether they were innocent victims or women who essentially got what they were asking for. Legal rules thus functioned to legitimize a good woman/bad woman dichotomy in which women who lead sexually autonomous lives were usually least likely to be vindicated if they were raped.

72. The discussion in following section focuses rather narrowly on the dynamics of a Black/white sexual hierarchy. I specify African Americans in part because given the centrality of sexuality as a site of racial domination of African Americans, any generalizations that might be drawn from this history seem least applicable to other racial groups. To be sure, the specific dynamics of racial oppression experienced by other racial groups are likely to have a sexual componant as well. Indeed, the repertoire of racist imagery that is commonly associated with different racial groups each contain a sexual stereotype as well. These images probably influence the way that rapes involving other minority groups are perceived both internally and in society-at-large, but they are likely to function in different ways.

73. For example, the use of rape to legitimize efforts to control and discipline the Black community is well established in historical literature on rape and race. *See* JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 26 (1981) ("Rape, or the threat of rape, is an important tool of social control in a complex system of racial-sexual stratification.").

Today, long after the most egregious discriminatory laws have been eradicated, constructions of rape in popular discourse and in criminal law continue to manifest vestiges of these racist and sexist themes. As Valerie Smith notes, "a variety of cultural narratives that historically have linked sexual violence with racial oppression continue to determine the nature of public response to [interracial rapes]."[74] Smith reviews the well-publicized case of a jogger who was raped in New York's Central Park[75] to expose how the public discourse on the assault "made the story of sexual victimization inseparable from the rhetoric of racism."[76] Smith contends that in dehumanizing the rapists as "savages," "wolves," and "beasts," the press "shaped the discourse around the event in ways that inflamed pervasive fears about black men."[77] Given the chilling parallels between the media representations of the Central Park rape and the sensationalized coverage of similar allegations that in the past frequently culminated in lynchings, one could hardly be surprised when Donald Trump took out a full page ad in four New York newspapers demanding that New York "Bring Back the Death Penalty, Bring Back Our Police."[78]

Other media spectacles suggest that traditional gender-based stereotypes that are oppressive to women continue to figure in the popular construction of rape. In Florida, for example, a controversy was sparked by a jury's acquittal of a man accused of a brutal rape because, in the jurors' view, the woman's attire suggested that she was asking for sex.[79] Even the press cov-

74. Valerie Smith, *Split Affinities: The Case of Interracial Rape,* in CONFLICTS IN FEMINISM 271, 274 (Marianne Hirsch & Evelyn Fox Keller eds. 1990).

75. On April 18, 1989, a young white woman, jogging through New York's Central Park, was raped, severely beaten, and left unconscious in an attack by as many as 12 Black youths. Craig Wolff, *Youths Rape and Beat Central Park Jogger,* N.Y. Times, Apr. 21, 1989, at B1.

76. Smith, *supra* note 74, at 276-78.

77. Smith cites the use of animal images to characterize the accused Black rapists, including descriptions such as: " 'a wolfpack of more than a dozen young teenagers' and '[t]here was a full moon Wednesday night. A suitable backdrop for the howling of wolves. A vicious pack ran rampant through Central Park. . . . This was bestial brutality.' " An editorial in the *New York Times* was entitled "The Jogger and the Wolf Pack." *Id.* at 277 (citations omitted).

Evidence of the ongoing link between rape and racism in American culture is by no means unique to media coverage of the Central Park jogger case. In December 1990, the George Washington University student newspaper, *The Hatchet,* printed a story in which a white student alleged that she had been raped at knifepoint by two Black men on or near the campus. The story caused considerable racial tension. Shortly after the report appeared, the woman's attorney informed the campus police that his client had fabricated the attack. After the hoax was uncovered, the woman said that she hoped the story "would highlight the problems of safety for women." Felicity Banger, *False Rape Report Upsetting Campus,* N.Y. Times, Dec. 12, 1990, at A2; *see also* Les Payne, *A Rape Hoax Stirs Up Hate,* Newsday, Dec. 16, 1990, at 6.

78. William C. Troft, *Deadly Donald,* UPI, Apr. 30 1989. Donald Trump explained that he spent $85,000 to take out these ads because "I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed for their crimes." *Trump Calls for Death to Muggers,* L.A. Times, May 1, 1989, at A2. *But cf. Leaders Fear 'Lynch' Hysteria in Response to Trump Ads,* UPI, May 6, 1989 (community leaders feared that Trump's ads would fan "the flames of racial polarization and hatred"); Cynthia Fuchs Epstein, *Cost of Full-Page Ad Could Help Fight Causes of Urban Violence,* N.Y. Times, May 15, 1989, at A18 ("Mr. Trump's proposal could well lead to further violence.").

79. Ian Ball, *Rape Victim to Blame, Says Jury,* Daily Telegraph, Oct. 6, 1989, at 3. Two months after the acquittal, the same man pled guilty to raping a Georgia woman to whom he said,

erage of William Kennedy Smith's rape trial involved a considerable degree of speculation regarding the sexual history of his accuser.[80]

The racism and sexism written into the social construction of rape are merely contemporary manifestations of rape narratives emanating from a historical period when race and sex hierarchies were more explicitly policed. Yet another is the devaluation of Black women and the marginalization of their sexual victimizations. This was dramatically shown in the special attention given to the rape of the Central Park jogger during a week in which twenty-eight other cases of first-degree rape or attempted rape were reported in New York.[81] Many of these rapes were as horrific as the rape in Central Park, yet all were virtually ignored by the media. Some were gang rapes,[82] and in a case that prosecutors described as was "one of the most brutal in recent years," a woman was raped, sodomized and thrown fifty feet off the top of a four-story building in Brooklyn. Witnesses testified that the victim "screamed as she plunged down the air shaft. . . . She suffered fractures of both ankles and legs, her pelvis was shattered and she suffered extensive internal injuries."[83] This rape survivor, like most of the other forgotten victims that week, was a woman of color.

In short, during the period when the Central Park jogger dominated the headlines, many equally horrifying rapes occurred. None, however, elicited the public expressions of horror and outrage that attended the Central Park rape.[84] To account for these different responses, Professor Smith suggests a

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"It's your fault. You're wearing a skirt." Roger Simon, *Rape: Clothing is Not the Criminal,* L.A. Times, Feb. 18, 1990, at E2.

80. *See* Barbara Kantrowitz, *Naming Names,* NEWSWEEK, Apr. 29, 1991, at 26 (discussing the tone of several newspaper investigations into the character of the woman who alleged that she was raped by William Kennedy Smith). There were other dubious assumptions animating the coverage. One article described Smith as an "unlikely candidate for the rapist's role." *Boy's Night Out in Palm Beach,* TIME, Apr. 22, 1991, at 82. *But see* Hillary Rustin, *Letters: The Kennedy Problem,* TIME, May 20, 1991, at 7 (criticizing authors for perpetuating stereotypical images of the who is or is not a "likely" rapist). Smith was eventually acquitted.

81. The New York Times pointed out that "[n]early all the rapes reported during that April week were of black or Hispanic women. Most went unnoticed by the public." Don Terry, *In Week of an Infamous Rape, 28 Other Victims Suffer,* N.Y. Times, May 29, 1989, at B25. Nearly all of the rapes occurred between attackers and victims of the same race: "Among the victims were 17 blacks, 7 Hispanic women, 3 whites, and 2 Asians." *Id.*

82. In Glen Ridge, an affluent New Jersey suburb, five white middle-class teenagers allegedly gang-raped a retarded white woman with a broom handle and a miniature baseball bat. *See* Robert Hanley, *Sexual Assault Splits a New Jersey Town,* N.Y. Times, May 26, 1989, at B1; Derrick Z. Jackson, *The Seeds of Violence,* Boston Globe, June 2, 1989, at 23; Bill Turque, *Gang Rape in the Suburbs,* NEWSWEEK, June 5, 1989, at 26.

83. Robert D. McFadden, *2 Men Get 6 to 18 Years for Rape in Brooklyn,* N.Y. Times, Oct. 2, 1990, at B2. The woman "lay, half naked, moaning and crying for help until a neighbor heard her" in the air shaft. *Community Rallies to Support Victim of Brutal Brooklyn Rape,* N.Y. Daily News, June 26, 1989, at 6. The victim "suffered such extensive injuries that she had to learn to walk again. . . . She faces years of psychological counseling . . . ." McFadden, *supra.*

84. This differential response was epitomized by public reaction to the rape-murder of a young Black woman in Boston on October 31, 1990. Kimberly Rae Harbour, raped and stabbed more than 100 times by eight members of a local gang, was an unwed mother, an occasional prostitute, and a drug-user. The Central Park victim was a white, upper-class professional. The Black woman was raped and murdered intraracially. The white woman was raped and left for dead interracially. The Central Park rape became a national rallying cause against random (read Black male) violence; the

sexual hierarchy in operation that holds certain female bodies in higher regard than others.[85] Statistics from prosecution of rape cases suggest that this hierarchy is at least one significant, albeit often overlooked factor in evaluating attitudes toward rape.[86] A study of rape dispositions in Dallas, for example, showed that the average prison term for a man convicted of raping a Black woman was two years,[87] as compared to five years for the rape of a Latina and ten years for the rape of an Anglo woman.[88] A related issue is the fact that African-American victims of rape are the least likely to be believed.[89] The Dallas study and others like it also point to a more subtle problem: neither the antirape nor the antiracist political agenda has focused on the Black rape victim. This inattention stems from the way the problem of rape is conceptualized within antiracist and antirape reform discourses. Although the rhetoric of both agendas formally includes Black women, racism is generally not problematized in feminism, and sexism, not problematized in antiracist discourses. Consequently, the plight of Black women is relegated to a secondary importance: The primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women; the primary beneficiaries of the Black community's concern over racism and rape, Black men. Ultimately, the reformist and rhetorical strategies that have grown out of antiracist and feminist rape reform movements have been ineffective in politicizing the treatment of Black women.

2. *Race and the antirape lobby.*

Feminist critiques of rape have focused on the way rape law has reflected

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rape of Kimberly Rae Harbour was written into a local script highlighted by the Boston Police Department's siege upon Black men in pursuit of the "fictional" Carol Stuart murderer. *See* John Ellement, *8 Teen-agers Charged in Rape, Killing of Dorchester Woman,* Boston Globe, Nov. 20, 1990, at 1; James S. Kunen, *Homicide No. 119,* PEOPLE, Jan. 14, 1991, at 42. For a comparison of the Stuart and Harbour murders, see Christopher B. Daly, *Scant Attention Paid Victim as Homicides Reach Record in Boston,* Wash. Post, Dec. 5, 1990, at A3.

85. Smith points out that "[t]he relative invisibility of black women victims of rape also reflects the differential value of women's bodies in capitalist societies. To the extent that rape is constructed as a crime against the property of privileged white men, crimes against less valuable women—women of color, working-class women, and lesbians, for example—mean less or mean differently than those against white women from the middle and upper classes." Smith, *supra* note 74, at 275-76.

86. "Cases involving black offenders and black victims were treated the least seriously." GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989). LaFree also notes, however, that "the race composition of the victim-offender dyad" was not the only predictor of case dispositions. *Id.* at 219-20.

87. *Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly,* Dallas Times Herald, Aug. 19, 1990, at A1. A study of 1988 cases in Dallas County's criminal justice system concluded that rapists whose victims were white were punished more severely than those whose victims were Black or Hispanic. The Dallas Times Herald, which had commissioned the study, reported that "[t]he punishment almost doubled when the attacker and victim were of different races. Except for such interracial crime, sentencing disparities were much less pronounced . . . ." *Id.*

88. *Id.* Two criminal law experts, Iowa law professor David Baldus and Carnegie-Mellon University professor Alfred Blumstein "said that the racial inequities might be even worse than the figures suggest." *Id.*

89. *See* G. LAFREE, *supra* note 86, at 219-20 (quoting jurors who doubted the credibility of Black rape survivors); *see also* H. FEILD & L. BIENEN, *supra* note 35, at 117-18.

dominant rules and expectations that tightly regulate the sexuality of women. In the context of the rape trial, the formal definition of rape as well as the evidentiary rules applicable in a rape trial discriminate against women by measuring the rape victim against a narrow norm of acceptable sexual conduct for women. Deviation from that norm tends to turn women into illegitimate rape victims, leading to rejection of their claims.

Historically, legal rules dictated, for example, that rape victims had to have resisted their assailants in order for their claims to be accepted. Any abatement of struggle was interpreted as the woman's consent to the intercourse under the logic that a real rape victim would protect her honor virtually to the death. While utmost resistance is not formally required anymore, rape law continues to weigh the credibility of women against narrow normative standards of female behavior. A woman's sexual history, for example, is frequently explored by defense attorneys as a way of suggesting that a woman who consented to sex on other occasions was likely to have consented in the case at issue. Past sexual conduct as well as the specific circumstances leading up to the rape are often used to distinguish the moral character of the legitimate rape victim from women who are regarded as morally debased or in some other way responsible for their own victimization.

This type of feminist critique of rape law has informed many of the fundamental reform measures enacted in antirape legislation, including increased penalties for convicted rapists[90] and changes in evidentiary rules to preclude attacks on the woman's moral character.[91] These reforms limit the tactics attorneys might use to tarnish the image of the rape victim, but they operate within preexisting social constructs that distinguish victims from nonvictims on the basis of their sexual character. And so these reforms, while beneficial, do not challenge the background cultural narratives that undermine the credibility of Black women.

Because Black women face subordination based on both race and gender, reforms of rape law and judicial procedures that are premised on narrow conceptions of gender subordination may not address the devaluation of Black women. Much of the problem results from the way certain gender expectations for women intersect with certain sexualized notions of race, no-

90. For example, Title I of the Violence Against Women Act creates federal penalties for sex crimes. *See* 137 CONG. REC. S597, S599-600 (daily ed. Jan. 14, 1991). Specifically, section 111 of the Act authorizes the Sentencing Commission to promulgate guidelines to provide that any person who commits a violation after a prior conviction can be punished by a term of imprisonment or fines up to twice of what is otherwise provided in the guidelines. S. 15, *supra* note 57, at 8. Additionally section 112 of the Act authorizes the Sentencing Commission to amend its sentencing guidelines to provide that a defendant convicted of rape or aggravated rape, "shall be assigned a base offense . . . that is at least 4 levels greater than the base offense level applicable to such offenses." *Id.* at 5.

91. Title I of the Act also creates new evidentiary rules for the introduction of sexual history in criminal and civil cases. *Id.* Sections 151 and 152 amend Fed. R. Evid. 412 by prohibiting "reputation or opinion evidence of the past sexual behavior of an alleged victim" from being admitted, and limiting other evidence of past sexual behavior. *Id.* at 39-44. Similarly, section 153 amends the rape shield law. *Id.* at 44-45. States have also either enacted or attempted to enact rape shield law reforms of their own. *See* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986); Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579 (1991).

tions that are deeply entrenched in American culture. Sexualized images of African Americans go all the way back to Europeans' first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores. Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. The discrediting of Black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of Black women. If these sexual images form even part of the cultural imagery of Black women, then the very representation of a Black female body at least suggests certain narratives that may make Black women's rape either less believable or less important. These narratives may explain why rapes of Black women are less likely to result in convictions and long prison terms than rapes of white women.[92]

Rape law reform measures that do not in some way engage and challenge the narratives that are read onto Black women's bodies are unlikely to affect the way cultural beliefs oppress Black women in rape trials. While the degree to which legal reform can directly challenge cultural beliefs that shape rape trials is limited,[93] the very effort to mobilize political resources toward addressing the sexual oppression of Black women can be an important first step in drawing greater attention to the problem. One obstacle to such an effort has been the failure of most antirape activists to analyze specifically the consequences of racism in the context of rape. In the absence of a direct attempt to address the racial dimensions of rape, Black women are simply presumed to be represented in and benefitted by prevailing feminist critiques.

3. *Antiracism and rape.*

Antiracist critiques of rape law focus on how the law operates primarily to condemn rapes of white women by Black men.[94] While the heightened

92. *See* note 35 *supra.*

93. One can imagine certain trial-based interventions that might assist prosecutors in struggling with these beliefs. For example, one might consider expanding the scope of voir dire to examine jurors' attitudes toward Black rape victims. Moreover, as more is learned about Black women's response to rape, this information may be deemed relevant in evaluating Black women's testimony and thus warrant introduction through expert testimony. In this regard, it is worth noting that the battered women's syndrome and the rape trauma syndrome are both forms of expert testimony that frequently function in the context of a trial to counter stereotypes and other dominant narratives that might otherwise produce a negative outcome for the woman "on trial." These interventions, probably unimaginable a short while ago, grew out of efforts to study and somehow quantify women's experience. Similar interventions that address the particular dimensions of the experiences of women of color may well be possible. This knowledge may grow out of efforts to map how women of color have fared under standard interventions. For an example of an intersectional critique of the battered women's syndrome, see Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective,* 1 U.C.L.A. WOMEN'S L.J. 191 (1991) (student author).

94. *See* Smith, *supra* note 74 (discussing media sensationalization of the Central Park jogger case as consistent with historical patterns of focusing almost exclusively on Black male/white female

concern with protecting white women against Black men has been primarily criticized as a form of discrimination against Black men,[95] it just as surely reflects devaluation of Black women.[96] This disregard for Black women results from an exclusive focus on the consequences of the problem for Black men.[97] Of course, rape accusations historically have provided a justification for white terrorism against the Black community, generating a legitimating power of such strength that it created a veil virtually impenetrable to appeals based on either humanity or fact.[98] Ironically, while the fear of the Black rapist was exploited to legitimate the practice of lynching, rape was not even alleged in most cases.[99] The well-developed fear of Black sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep Blacks under control.[100] Within the African-American community, cases involving race-based accusations against Black men have stood as hallmarks of racial injustice. The prosecution of the Scottsboro boys[101] and the Emmett Till[102] tragedy, for example, triggered African-

dyads.); *see also* Terry, *supra* note 81 (discussing the 28 other rapes that occurred during the same week, but that were not given the same media coverage). Although rape is largely an intraracial crime, this explanation for the disparate coverage given to nonwhite victims is doubtful, however, given the findings of at least one study that 48% of those surveyed believed that most rapes involved a Black offender and a white victim. *See* H. FEILD & L. BIENEN, *supra* note 35, at 80. Ironically, Feild and Bienen include in their book-length study of rape two photographs distributed to the subjects in their study depicting the alleged victim as white and the alleged assailant as Black. Given the authors' acknowledgment that rape was overwhelmingly intraracial, the appearance of these photos was particularly striking, especially because they were the only photos included in the entire book.

95. *See, e.g.*, G. LAFREE, *supra* note 86, at 237-39.

96. For a similar argument that race-of-victim discrimination in the administration of the death penalty actually represents the devalued status of Black victims rather than discrimination against Black offenders, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

97. The statistic that 89% of all men executed for rape in this country were Black is a familiar one. Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring). Unfortunately, the dominant analysis of racial discrimination in rape prosecutions generally does not discuss whether any of the rape *victims* in these cases were Black. *See* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 113 (1983) (student author).

98. Race was frequently sufficient to fill in facts that were unknown or unknowable. As late as 1953, the Alabama Supreme Court ruled that a jury could take race into account in determining whether a Black man was guilty of "an attempt to commit an assault with an attempt to rape." *See* McQuirter v. State, 63 So. 2d. 388, 390 (Ala. 1953). According to the "victim's" testimony, the man stared at her and mumbled something unintelligible as they passed. *Id.* at 389.

99. Ida Wells, an early Black feminist, investigated every lynching she could for about a decade. After researching 728 lynchings, she concluded that "[o]nly a third of the murdered Blacks were even *accused* of rape, much less guilty of it." PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 28 (1984) (quoting Wells).

100. *See* Jacquelyn Dowd Hall, *"The Mind That Burns in Each Body": Women, Rape, and Racial Violence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 334 (Ann Snitow, Christine Stansell, & Sharon Thompson eds. 1983).

101. Nine Black youths were charged with the rape of two white women in a railroad freight car near Scottsboro, Alabama. Their trials occurred in a heated atmosphere. Each trial was completed in a single day, and the defendants were all convicted and sentenced to death. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1976). The Supreme Court reversed the defendants' convictions and death sentences, holding that they were unconstitutionally denied the right to counsel. Powell v. Alabama, 287 U.S. 45, 65 (1932). However, the defendants were retried by an all-white jury after the Supreme Court reversed their convictions.

102. Emmett Till was a 14-year-old Black boy from Chicago visiting his relatives near Money,

American resistance to the rigid social codes of white supremacy.[103] To the extent rape of Black women is thought to dramatize racism, it is usually cast as an assault on Black manhood, demonstrating his inability to protect Black women. The direct assault on Black womanhood is less frequently seen as an assault on the Black community.[104]

The sexual politics that this limited reading of racism and rape engenders continues to play out today, as illustrated by the Mike Tyson rape trial. The use of antiracist rhetoric to mobilize support for Tyson represented an ongoing practice of viewing with considerable suspicion rape accusations against Black men and interpreting sexual racism through a male-centered frame. The historical experience of Black men has so completely occupied the dominant conceptions of racism and rape that there is little room to squeeze in the experiences of Black women. Consequently, racial solidarity was continually raised as a rallying point on behalf of Tyson, but never on behalf of Desiree Washington, Tyson's Black accuser. Leaders ranging from Benjamin Hooks to Louis Farrakhan expressed their support for Tyson,[105] yet no established Black leader voiced any concern for Washington. The fact that Black men have often been falsely accused of raping white women underlies the antiracist defense of Black men accused of rape even when the accuser herself is a Black woman.

As a result of this continual emphasis on Black male sexuality as the core issue in antiracist critiques of rape, Black women who raise claims of rape against Black men are not only disregarded but also sometimes vilified within the African-American community. One can only imagine the alienation experienced by a Black rape survivor such as Desiree Washington when the accused rapist is embraced and defended as a victim of racism while she is, at best, disregarded, and at worst, ostracized and ridiculed. In contrast, Tyson was the beneficiary of the longstanding practice of using antiracist rhetoric to deflect the injury suffered by Black women victimized by Black men. Some defended the support given to Tyson on the ground that all Afri-

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Mississippi. On a dare by local boys, he entered a store and spoke to a white woman. Several days later, Emmett Till's body was found in the Tallahatchie River. "The barbed wire holding the cottongin fan around his neck had became snagged on a tangled river root." After the corpse was discovered, the white woman's husband and his brother-in-law were charged with Emmett Till's murder. JUAN WILLIAMS, EYES ON THE PRIZE 39-43 (1987). For a historical account of the Emmett Till tragedy, see STEPHEN J. WHITFIELD, A DEATH IN THE DELTA (1988).

103. Crenshaw, *supra* note 7, at 159 (discussing how the generation of Black activists who created the Black Liberation Movement were contemporaries of Emmett Till).

104.

> Until quite recently, for example, when historians talked of rape in the slavery experience they often bemoaned the damage this act did to the Black male's sense of esteem and respect. He was powerless to protect his woman from white rapists. Few scholars probed the effect that rape, the threat of rape, and domestic violence had on the psychic development of the female victims.

Darlene Clark Hine, *Rape and the Inner Lives of Black Women in the Middle West: Preliminary Thoughts on the Culture of Dissemblance,* in UNEQUAL SISTERS: A MULTI-CULTURAL READER IN U.S. WOMEN'S HISTORY (Ellen Carol Dubois & Vicki L. Ruiz eds. 1990).

105. Michael Madden, *No Offensive from Defense,* Boston Globe, Feb. 1, 1992, at 33 (Hooks); *Farrakhan Backs Calls for Freeing Tyson,* UPI, July 10, 1992.

can Americans can readily imagine their sons, fathers, brothers, or uncles being wrongly accused of rape. Yet daughters, mothers, sisters, and aunts also deserve at least a similar concern, since statistics show that Black women are more likely to be raped than Black men are to be falsely accused of it. Given the magnitude of Black women's vulnerability to sexual violence, it is not unreasonable to expect as much concern for Black women who are raped as is expressed for the men who are accused of raping them.

Black leaders are not alone in their failure to empathize with or rally around Black rape victims. Indeed, some Black women were among Tyson's staunchest supporters and Washington's harshest critics.[106] The media widely noted the lack of sympathy Black women had for Washington; Barbara Walters used the observation as a way of challenging Washington's credibility, going so far as to press Washington for a reaction.[107] The most troubling revelation was that many of the women who did not support Washington also doubted Tyson's story. These women did not sympathize with Washington because they believed that Washington had no business in Tyson's hotel room at 2:00 a.m. A typical response was offered by one young Black woman who stated, "She asked for it, she got it, it's not fair to cry rape."[108]

Indeed, some of the women who expressed their disdain for Washington acknowledged that they encountered the threat of sexual assault almost daily.[109] Yet it may be precisely this threat—along with the relative absence of rhetorical strategies challenging the sexual subordination of Black women—that animated their harsh criticism. In this regard, Black women who condemned Washington were quite like all other women who seek to distance themselves from rape victims as a way of denying their own vulnerability. Prosecutors who handle sexual assault cases acknowledge that they often exclude women as potential jurors because women tend to empathize the least with the victim.[110] To identify too closely with victimization may reveal their own vulnerability.[111] Consequently, women often look for evi-

106. *See* Megan Rosenfeld, *After the Verdict, The Doubts: Black Women Show Little Sympathy for Tyson's Accuser,* Wash. Post, Feb. 13, 1992, at D1; Allan Johnson, *Tyson Rape Case Strikes a Nerve Among Blacks,* Chicago Trib., Mar. 29, 1992, at C1; Suzanne P. Kelly, *Black Women Wrestle with Abuse Issue: Many Say Choosing Racial Over Gender Loyalty Is Too Great a Sacrifice,* Star Trib., Feb. 18, 1992, at A1.

107. *20/20* (ABC television broadcast, Feb. 21, 1992).

108. *Id.*

109. According to a study by the Bureau of Justice, Black women are significantly more likely to be raped than white women, and women in the 16-24 age group are 2 to 3 times more likely to be victims of rape or attempted rape than women in any other age group. *See* Ronald J. Ostrow, *Typical Rape Victim Called Poor, Young,* L.A. Times, Mar. 25, 1985, at 8.

110. *See* Peg Tyre, *What Experts Say About Rape Jurors,* Newsday, May 19, 1991, at 10 (reporting that "researchers had determined that jurors in criminal trials side with the complainant or defendant whose ethnic, economic and religious background most closely resembles their own. The exception to the rule . . . is the way women jurors judge victims of rape and sexual assault."). Linda Fairstein, a Manhattan prosecutor, states, "(T)oo often women tend to be very critical of the conduct of other women, and they often are not good jurors in acquaintance-rape cases." Margaret Carlson, *The Trials of Convicting Rapists,* TIME, Oct. 14, 1991, at 11.

111. As sex crimes prosecutor Barbara Eganhauser notes, even young women with contemporary lifestyles often reject a woman's rape accusation out of fear. "To call another woman the victim

dence that the victim brought the rape on herself, usually by breaking social rules that are generally held applicable only to women. And when the rules classify women as dumb, loose, or weak on the one hand, and smart, discriminating, and strong on the other, it is not surprising that women who cannot step outside the rules to critique them attempt to validate themselves within them. The position of most Black women on this issue is particularly problematic, first, because of the extent to which they are consistently reminded that they are the group most vulnerable to sexual victimization, and second, because most Black women share the African-American community's general resistance to explicitly feminist analysis when it appears to run up against long-standing narratives that construct Black men as the primary victims of sexual racism.

C. *Rape and Intersectionality in Social Science*

The marginalization of Black women's experiences within the antiracist and feminist critiques of rape law are facilitated by social science studies that fail to examine the ways in which racism and sexism converge. Gary LaFree's *Rape and Criminal Justice: The Social Construction of Sexual Assault*[112] is a classic example. Through a study of rape prosecutions in Minneapolis, LaFree attempts to determine the validity of two prevailing claims regarding rape prosecutions. The first claim is that Black defendants face significant racial discrimination.[113] The second is that rape laws serve to regulate the sexual conduct of women by withholding from rape victims the ability to invoke sexual assault law when they have engaged in nontraditional behavior.[114] LaFree's compelling study concludes that law constructs rape in ways that continue to manifest both racial and gender domination.[115] Although Black women are positioned as victims of both the racism and the sexism that LaFree so persuasively details, his analysis is less illuminating than might be expected because Black women fall through the cracks of his dichotomized theoretical framework.

1. *Racial domination and rape.*

LaFree confirms the findings of earlier studies that show that race is a significant determinant in the ultimate disposition of rape cases. He finds that Black men accused of raping white women were treated most harshly, while Black offenders accused of raping Black women were treated most leniently.[116] These effects held true even after controlling for other factors

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of rape is to acknowledge the vulnerability in yourself. They go out at night, they date, they go to bars, and walk alone. To deny it is to say at the trial that women are not victims." Tyre, *supra* note 110.

112. G. LAFREE, *supra* note 86.

113. *Id.* at 49-50.

114. *Id.* at 50-51.

115. *Id.* at 237-40.

116. LaFree concludes that recent studies finding no discriminatory effect were inconclusive because they analyzed the effects of the defendant's race independently of the race of victim. The differential race effects in sentencing are often concealed by combining the harsher sentences given to

such as injury to the victim and acquaintance between victim and assailant.

> Compared to other defendants, blacks who were suspected of assaulting white women received more serious charges, were more likely to have their cases filed as felonies, were more likely to receive prison sentences if convicted, were more likely to be incarcerated in the state penitentiary (as opposed to a jail or minimum-security facility), and received longer sentences on the average.[117]

LaFree's conclusions that Black men are differentially punished depending on the race of the victim do not, however, contribute much to understanding the plight of Black rape victims. Part of the problem lies in the author's use of "sexual stratification" theory, which posits both that women are differently valued according to their race and that there are certain "rules of sexual access" governing who may have sexual contact with whom in this sexually stratified market.[118] According to the theory, Black men are discriminated against in that their forced "access" to white women is more harshly penalized than their forced "access" to Black women.[119] LaFree's analysis focuses on the harsh regulation of access by Black men to white women, but is silent about the relative subordination of Black women to

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Black men accused of raping white women with the more lenient treatment of Black men accused of raping Black women. *Id.* at 117, 140. Similar results were found in another study. *See* Anthony Walsh, *The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race,* 25 CRIMINOLOGY 153, 170 (1987) ("sentence severity mean for blacks who assaulted whites, which was significantly in excess of mean for whites who assaulted whites, was masked by the lenient sentence severity mean for blacks who assaulted blacks").

117. G. LAFREE, *supra* note 86, at 139-40.

118. Sexual stratification, according to LaFree, refers to the differential valuation of women according to their race and to the creation of "rules of sexual access" governing who may have contact with whom. Sexual stratification also dictates what the penalty will be for breaking these rules: The rape of a white woman by a Black man is seen as a trespass on the valuable property rights of white men and is punished most severely. *Id.* at 48-49.

The fundamental propositions of the sexual stratification thesis have been summarized as follows:

> (1) Women are viewed as the valued and scarce property of the men of their own race.
>
> (2) White women, by virtue of membership in the dominant race, are more valuable than black women.
>
> (3) The sexual assault of a white by a black threatens both the white man's "property rights" and his dominant social position. This dual threat accounts for the strength of the taboo attached to interracial sexual assault.
>
> (4) A sexual assault by a male of any race upon members of the less valued black race is perceived as nonthreatening to the status quo and therefore less serious.
>
> (5) White men predominate as agents of social control. Therefore, they have the power to sanction differentially according to the perceived threat to their favored social position.

Walsh, *supra* note 116, at 155.

119. I use the term "access" guardedly because it is an inapt euphemism for rape. On the other hand, rape is conceptualized differently depending on whether certain race-specific rules of sexual access are violated. Although violence is not explicitly written into the sexual stratification theory, it does work itself into the rules, in that sexual intercourse that violates the racial access rules is presumed to be coercive rather that voluntary. *See, e.g.,* Sims v. Balkam, 136 S.E. 2d 766, 769 (Ga. 1964) (describing the rape of a white woman by a Black man as "a crime more horrible than death"); Story v. State, 59 So. 480 (Ala. 1912) ("The consensus of public opinion, unrestricted to either race, is that a white woman prostitute is yet, though lost of virtue, above the even greater sacrifice of the voluntary submission of her person to the embraces of the other race."); Wriggins, *supra* note 97, at 125, 127.

white women. The emphasis on differential access to women is consistent with analytical perspectives that view racism primarily in terms of the inequality between men. From this prevailing viewpoint, the problem of discrimination is that white men can rape Black women with relative impunity while Black men cannot do the same with white women.[120] Black women are considered victims of discrimination only to the extent that white men can rape them without fear of significant punishment. Rather than being viewed as victims of discrimination in their own right, they become merely the means by which discrimination against Black men can be recognized. The inevitable result of this orientation is that efforts to fight discrimination tend to ignore the particularly vulnerable position of Black women, who must both confront racial bias *and* challenge their status as instruments, rather than beneficiaries, of the civil rights struggle.

Where racial discrimination is framed by LaFree primarily in terms of a contest between Black and white men over women, the racism experienced by Black women will only be seen in terms of white male access to them. When rape of Black women by white men is eliminated as a factor in the analysis, whether for statistical or other reasons, racial discrimination against Black women no longer matters, since LaFree's analysis involves comparing the "access" of white and Black men to white women.[121] Yet Black women are not discriminated against simply because white men can rape them with little sanction and be punished less than Black men who rape white women, or because white men who rape them are not punished the same as white men who rape white women. Black women are also discriminated against because intraracial rape of white women is treated more seriously than intraracial rape of Black women. But the differential protection that Black and white women receive against intraracial rape is not seen as racist because intraracial rape does not involve a contest between Black and white men. In other words, the way the criminal justice system treats rapes of Black women by Black men and rapes of white women by white men is not seen as raising issues of racism because Black and white men are not involved with each other's women.

In sum, Black women who are raped are racially discriminated against because their rapists, whether Black or white, are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women. And while sexual stratification theory does posit that women are stratified sexually by race, most applications of the theory focus on the inequality of male agents of rape rather than on the inequality of rape victims, thus marginalizing the racist

120. This traditional approach places Black women in a position of denying their own victimization, requiring Black women to argue that it is racist to punish Black men more harshly for raping white women than for raping Black women. However, in the wake of the Mike Tyson trial, it seems that many Black women are prepared to do just that. *See* notes 106-109 *supra* and accompanying text.

121. In fact, critics and commentators often use the term "interracial rape" when they are actually talking only about Black male/white female rape.

treatment of Black women by consistently portraying racism in terms of the relative power of Black and white men.

In order to understand and treat the victimization of Black women as a consequence of racism and sexism, it is necessary to shift the analysis away from the differential access of men and more toward the differential protection of women. Throughout his analysis, LaFree fails to do so. His sexual stratification thesis—in particular, its focus on the comparative power of male agents of rape—illustrates how the marginalization of Black women in antiracist politics is replicated in social science research. Indeed, the thesis leaves unproblematized the racist subordination of less valuable objects (Black women) to more valuable objects (white women), and it perpetuates the sexist treatment of women as property extensions of "their" men.

2. *Rape and gender subordination.*

Although LaFree does attempt to address gender-related concerns of women in his discussion of rape and the social control of women, his theory of sexual stratification fails to focus sufficiently on the effects of stratification on women.[122] LaFree quite explicitly uses a framework that treats race and gender as separate categories, giving no indication that he understands that Black women may fall in between or within both. The problem with LaFree's analysis lies not in its individual observations, which can be insightful and accurate, but in his failure to connect them and develop a broader, deeper perspective. His two-track framework makes for a narrow interpretation of the data because it leaves untouched the possibility that these two tracks may intersect. And it is those who reside at the intersection of gender and race discrimination—Black women—that suffer from this fundamental oversight.

LaFree attempts to test the feminist hypothesis that "the application of law to nonconformist women in rape cases may serve to control the behavior of all women."[123] This inquiry is important, he explains, because "if women who violate traditional sex roles and are raped are unable to obtain justice through the legal system, then the law may be interpreted as an institutional arrangement for reinforcing women's gender-role conformity."[124] He finds that "acquittals were more common and final sentences were shorter when nontraditional victim behavior was alleged."[125] Thus LaFree concludes that the victim's moral character was more important than victim injury, and was second only to the defendant's character. Overall, 82.3 percent of the traditional victim cases resulted in convictions and average sentences of

122. G. LAFREE, *supra* note 86, at 148. LaFree's transition between race and gender suggests that the shift might not loosen the frame enough to permit discussion of the combined effects of race and gender subordination on Black women. LaFree repeatedly separates race from gender, treating them as wholly distinguishable issues. *See, e.g., id.* at 147.

123. *Id.*

124. *Id.* at 151. LaFree interprets nontraditional behavior to include drinking, drug use, extramarital sex, illegitimate children, and "having a reputation as a 'partier,' a 'pleasure seeker' or someone who stays out late at night." *Id.* at 201.

125. *Id.* at 204.

43.38 months.[126] Only 50 percent of nontraditional victim cases led to convictions, with an average term of 27.83 months.[127] The effects of traditional and nontraditional behavior by Black women are difficult to determine from the information given and must be inferred from LaFree's passing comments. For example, LaFree notes that Black victims were evenly divided between traditional and nontraditional gender roles. This observation, together with the lower rate of conviction for men accused of raping Blacks, suggests that gender role behavior was not as significant in determining case disposition as it was in cases involving white victims. Indeed, LaFree explicitly notes that "the victim's *race* was . . . an important predictor of jurors' case evaluations."[128]

> Jurors were less likely to believe in a defendant's guilt when the victim was black. Our interviews with jurors suggested that part of the explanation for this effect was that jurors . . . were influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the assault. In a case involving the rape of a young black girl, one juror argued for acquittal on the grounds that a girl her age from 'that kind of neighborhood' probably wasn't a virgin anyway.[129]

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126. *Id.*

127. *Id.*

128. *Id.* at 219 (emphasis added). While there is little direct evidence that prosecutors are influenced by the race of the victim, it is not unreasonable to assume that since race is an important predictor of conviction, prosecutors determined to maintain a high conviction rate might be less likely to pursue a case involving a Black victim than a white one. This calculus is probably reinforced when juries fail to convict in strong cases involving Black victims. For example, the acquittal of three white St. John's University athletes for the gang rape of a Jamaican schoolmate was interpreted by many as racially influenced. Witnesses testified that the woman was incapacitated during much of the ordeal, having ingested a mixture of alcohol given to her by a classmate who subsequently initiated the assault. The jurors insisted that race played no role in their decision to acquit. "There was no race, we all agreed to it," said one juror; "They were trying to make it racial but it wasn't," said another. *Jurors: 'It Wasn't Racial,'* Newsday, July 25, 1991, at 4. Yet it is possible that race did influence on some level their belief that the woman consented to what by all accounts, amounted to dehumanizing conduct. *See, e.g.*, Carole Agus, *Whatever Happened to 'The Rules'*, Newsday, July 28, 1991, at 11 (citing testimony that at least two of the assailants hit the victim in the head with their penises). The jury nonetheless thought, in the words of its foreman, that the defendants' behavior was "obnoxious" but not criminal. *See* Sydney H. Schanberg, *Those 'Obnoxious' St. John's Athletes,* Newsday, July 30, 1991, at 79. One can imagine a different outcome had the races of the parties only been reversed.

Representative Charles Rangel (D-N.Y.) called the verdict "a rerun of what used to happen in the South." James Michael Brodie, *The St. John's Rape Acquittal: Old Wounds That Just Won't Go Away,* BLACK ISSUES IN HIGHER EDUC., Aug. 15, 1991, at 18. Denise Snyder, executive director of the D.C. Rape Crisis Center, commented:

> It's a historical precedent that white men can assault black women and get away with it. Woe be to the black man who assaults white women. All the prejudices that existed a hundred years ago are dormant and not so dormant, and they rear their ugly heads in situations like this. Contrast this with the Central Park jogger who was an upper-class white woman.

Judy Mann, *New Age, Old Myths,* Wash. Post, July 26, 1991, at C3 (quoting Snyder); *see* Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism,* 42 U. MIAMI L. REV. 75, 88 ("The cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women.").

129. *Id.* at 219-20 (citations omitted). Anecdotal evidence suggests that this attitude exists among some who are responsible for processing rape cases. Fran Weinman, a student in my seminar on race, gender, and the law, conducted a field study at the Rosa Parks Rape Crisis Center. During

LaFree also notes that "[o]ther jurors were simply less willing to believe the testimony of black complainants."[130] One white juror is quoted as saying, "Negroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."[131]

Despite explicit evidence that the race of the victim is significant in determining the disposition of rape cases, LaFree concludes that rape law functions to penalize nontraditional behavior in women.[132] LaFree fails to note that racial identification may itself serve as a proxy for nontraditional behavior. Rape law, that is, serves not only to penalize actual examples of nontraditional behavior but also to diminish and devalue women who belong to groups in which nontraditional behavior is perceived as common. For the Black rape victim, the disposition of her case may often turn less on her behavior than on her identity. LaFree misses the point that although white and Black women have shared interests in resisting the madonna/whore dichotomy altogether, they nevertheless experience its oppressive power differently. Black women continue to be judged by who they are, not by what they do.

3. *Compounding the marginalizations of rape.*

LaFree offers clear evidence that the race/sex hierarchy subordinates Black women to white women, as well as to men—both Black and white. However, the different effects of rape law on Black women are scarcely mentioned in LaFree's conclusions. In a final section, LaFree treats the devaluation of Black women as an aside—one without apparent ramifications for rape law. He concludes: "The more severe treatment of black offenders who rape white women *(or, for that matter, the milder treatment of black offenders who rape black women)* is probably best explained in terms of racial discrimination within a broader context of continuing social and physical segregation between blacks and whites."[133] Implicit throughout LaFree's

her study, she counseled and accompanied a 12-year-old Black rape survivor who became pregnant as a result of the rape. The girl was afraid to tell her parents, who discovered the rape after she became depressed and began to slip in school. Police were initially reluctant to interview the girl. Only after the girl's father threatened to take matters into his own hands did the police department send an investigator to the girl's house. The City prosecutor indicated that the case wasn't a serious one, and was reluctant to prosecute the defendant for statutory rape even though the girl was underage. The prosecutor reasoned, "After all, she looks 16." After many frustrations, the girl's family ultimately decided not to pressure the prosecutor any further and the case was dropped. *See* Fran Weinman, Racism and the Enforcement of Rape Law, 13-30 (1990) (unpublished manuscript) (on file with the *Stanford Law Review*).

130. G. LAFREE, *supra* note 86, at 220.

131. *Id.*

132. *Id.* at 226.

133. *Id.* at 239 (emphasis added). The lower conviction rates for those who rape Black women may be analogous to the low conviction rates for acquaintance rape. The central issue in many rape cases is proving that the victim did not consent. The basic presumption in the absence of explicit evidence of lack of consent is that consent exists. Certain evidence is sufficient to disprove that presumption, and the quantum of evidence necessary to prove nonconsent increases as the presumptions warranting an inference of consent increases. Some women—based on their character, identity, or dress—are viewed as more likely to consent than other women. Perhaps it is the combination of the sexual stereotypes about Black people along with the greater degree of familiarity presumed to

study is the assumption that Blacks who are subjected to social control are Black *men*. Moreover, the social control to which he refers is limited to securing the boundaries between Black males and white females. His conclusion that race differentials are best understood within the context of social segregation as well as his emphasis on the interracial implications of boundary enforcement overlook the intraracial dynamics of race and gender subordination. When Black men are leniently punished for raping Black women, the problem is *not* "best explained" in terms of social segregation but in terms of both the race- and gender-based devaluation of Black women. By failing to examine the sexist roots of such lenient punishment, LaFree and other writers sensitive to racism ironically repeat the mistakes of those who ignore race as a factor in such cases. Both groups fail to consider directly the situation of Black women.

Studies like LaFree's do little to illuminate how the interaction of race, class and nontraditional behavior affects the disposition of rape cases involving Black women. Such an oversight is especially troubling given evidence that many cases involving Black women are dismissed outright.[134] Over 20 percent of rape complaints were recently dismissed as "unfounded" by the Oakland Police Department, which did not even interview many, if not most, of the women involved.[135] Not coincidentally, the vast majority of the complainants were Black and poor; many of them were substance abusers or prostitutes.[136] Explaining their failure to pursue these complaints, the police remarked that "those cases were hopelessly tainted by women who are transient, uncooperative, untruthful or not credible as witnesses in court."[137]

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exist between Black men and Black women that leads to the conceptualization of such rapes as existing somewhere between acquaintance rape and stranger rape.

134. *See, e.g.*, Candy J. Cooper, *Nowhere to Turn for Rape Victims: High Proportion of Cases Tossed Aside by Oakland Police*, S.F. Examiner, Sept. 16, 1990, at A1 [hereinafter Cooper, *Nowhere to Turn*]. The most persuasive evidence that the images and beliefs that Oakland police officers hold toward rape victims influence the disposition of their cases is represented in two follow-up stories. *See* Candy J. Cooper, *A Rape Victim Vindicated*, S.F. Examiner, Sept. 17, 1990, at A1; Candy J. Cooper, *Victim of Rape, Victim of the System*, S.F. Examiner, Sept. 17, 1990, at A10. These stories contrasted the experiences of two Black women, both of whom had been raped by an acquaintance after smoking crack. In the first case, although there was little physical evidence and the woman was initially reluctant to testify, her rapist was prosecuted and ultimately convicted. In the second case, the woman was severely beaten by her assailant. Despite ample physical evidence and corroboration, and a cooperative victim, her case was not pursued. The former case was handled by the Berkeley, California, police department while the latter was handled by the Oakland police department. Perhaps the different approaches producing these disparate results can best be captured by the philosophies of the investigators. Officers in Berkeley "take every woman's case so seriously that not one [in 1989] was found to be false." *See* Candy J. Cooper, *Berkeley Unit Takes All Cases as Legitimate*, S.F. Examiner, Sept. 16, 1990, at A16. The same year, 24.4% of Oakland's rape cases were classified as "unfounded." Cooper, *Nowhere to Turn, supra*.

135. Cooper, *Nowhere to Turn, supra* note 134, at A10.

136. *Id.* ("Police, prosecutors, victims and rape crisis workers agree that most of the dropped cases were reported by women of color who smoked crack or were involved in other criminal, high-risk behavior, such as prostitution.").

137. *Id.* Advocates point out that because investigators work from a profile of the kind of case likely to get a conviction, people left out of that profile are people of color, prostitutes, drug users and people raped by acquaintances. This exclusion results in "a whole class of women . . . systematically being denied justice. Poor women suffer the most." *Id.*

The effort to politicize violence against women will do little to address the experiences of Black and other nonwhite women until the ramifications of racial stratification among women are acknowledged. At the same time, the antiracist agenda will not be furthered by suppressing the reality of intraracial violence against women of color. The effect of both these marginalizations is that women of color have no ready means to link their experiences with those of other women. This sense of isolation compounds efforts to politicize sexual violence within communities of color and permits the deadly silence surrounding these issues.

D. *Implications*

With respect to the rape of Black women, race and gender converge in ways that are only vaguely understood. Unfortunately, the analytical frameworks that have traditionally informed both antirape and antiracist agendas tend to focus only on single issues. They are thus incapable of developing solutions to the compound marginalization of Black women victims, who, yet again, fall into the void between concerns about women's issues and concerns about racism. This dilemma is complicated by the role that cultural images play in the treatment of Black women victims. That is, the most critical aspects of these problems may revolve less around the political agendas of separate race- and gender-sensitive groups, and more around the social and cultural devaluation of women of color. The stories our culture tells about the experience of women of color present another challenge—and a further opportunity—to apply and evaluate the usefulness of the intersectional critique.

III. Representational Intersectionality

With respect to the rape of Black women, race and gender converge so that the concerns of minority women fall into the void between concerns about women's issues and concerns about racism. But when one discourse fails to acknowledge the significance of the other, the power relations that each attempts to challenge are strengthened. For example, when feminists fail to acknowledge the role that race played in the public response to the rape of the Central Park jogger, feminism contributes to the forces that produce disproportionate punishment for Black men who rape white women, and when antiracists represent the case solely in terms of racial domination, they belittle the fact that women particularly, and all people generally, should be outraged by the gender violence the case represented.

Perhaps the devaluation of women of color implicit here is linked to how women of color are represented in cultural imagery. Scholars in a wide range of fields are increasingly coming to acknowledge the centrality of issues of representation in the reproduction of racial and gender hierarchy in the United States. Yet current debates over representation continually elide the intersection of race and gender in the popular culture's construction of images of women of color. Accordingly, an analysis of what may be termed

"representational intersectionality" would include both the ways in which these images are produced through a confluence of prevalent narratives of race and gender, as well as a recognition of how contemporary critiques of racist and sexist representation marginalize women of color.

In this section I explore the problem of representational intersectionality—in particular, how the production of images of women of color and the contestations over those images tend to ignore the intersectional interests of women of color—in the context of the controversy over 2 Live Crew, the Black rap group that was the subject of an obscenity prosecution in Florida in 1990. I oppose the obscenity prosecution of 2 Live Crew, but not for the same reasons as those generally offered in support of 2 Live Crew, and not without a sense of sharp internal division, of dissatisfaction with the idea that the "real issue" is race or gender, inertly juxtaposed. An intersectional analysis offers both an intellectual and political response to this dilemma. Aiming to bring together the different aspects of an otherwise divided sensibility, an intersectional analysis argues that racial and sexual subordination are mutually reinforcing, that Black women are commonly marginalized by a politics of race alone or gender alone, and that a political response to each form of subordination must at the same time be a political response to both.

A. *The 2 Live Crew Controversy*

In June 1990, the members of 2 Live Crew were arrested and charged under a Florida obscenity statute for their performance in an adults-only club in Hollywood, Florida. The arrests came just two days after a federal court judge ruled that the sexually explicit lyrics in 2 Live Crew's album, *As Nasty As They Wanna Be*,[138] were obscene.[139] Although the members of 2 Live Crew were eventually acquitted of charges stemming from the live performance, the federal court determination that *Nasty* is obscene still stands. This obscenity judgment, along with the arrests and subsequent trial, prompted an intense public controversy about rap music, a controversy that merged with a broader debate about the representation of sex and violence in popular music, about cultural diversity, and about the meaning of freedom of expression.

Two positions dominated the debate over 2 Live Crew. Writing in *Newsweek*, political columnist George Will staked out a case for the prosecu-

138. 2 LIVE CREW, AS NASTY AS THEY WANNA BE (Luke Records 1989).

139. In June 1990, a federal judge ruled that 2 Live Crew's lyrics referring to sodomy and sexual intercourse were obscene. Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 596 (S.D. Fla. 1990). The court held that the recording appealed to the prurient interest, was patently offensive as defined by state law, and taken as a whole, lacked serious literary, artistic or political value. *Id.* at 591-96. However, the court also held that the sheriff's office had subjected the recording to unconstitutional prior restraint and consequently granted 2 Live Crew permanent injunctive relief. *Id.* at 596-604. Two days after the judge declared the recording obscene, 2 Live Crew members were charged with giving an obscene performance at a club in Hollywood, Florida. *Experts Defend Live Crew Lyrics,* UPI, Oct. 19, 1990. Deputy sheriffs also arrested Charles Freeman, a merchant who was selling copies of the *Nasty* recording. *See* Gene Santoro, *How 2 B Nasty,* NATION, July 2, 1990, at 4. The 11th Circuit reversed the conviction, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

tion.[140] Will argued that *Nasty* was misogynistic filth and characterized 2 Live Crew's performance as a profoundly repugnant "combination of extreme infantilism and menace" that objectified Black women and represented them as suitable targets of sexual violence.[141] The most prominent defense of 2 Live Crew was advanced by Henry Louis Gates, Jr., Harvard professor and expert on African-American literature. In a *New York Times* op-ed piece and in testimony at the criminal trial, Gates contended that 2 Live Crew's members were important artists operating within and inventively elaborating upon distinctively African-American forms of cultural expression.[142] According to Gates, the characteristic exaggeration featured in 2 Live Crew's lyrics served a political end: to explode popular racist stereotypes in a comically extreme form.[143] Where Will saw a misogynistic assault on Black women by social degenerates, Gates found a form of "sexual carnivalesque" with the promise to free us from the pathologies of racism.[144]

Unlike Gates, there are many who do not simply "bust out laughing" upon first hearing 2 Live Crew.[145] One does a disservice to the issue to describe the images of women in *Nasty* as simply "sexually explicit."[146] Listening to *Nasty*, we hear about "cunts" being "fucked" until backbones are cracked, "asses" being "busted," "dicks" rammed down throats, and semen

140. *See* George F. Will, *America's Slide into the Sewer,* NEWSWEEK, July 30, 1990, at 64.

141. *Id.*

142. Henry Louis Gates, *2 Live Crew, Decoded,* N.Y. Times, June 19, 1990, at A23. Professor Gates, who testified on behalf of 2 Live Crew in the criminal proceeding stemming from their live performance, pointed out that the members of 2 Live Crew were expressing themselves in coded messages, and were engaging in parody. "For centuries, African-Americans have been forced to develop coded ways of communicating to protect them from danger. Allegories and double meanings, words redefined to mean their opposites . . . have enabled blacks to share messages only the initiated understood." *Id.* Similarly, parody is a component of "the street tradition called 'signifying' or 'playing the dozens,' which has generally been risqué, and where the best signifier or 'rapper' is the one who invents the most extravagant images, the biggest 'lies,' as the culture says." *Id.*

143. Testifying during 2 Live Crew's prosecution for obscenity, Gates argued that, "[o]ne of the brilliant things about these four songs is they embrace that stereotype [of blacks having overly large sexual organs and being hypersexed individuals]. They name it and they explode it. You can have no reaction but to bust out laughing. The fact that they're being sung by four virile young black men is inescapable to the audience." Laura Parker, *Rap Lyrics Likened to Literature; Witness in 2 Live Crew Trial Cites Art, Parody, Precedents,* Wash. Post, Oct. 20, 1990, at D1.

144. *Compare* Gates, *supra* note 142 (labeling 2 Live Crew's braggadocio as "sexual carnivalesque") *with* Will, *supra* note 140 (characterizing 2 Live Crew as "lower animals").

145. *See* note 143 *supra.*

146. Although I have elected to print some of the actual language from *Nasty,* much of the debate about this case has proceeded without any specific discussion of the lyrics. There are reasons one might avoid repeating such sexually explicit material. Among the more compelling ones is the concern that presenting lyrics outside of their fuller musical context hampers a complex understanding and appreciation of the art form of rap itself. Doing so also essentializes one dimension of the art work—its lyrics—to stand for the whole. Finally, focusing on the production of a single group may contribute to the impression that that group—here, 2 Live Crew—fairly represents all rappers.

Recognizing these risks, I believe that it is nonetheless important to incorporate excerpts from the Crew's lyrics into this analysis. Not only are the lyrics legally relevant in any substantive discussion of the obscenity prosecution, but also their inclusion here serves to reveal the depth of misogyny many African-American women must grapple with in order to defend 2 Live Crew. This is particularly true for African-American women who have been sexually abused by men in their lives. Of course, it is also the case that many African-American women who are troubled by the sexual degradation of Black women in some rap music can and do enjoy rap music generally.

splattered across faces. Black women are "cunts," "bitches," and all-purpose "hos."[147]

This is no mere braggadocio. Those who are concerned about high rates of gender violence in our communities must be troubled by the possible connections between these images and the tolerance for violence against women. Children and teenagers are listening to this music, and one cannot but be concerned that the range of acceptable behavior is being broadened by the constant propagation of misogynistic imagery. One must worry as well about young Black women who, like young men, are learning that their value lies between their legs. But the sexual value of women, unlike that of men, is a depletable commodity; boys become men by expending theirs, while girls become whores.

Nasty is misogynist, and an intersectional analysis of the case against 2 Live Crew should not depart from a full acknowledgement of that misogyny. But such an analysis must also consider whether an exclusive focus on issues of gender risks overlooking aspects of the prosecution of 2 Live Crew that raise serious questions of racism.

B. *The Obscenity Prosecution of 2 Live Crew*

An initial problem with the obscenity prosecution of 2 Live Crew was its apparent selectivity.[148] Even the most superficial comparison between 2 Live Crew and other mass-marketed sexual representations suggests the likelihood that race played some role in distinguishing 2 Live Crew as the first group ever to be prosecuted for obscenity in connection with a musical recording, and one of a handful of recording artists to be prosecuted for a live performance. Recent controversies about sexism, racism, and violence in popular culture point to a vast range of expression that might have provided targets for censorship, but was left untouched. Madonna has acted out masturbation, portrayed the seduction of a priest, and insinuated group sex on stage,[149] but she has never been prosecuted for obscenity. While 2 Live Crew was performing in Hollywood, Florida, Andrew Dice Clay's recordings were being sold in stores and he was performing nationwide on HBO.

147. *See generally* 2 LIVE CREW, *supra* note 138; N.W.A., STRAIGHT OUTTA COMPTON (Priority Records, Inc. 1988); N.W.A., N.W.A. & THE POSSE (Priority Records, Inc. 1989).

148. There is considerable support for the assertion that prosecution of 2 Live Crew and other rap groups is a manifestation of selective repression of Black expression which is no more racist or sexist than expression by non-Black groups. The most flagrant example is Geffen Records' decision not to distribute an album by the rap act, the Geto Boys. Geffen explained that "the extent to which the Geto Boys album glamorizes and possibly endorses violence, racism, and misogyny compels us to encourage Def American (the group's label) to select a distributor with a greater affinity for this musical expression." Greg Ket, *No Sale, Citing Explicit Lyrics, Distributor Backs Away From Geto Boys Album,* Chicago Trib., Sept. 13, 1990, § 5, at 9. Geffen apparently has a greater affinity for the likes of Andrew Dice Clay and Guns 'N Roses, non-Black acts which have come under fire for racist and sexist comments. Despite criticism of Guns 'N Roses for lyrics which include "niggers" and Clay's "joke" about Native Americans (see note 150 *infra*), Geffen continued to distribute their recordings. *Id.*

149. *See* Derrick Z. Jackson, *Why Must Only Rappers Take the Rap?,* Boston Globe, June 17, 1990, at A17.

Well-known for his racist "humor," Clay is also comparable to 2 Live Crew in sexual explicitness and misogyny. In his show, for example, Clay offers, "Eenie, meenie, minee, mo / Suck my [expletive] and swallow slow," and "Lose the bra, bitch."[150] Moreover, graphic sexual images—many of them violent—were widely available in Broward County where the performance and trial took place. According to the testimony of a Broward County vice detective, "nude dance shows and adult bookstores are scattered throughout the county where 2 Live Crew performed."[151] Given the availability of other forms of sexually explicit "entertainment" in Broward County, Florida, one might wonder how 2 Live Crew could have been seen as uniquely obscene by the lights of the "community standards" of the county.[152] After all, patrons of certain Broward County clubs "can see women dancing with at least their breasts exposed," and bookstore patrons can "view and purchase films and magazines that depict vaginal, oral and anal sex, homosexual sex and group sex."[153] In arriving at its finding of obscenity, the court placed little weight on the available range of films, magazines, and live shows as evidence of the community's sensibilities. Instead, the court apparently accepted the sheriff's testimony that the decision to single out *Nasty* was based on the number of complaints against 2 Live Crew "communicated by telephone calls, anonymous messages, or letters to the police."[154]

Evidence of this popular outcry was never substantiated. But even if it

150. *Id.* at A20. Not only does Clay exhibit sexism comparable to, if not greater than, that of 2 Live Crew, he also intensifies the level of hatred by flaunting racism: " 'Indians, bright people, huh? They're still livin' in [expletive] tepees. They deserved it. They're dumb as [expletive].' " *Id.* (quoting Clay).

One commentator asked, "What separates Andrew Dice Clay and 2 Live Crew? Answer: Foulmouthed Andrew Dice Clay is being chased by the producers of 'Saturday Night Live.' Foulmouthed 2 Live Crew are being chased by the police." *Id.* at A17. When Clay did appear on Saturday Night Live, a controversy was sparked because cast member Nora Dunn and musical guest Sinead O'Connor refused to appear. Jean Seligmann, *Dicey Problem,* NEWSWEEK, May 21, 1990, at 95.

151. Jane Sutton, *Untitled, 2 Live Crew,* UPI, Oct. 18, 1990.

152. Prosecuting 2 Live Crew but not Clay might be justified by the argument that there is a distinction between "obscenity," defined as expressions of prurient interests, and "pornography" or "racist speech," defined as expressions of misogyny and race hatred, respectively. 2 Live Crew's prurient expressions could be prosecuted as constitutionally unprotected obscenity while Clay's protected racist and misogynistic expressions could not. Such a distinction has been subjected to critical analysis. *See* Catharine A. MacKinnon, *Not A Moral Issue,* 2 YALE L. & POL'Y REV. 321 (1984). The distinction does not explain why other expressions which appeal more directly to "prurient interests" are not prosecuted. Further, 2 Live Crew's prurient appeal is produced, at least in part, through the degradation of women. Accordingly, there can be no compelling distinction between the appeal Clay makes and that of 2 Live Crew.

153. Sutton, *supra* note 151.

154. Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 589 (S.D. Fla 1990). The court rejected the defendants' argument that "admission of other sexually explicit works" is entitled to great weight in determining community standards and held that "this type of evidence does not even have to be considered even if the comparable works have been found to be nonobscene." *Id.* (citing Hamling v. United States, 418 U.S. 82, 126-27 (1974)). Although the court gave "some weight" to sexually explicit writings in books and magazines, Eddie Murphy's audio tape of *Raw,* and Andrew Dice Clay's tape recording, it did not explain why these verbal messages "analogous to the format in the *Nasty* recording" were not obscene as well. *Id.*

were, the case for selectivity would remain.[155] The history of social repression of Black male sexuality is long, often violent, and all too familiar.[156] Negative reactions to the sexual conduct of Black men have traditionally had racist overtones, especially where that conduct threatens to "cross over" into the mainstream community.[157] So even if the decision to prosecute did reflect a widespread community perception of the purely prurient character of 2 Live Crew's music, that perception itself might reflect an established pattern of vigilante attitudes directed toward the sexual expression of Black men.[158] In short, the appeal to community standards does not undercut a

155. One report suggested that the complaint came from a lawyer, Jack Thompson. Thompson has continued his campaign, expanding his net to include rap artists the Geto Boys and Too Short. Sara Rimer, *Obscenity or Art? Trial on Rap Lyrics Opens,* N.Y. Times, Oct. 17, 1990, at A1. Despite the appearance of selective enforcement, it is doubtful that any court would be persuaded that the requisite racial motivation was proved. Even evidence of racial disparity in the heaviest of criminal penalties—the death sentence—is insufficient to warrant relief absent specific evidence of discrimination in the defendant's case. *See* McClesky v. Kemp, 481 U. S. 279 (1987).

156. *See* notes 101-104 *supra* and accompanying text.

157. Some critics speculate that the prosecution of 2 Live Crew has less to do with obscenity than with the traditional policing of Black males, especially as it relates to sexuality. Questioning whether 2 Live Crew is more obscene than Andrew Dice Clay, Gates states, "Clearly, this rap group is seen as more threatening than others that are just as sexually explicit. Can this be completely unrelated to the specter of the young black male as a figure of sexual and social disruption, the very stereotypes that 2 Live Crew seems determined to undermine?" Gates, *supra* note 142. Clarence Page makes a similar point, speculating that "2 Live Crew has become the scapegoat for widespread frustration shared by many blacks and whites over a broad range of social problems that seem to have gotten out of control." Clarence Page, *Culture, Taste and Standard-Setting,* Chicago Trib., Oct. 7, 1990, § 4, at 3. Page implies, however, that this explanation is something more than or different from racism. "Could it be (drumroll, please) racism? *Or* could it be fear?" *Id.* (emphasis added). Page's definition of racism apparently does not include the possibility that it is racist to attach one's societal fears and discomforts to a subordinated and highly stigmatized "other." In other words, scapegoating, at least in this country, has traditionally been, and still is, considered racist, whatever the source of the fear.

158. Even in the current era, this vigilantism is sometimes tragically expressed. Yusef Hawkins became a victim of it in New York on August 23, 1989, when he was killed by a mob of white men who believed themselves to be protecting "their" women from being taken by Black men. UPI, May 18, 1990. Jesse Jackson called Hawkins's slaying a "racially and sexually motivated lynching" and compared it to the 1955 murder of black Mississippi youth Emmett Till, who was killed by men who thought he whistled at a white woman. *Id.* Even those who denied the racial overtones of Hawkins's murder produced alternative explanations that were part of the same historical narrative. Articles about the Hawkins incident focused on Gina Feliciano as the cause of the incident, attacking her credibility. *See, e.g.,* Lorrin Anderson, *Cracks in the Mosaic,* NAT'L REV., June 25, 1990, at 36. "Gina instigated the trouble . . . . Gina used drugs and apparently still does. She dropped out of a rehabilitation program before testifying for the prosecution at trial" and was later picked up by the police and "charged with possession of cocaine—15 vials of crack fell out of her purse, police said, and she had a crack pipe in her bra." *Id.* at 37. At trial, defense attorney Stephen Murphy claimed that Feliciano "lied, . . . perjured herself . . . . She divides, polarizes eight million people . . . . It's despicable what she did, making this a racial incident." *Id.* (quoting Murphy). But feminists attacked the "scapegoating" of Feliciano, one stating, "Not only are women the victims of male violence, they're blamed for it." Alexis Jetter, *Protesters Blast Scapegoat Tactics,* Newsday, Apr. 3, 1990, at 29 (quoting Francoise Jacobsohn, president of the New York chapter of the National Organization for Women). According to Merle Hoffman, founder of the New York Pro-Choice Coalition, "Gina's personal life has nothing to do with the crime, . . . [b]ut rest assured, they'll go into her sexual history. . . . It's all part of the 'she made me do it' idea." *Id.* (quoting Hoffman). And New York columnist Ilene Barth observed that

> Gender . . . has a role in New York's race war. Fingers were pointed in Bensonhurst last week at a teenage girl . . . [who] never harmed anyone . . . . Word of her invitation offended local studs, sprouting macho-freaks determined to own local turf and the young

concern about racism; rather, it underscores that concern.

A second troubling dimension of the case brought against 2 Live Crew was the court's apparent disregard for the culturally rooted aspects of 2 Live Crew's music. Such disregard was essential to a finding of obscenity given the third prong of the *Miller* test requiring that material judged obscene must, taken as a whole, lack literary, artistic, or political value.[159] 2 Live Crew argued that this criterion of the *Miller* test was not met in the case of *Nasty* since the recording exemplified such African-American cultural modes as "playing the dozens," "call and response," and "signifying."[160] The court denied each of the group's claims of cultural specificity, recharacterizing in more generic terms what 2 Live Crew contended was distinctly African American. According to the court, "playing the dozens" is "commonly seen in adolescents, especially boys, of all ages"; "boasting" appears to be "part of the universal human condition"; and the cultural origins of "call and response"—featured in a song on *Nasty* about fellatio in which competing groups chanted "less filling" and "tastes great"—were to be found in a Miller beer commercial, not in African-American cultural tradition.[161] The possibility that the Miller beer commercial may have itself evolved from an African-American cultural tradition was apparently lost on the court.

In disregarding the arguments made on behalf of 2 Live Crew, the court denied that the form and style of *Nasty* and, by implication, rap music in general had any artistic merit. This disturbing dismissal of the cultural attributes of rap and the effort to universalize African-American modes of expression are a form of colorblindness that presumes to level all significant racial and ethnic differences in order to pass judgment on intergroup conflicts. The court's analysis here also manifests a frequently encountered strategy of cultural appropriation. African-American contributions that have been accepted by the mainstream culture are eventually absorbed as

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females in their ethnic group. . . . [W]omen have not made the headlines as part of marauding bands intent on racial assault. But they number among their victims."

Ilene Barth, *Let the Women of Bensonhurst Lead Us in a Prayer Vigil,* Newsday, Sept. 3, 1989, at 10.

159. The Supreme Court articulated its standard for obscenity in Miller v. California, 413 U.S. 15 (1973), *reh'g denied,* 414 U.S. 881 (1973). The Court held that the basic guidelines for the trier of fact were (a) "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (b) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citations omitted).

160. *See* Gates, *supra* note 142.

161. Skywalker Records, Inc., v. Navarro, 739 F. Supp. 578, 595 (S.D. Fla. 1990). The commercial appropriation of rap is readily apparent in pop culture. Soft drink and fast food commercials now feature rap even though the style is sometimes presented without its racial/cultural face. Dancing McDonald's french fries and the Pillsbury Doughboy have gotten into the rap act. The crossover of rap is not the problem; instead, it is the tendency, represented in *Skywalker,* to reject the cultural origins of language and practices which are disturbing. This is part of an overall pattern of cultural appropriation that predates the rap controversy. Most starkly illustrated in music and dance, cultural trailblazers like Little Richard and James Brown have been squeezed out of their place in popular consciousness to make room for Elvis Presley, Mick Jagger, and others. The meteoric rise of white rapper Vanilla Ice is a contemporary example.

simply "American" or found to be "universal." Other modes associated with African-American culture that resist absorption remain distinctive and are either neglected or dismissed as "deviant."

The court apparently rejected as well the possibility that even the most misogynistic rap may have political value as a discourse of resistance. The element of resistance found in some rap is in making people uncomfortable, thereby challenging received habits of thought and action. Such challenges are potentially political, as are more subversive attempts to contest traditional rules by becoming what is most feared.[162] Against a historical backdrop in which the Black male as social outlaw is a prominent theme, "gangsta' rap" might be taken as a rejection of a conciliatory stance aimed at undermining fear through reassurance, in favor of a more subversive form of opposition that attempts to challenge the rules precisely by becoming the very social outlaw that society fears and attempts to proscribe. Rap representations celebrating an aggressive Black male sexuality can be easily construed as discomforting and oppositional. Not only does reading rap in this way preclude a finding that *Nasty* lacks political value, it also defeats the court's assumption that the group's intent was to appeal solely to prurient interests. To be sure, these considerations carry greater force in the case of other rap artists, such as N.W.A., Too Short, Ice Cube, and The Geto Boys, all of whose standard fare includes depictions of violent assault, rape, rape-murder, and mutilation.[163] In fact, had these other groups been targeted rather than the comparatively less offensive 2 Live Crew, they might have successfully defeated prosecution. The graphic violence in their representations militate against a finding of obscenity by suggesting an intent not to appeal to prurient interests but instead to more expressly political ones. So long as violence is seen as distinct from sexuality, the prurient interest requirement may provide a shield for the more violent rap artists. However, even this somewhat formalistic dichotomy may provide little solace to such rap artists given the historical linkages that have been made between Black

162. Gates argues that 2 Live Crew is undermining the "specter of the young black male as a figure of sexual and social disruption." Gates, *supra* note 142. Faced with "racist stereotypes about black sexuality," he explains, "you can do one of two things: you can disavow them or explode them with exaggeration." *Id.* 2 Live Crew, Gates suggests, has chosen to burst the myth by parodying exaggerations of the "oversexed black female and male." *Id.*

163. Other rap acts that have been singled out for their violent lyrics include Ice Cube, the Geto Boys, and Too Short. *See, e.g.*, ICE CUBE, KILL AT WILL (Gangsta Boogie Music (ASCAP)/ UJAMA Music, Inc. 1990); GETO BOYS, THE GETO BOYS (N-The-Water Music, Inc. (ASCAP) 1989); TOO SHORT, SHORT DOG'S IN THE HOUSE (RCA Records 1990). Not all rap lyrics are misogynist. Moreover, even misogynist acts also express a political world view. The differences among rap groups and the artistic value of the medium is sometimes overlooked by mainstream critics. *See, e.g.*, Jerry Adler, *The Rap Attitude*, NEWSWEEK, Mar. 19, 1990, at 56, 57 (labeling rap as a "bombastic, self-aggrandizing" by-product of the growing "Culture of Attitude"). Adler's treatment of rap set off a storm of responses. *See, e.g.*, Patrick Goldstein, *Pop Eye: Rappers Don't Have Time For Newsweek's Attitude*, L.A. Times, Mar. 25, 1990, at 90 (Magazine). Said Russell Simmons, chairman of Def-Jam Records, rap's most successful label, "Surely the moral outrage in [Adler's] piece would be better applied to contemporary American crises in health care, education, homelessness .... Blaming the victims—in this case America's black working class and underclass—is never a very useful approach to problem-solving." *Id.* (quoting Simmons).

male sexuality and violence. Indeed, it has been the specter of violence that surrounds images of Black male sexuality that presented 2 Live Crew as an acceptable target of an obscenity prosecution in a field that included Andrew Dice Clay and countless others.

The point here is not that the distinction between sex and violence should be rigorously maintained in determining what is obscene or, more specifically, that rap artists whose standard fare is more violent ought to be protected. To the contrary, these more violent groups should be much more troubling than 2 Live Crew. My point instead is to suggest that obscenity prosecutions of rap artists do nothing to protect the interests of those most directly implicated in rap—Black women. On the one hand, prevailing notions of obscenity separate out sexuality from violence, which has the effect of shielding the more violently misogynistic groups from prosecution; on the other, historical linkages between images of Black male sexuality and violence permit the singling out of "lightweight" rappers for prosecution among all other purveyors of explicit sexual imagery.

C. *Addressing the Intersectionality*

Although Black women's interests were quite obviously irrelevant in the 2 Live Crew obscenity judgment, their images figured prominently in the public case supporting the prosecution. George Will's *Newsweek* essay provides a striking example of how Black women's bodies were appropriated and deployed in the broader attack against 2 Live Crew. Commenting on "America's Slide into the Sewers," Will laments that

> America today is capable of terrific intolerance about smoking, or toxic waste that threatens trout. But only a deeply confused society is more concerned about protecting lungs than minds, trout than black women. We legislate against smoking in restaurants; singing "Me So Horny" is a constitutional right. Secondary smoke is carcinogenic; celebration of torn vaginas is "mere words."[164]

Lest one be misled into thinking that Will has become an ally of Black women, Will's real concern is suggested by his repeated references to the Central Park jogger assault. Will writes, "Her face was so disfigured a friend took 15 minutes to identify her. 'I recognized her ring.' Do you recognize the relevance of 2 Live Crew?"[165] While the connection between the threat of 2 Live Crew and the image of the Black male rapist was suggested subtly in the public debate, it is blatant throughout Will's discussion. Indeed, it bids to be the central theme of the essay. "Fact: Some members of a particular age and societal cohort—the one making 2 Live Crew rich—stomped and raped the jogger to the razor edge of death, for the fun of it."[166] Will directly indicts 2 Live Crew in the Central Park jogger rape through a fictional dialogue between himself and the defendants. Responding to one de-

164. *See* Will, *supra* note 140.
165. *Id.*
166. *Id.*

fendant's alleged confession that the rape was fun, Will asks, "Where can you get the idea that sexual violence against women is fun? From a music store, through Walkman earphones, from boom boxes blaring forth the rap lyrics of 2 Live Crew."[167] Since the rapists were young Black males and *Nasty* presents Black men celebrating sexual violence, 2 Live Crew was in Central Park that night, providing the underlying accompaniment to a vicious assault. Ironically, Will rejected precisely this kind of argument in the context of racist speech on the ground that efforts to link racist speech to racist violence presume that those who hear racist speech will mindlessly act on what they hear.[168] Apparently, the certain "social cohort" that produces and consumes racist speech is fundamentally different from the one that produces and consumes rap music.

Will invokes Black women—twice—as victims of this music. But if he were really concerned with the threat of 2 Live Crew to Black women, why does the Central Park jogger figure so prominently in his argument? Why not the Black woman in Brooklyn who was gang-raped and then thrown down an airshaft? In fact, Will fails even to mention Black victims of sexual violence, which suggests that Black women simply function for Will as stand-ins for white women. Will's use of the Black female body to press the case against 2 Live Crew recalls the strategy of the prosecutor in Richard Wright's novel *Native Son*. Bigger Thomas, Wright's Black male protagonist, is on trial for killing Mary Dalton, a white woman. Because Bigger burned her body, it cannot be established whether Bigger had sexually assaulted her, so the prosecutor brings in the body of Bessie, a Black woman raped by Bigger and left to die, in order to establish that Bigger had raped Mary Dalton.[169]

These considerations about selectivity, about the denial of cultural specificity, and about the manipulation of Black women's bodies convince me that race played a significant, if not determining, role in the shaping of the case against 2 Live Crew. While using antisexist rhetoric to suggest a concern for women, the attack on 2 Live Crew simultaneously endorses traditional readings of Black male sexuality. The fact that the objects of these violent sexual images are Black women becomes irrelevant in the representation of the threat in terms of the Black rapist/white victim dyad. The Black male becomes the agent of sexual violence and the white community becomes his potential victim. The subtext of the 2 Live Crew prosecution thus becomes a re-reading of the sexualized racial politics of the past.

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167. *Id.*

168. *See* George F. Will, *On Campuses, Liberals Would Gag Free Speech,* Newsday, Nov. 6, 1989, at 62.

169. RICHARD WRIGHT, NATIVE SON 305-08 (Perennial Library ed. 1989) (1940). Wright wrote,

> Though he had killed a black girl and a white girl, he knew that it would be for the death of the white girl that he would be punished. The black girl was merely "evidence." And under it all he knew that white people did not really care about Bessie's being killed. White people never searched for Negroes who killed other Negroes.

Id. at 306-07.

While concerns about racism fuel my opposition to the obscenity prosecution of 2 Live Crew, the uncritical support for, and indeed celebration of, 2 Live Crew by other opponents of the prosecution is extremely troubling as well. If the rhetoric of antisexism provided an occasion for racism, so, too, the rhetoric of antiracism provided an occasion for defending the misogyny of 2 Live Crew. That defense took two forms, one political, the other cultural, both advanced prominently by Henry Louis Gates. Gates's political defense argues that 2 Live Crew advances the antiracist agenda by exaggerating stereotypes of Black male sexuality "to show how ridiculous [they] are."[170] The defense contends that by highlighting to the extreme the sexism, misogyny, and violence stereotypically associated with Black male sexuality, 2 Live Crew represents a postmodern effort to "liberate" us from the racism that perpetuates these stereotypes.[171]

Gates is right to contend that the reactions of Will and others confirm that the racial stereotypes still exist, but even if 2 Live Crew intended to explode these stereotypes, their strategy was misguided. Certainly, the group wholly miscalculated the reaction of their white audience, as Will's polemic amply illustrates. Rather than exploding stereotypes, as Gates suggests, 2 Live Crew, it seems most reasonable to argue, was simply (and unsuccessfully) trying to be funny. After all, trading in sexual stereotypes has long been a means to a cheap laugh, and Gates's cultural defense of 2 Live Crew recognizes as much in arguing the identification of the group with a distinctly African-American cultural tradition of the "dozens" and other forms of verbal boasting, raunchy jokes, and insinuations of sexual prowess, all of which were meant to be laughed at and to gain for the speaker respect for his word wizardry, and not to disrupt conventional myths of Black sexuality.[172] Gates's cultural defense of 2 Live Crew, however, recalls similar efforts on behalf of racist humor, which has sometimes been defended as antiracist—an effort to poke fun at or to show the ridiculousness of racism.

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170. Gates, *supra* note 142. Gates's defense of 2 Live Crew portrayed the group as engaging in postmodern guerrilla warfare against racist stereotypes of Black sexuality. Says Gates, "2 Live Crew's music exaggerates stereotypes of black men and women to show how ridiculous those portrayals are. One of the brilliant things about these songs is that they embrace the stereotypes . . . . It's ridiculous. That's why we laugh about them. That is one of the things I noticed in the audience's reaction. There is no undertone of violence. There's laughter, there's joy." *Id.* Gates repeats the celebratory theme elsewhere, linking 2 Live Crew to Eddie Murphy and other Black male performers because

> they're saying all the things that we couldn't say even in the 1960's about our own excesses, things we could only whisper in dark rooms. They're saying we're going to explode all these sacred cows. It's fascinating, and it's upsetting everybody—not just white people but black people. But it's a liberating moment.

John Pareles, *An Album is Judged Obscene; Rap: Slick, Violent, Nasty and, Maybe Hopeful,* N. Y. Times, June 17, 1990, at 1 (quoting Gates). For a cogent intersectional analysis of Eddie Murphy's popular appeal, see Herman Beavers, The Cool Pose: Intersectionality, Masculinity and Quiescence in the Comedy and Films of Richard Pryor and Eddie Murphy (unpublished manuscript) (on file with the *Stanford Law Review*).

171. Gates and others who defend 2 Live Crew as postmodern comic heroes tend to dismiss or downplay the misogyny represented in their rap. Said Gates, "Their sexism is so flagrant, however, that it almost cancels itself out in a hyperbolic war between the sexes." Gates, *supra* note 142.

172. *See* note 142 *supra*.

More simply, racist humor has often been excused as "just joking"—even racially motivated assaults have been defended as simple pranks. Thus the racism of an Andrew Dice Clay could be defended in either mode as an attempt to explode racist stereotypes or as simple humor not meant to be taken seriously. Implicit in these defenses is the assumption that racist representations are injurious only if they are intended to injure, or to be taken literally, or are devoid of some other nonracist objective. It is highly unlikely that this rationale would be accepted by Blacks as a persuasive defense of Andrew Dice Clay. Indeed, the Black community's historical and ongoing criticism of such humor suggests widespread rejection of these arguments.

The claim that a representation is meant simply as a joke may be true, but the joke functions as humor within a specific social context in which it frequently reinforces patterns of social power. Though racial humor may sometimes be intended to ridicule racism, the close relationship between the stereotypes and the prevailing images of marginalized people complicates this strategy. And certainly, the humorist's positioning vis-á-vis a targeted group colors how the group interprets a potentially derisive stereotype or gesture. Although one could argue that Black comedians have broader license to market stereotypically racist images, that argument has no force here. 2 Live Crew cannot claim an in-group privilege to perpetuate misogynist humor against Black women: the members of 2 Live Crew are not Black women, and more importantly, they enjoy a power relationship over them.

Humor in which women are objectified as packages of bodily parts to serve whatever male-bonding/male-competition needs men please subordinates women in much the same way that racist humor subordinates African Americans. Claims that incidences of such humor are just jokes and are not meant to injure or to be taken literally do little to blunt their demeaning quality—nor, for that matter, does the fact that the jokes are told within an intragroup cultural tradition.

The notion that sexism can serve antiracist ends has proponents ranging from Eldridge Cleaver[173] to Shahrazad Ali,[174] all of whom seem to expect Black women to serve as vehicles for the achievement of a "liberation" that functions to perpetuate their own subordination.[175] Claims of cultural specificity similarly fail to justify toleration of misogyny.[176] While the cultural

173. *See* note 47 *supra*.

174. *See* notes 37-42 *supra* and accompanying text.

175. Gates occasionally claims that both Black male and Black female images are exploded by 2 Live Crew. Even if Gates's view holds true for Black male images, the strategy does not work—and was not meant to work—for Black women. Black women are not the actors in 2 Live Crew's strategy; they are acted upon. To challenge the images of Black women, Black women themselves would have to embrace them, not simply permit Black men to "act out" on them. The only Black female rap groups that might conceivably claim such a strategy are Bytches With Problems and Hoes With Attitudes. Yet, having listened to the music of these Black female rap groups, I am not sure that exploding racist images is either their intent or effect. This is not to say, of course, that all Black female rap is without its strategies of resistance. *See* note 179 *infra*.

176. It is interesting that whether those judging the 2 Live Crew case came out for or against,

defense of 2 Live Crew has the virtue of recognizing merit in a form of music common to the Black community, something George Will and the court that convicted 2 Live Crew were all too glib in dismissing, it does not eliminate the need to question both the sexism within the tradition it defends and the objectives to which the tradition has been pressed. The fact that playing the dozens, say, is rooted in the Black cultural tradition, or that themes represented by mythic folk heroes such as "Stackolee" are African American does not settle the question of whether such practices oppress Black women.[177] Whether these practices are a distinctive part of the African-American cultural tradition is decidedly beside the point. The real question is how subordinating aspects of these practices play out in the lives of people in the community, people who share the benefits as well as the burdens of a common culture. With regard to 2 Live Crew, while it may be true that the Black community has accepted the cultural forms that have evolved into rap, that acceptance should not preclude discussion of whether the misogyny within rap is itself acceptable.

With respect to Gates's political and cultural defenses of 2 Live Crew, then, little turns on whether the "word play" performed by the Crew is a postmodern challenge to racist sexual mythology or simply an internal group practice that crossed over into mainstream America. Both defenses are problematic because they require Black women to accept misogyny and its attendant disrespect and exploitation in the service of some broader group objective, whether it be pursuing an antiracist political agenda or maintaining the cultural integrity of the Black community. Neither objective obligates Black women to tolerate such misogyny.

Likewise, the superficial efforts of the anti-2 Live Crew movement to link

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all seemed to reject the notion that race has anything to do with their analysis. *See* Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 594-96 (S.D. Fla 1990) (rejecting defense contention that 2 Live Crew's *Nasty* had artistic value as Black cultural expression); *see also* Sara Rimer, *Rap Band Members Found Not Guilty in Obscenity Trial,* N.Y. Times, Oct. 21, 1990, at A30 ("Jurors said they did not agree with the defense's assertion that the 2 Live Crew's music had to be understood in the context of black culture. They said they thought race had nothing to do with it."). Clarence Page also rejects the argument that 2 Live Crew's NASTY must be valued as Black cultural expression: "I don't think 2 Live Crew can be said to represent black culture any more than, say, Andrew Dice Clay can be said to represent white culture. Rather, I think both represent a lack of culture." *See* Page, *supra* note 157.

177. Gay men are also targets of homophobic humor that might be defended as culturally specific. Consider the homophobic humor of such comedians as Eddie Murphy, Arsenio Hall, and Damon Wayans and David Alan Grier, the two actors who currently portray Black gay men on the television show *In Living Color.* Critics have linked these homophobic representations of Black gay men to patterns of subordination within the Black community. Black gay filmmaker Marlon Riggs has argued that such caricatures discredit Black gay men's claim to Black manhood, presenting them as "game for play, to be used, joked about, put down, beaten, slapped, and bashed, not just by illiterate homophobic thugs in the night, but by black American culture's best and brightest." Marlon Riggs, *Black Macho Revisited: Reflections of a SNAP! Queen,* in BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN 253, 254 (Essex Hemphill ed. 1991); *see also* Blair Fell, *Gayface/Blackface: Parallels of Oppression,* NYQ, Apr. 5, 1992, at 32 (drawing parallels between gayface and blackface and arguing that "gayfaced contemporary comedy . . . serves as a tool to soothe the guilty consciences and perpetuate the injustices of gay-bashing America. After all, laughing at something barely human is easier than dealing with flying bullets, split skulls, dying bodies and demands for civil rights.").

the prosecution of the Crew to the victimization of Black women had little to do with Black women's lives. Those who deployed Black women in the service of condemning 2 Live Crew's misogynist representations did not do so in the interest of empowering Black women; rather, they had other interests in mind, the pursuit of which was racially subordinating. The implication here is not that Black feminists should stand in solidarity with the supporters of 2 Live Crew. The spirited defense of 2 Live Crew was no more about defending the entire Black community than the prosecution was about defending Black women. After all, Black women whose very assault is the subject of the representation can hardly regard the right to be represented as bitches and whores as essential to their interest. Instead, the defense primarily functions to protect 2 Live Crew's prerogative to be as misogynistic as they want to be.[178]

Within the African-American political community, Black women will have to make it clear that patriarchy is a critical issue that negatively affects the lives not only of Black women, but of Black men as well. Doing so would help reshape traditional practices so that evidence of racism would not constitute sufficient justification for uncritical rallying around misogynistic politics and patriarchal values. Although collective opposition to racist practice has been and continues to be crucially important in protecting Black interests, an empowered Black feminist sensibility would require that the terms of unity no longer reflect priorities premised upon the continued marginalization of Black women.

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178. Although much of the sexism that is voiced in rap pervades the industry, Black female rappers have gained a foothold and have undertaken various strategies of resistance. For some, their very presence in rap challenges prevailing assumptions that rap is a Black male tradition. *See* Tricia Rose, *One Queen, One Tribe, One Destiny,* VILLAGE VOICE ROCK & ROLL QUARTERLY, Spring 1990, at 10 (profiling Queen Latifah, widely regarded as one of the best female rappers). Although Latifah has eschewed the head-on approach, her rap and videos are often women-centered, as exemplified by her single, "Ladies First." QUEEN LATIFAH, ALL HAIL THE QUEEN (Tommy Boy 1989). The "Ladies First" video featured other female rappers, "showing a depth of women's solidarity never seen before." Rose, *supra,* at 16. Rappers like Yo-Yo, "hip-hop's first self-proclaimed feminist activist," take a more confrontational line; for example, Yo-Yo duels directly with rapper Ice Cube in "It's a Man's World." Joan Morgan, *Throw the 'F',* Village Voice, June 11, 1991, at 75.

Some female rappers, such as Bytches With Problems, have attempted to subvert the categories of bitches and whores by taking on the appellations and infusing them with power. As Joan Morgan observes,

> It's common practice for oppressed peoples to neutralize terms of disparagement by adopting and redefining them. Lyndah McCaskill and Tanisha Michelle Morgan's decision to define *bitch* "as a strong woman who doesn't take crap from anyone, male or female" and to encourage women to "wear the title as a badge of honor and keep getting yours" does not differ significantly from blacks opting to use the word *nigger* or gays embracing *queer.*

Id. However in the case of the Bytches, Joan Morgan ultimately found the attempt unsuccessful, in part because the subversion operated merely as an exception for the few ("Lynda and Tanisha Michelle are the only B-Y-T-C-H's here; all the other women they speak about, including the menstrual accident, the woman whose boyfriend Lyndah screws, and anyone else who doesn't like their style, are B-I-T-C-H's in the very male sense of the word") and because ultimately, their world view serves to reinscribe male power. Said Morgan, "It's a tired female rendition of age-old sexist, patriarchal thinking: the power is in the pistol or the penis." *Id.*

CONCLUSION

This article has presented intersectionality as a way of framing the various interactions of race and gender in the context of violence against women of color. Yet intersectionality might be more broadly useful as a way of mediating the tension between assertions of multiple identity and the ongoing necessity of group politics. It is helpful in this regard to distinguish intersectionality from the closely related perspective of antiessentialism, from which women of color have critically engaged white feminism for the absence of women of color on the one hand, and for speaking for women of color on the other. One rendition of this antiessentialist critique—that feminism essentializes the category woman—owes a great deal to the postmodernist idea that categories we consider natural or merely representational are actually socially constructed in a linguistic economy of difference.[179] While the descriptive project of postmodernism of questioning the ways in which meaning is socially constructed is generally sound, this critique sometimes misreads the meaning of social construction and distorts its political relevance.

One version of antiessentialism, embodying what might be called the vulgarized social construction thesis, is that since all categories are socially constructed, there is no such thing as, say, Blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.[180] Even the Supreme Court has gotten into this act. In *Metro Broadcasting, Inc. v. FCC*,[181] the Court conservatives, in rhetoric that oozes vulgar constructionist smugness, proclaimed that any set-aside designed to increase the voices of minorities on the air waves was itself based on a racist assumption that skin color is in some way connected to the likely content of one's broadcast.[182]

But to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people—and indeed, one of the projects for which postmodern theories have been very helpful—is

179. I follow the practice of others in linking antiessentialism to postmodernism. *See generally* LINDA NICHOLSON, FEMINISM/POSTMODERNISM (1990).

180. I do not mean to imply that all theorists who have made antiessentialist critiques have lasped into vulgar constructionism. Indeed, antiessentialists avoid making these troubling moves and would no doubt be receptive to much of the critique set forth herein. I use the term vulgar constructionism to distinguish between those antiessentialist critiques that leave room for identity politics and those that do not.

181. 110 S. Ct. 2997 (1990).

182.

> The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because the applicant is "likely to provide [that] distinct perspective." The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. . . . The policies impermissibly value individuals because they presume that persons think in a manner associated with their race.

Id. at 3037 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J., dissenting) (internal citations omitted).

thinking about the way power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them. It is, then, a project that presumes that categories have meaning and consequences. And this project's most pressing problem, in many if not most cases, is not the existence of the categories, but rather the particular values attached to them and the way those values foster and create social hierarchies.

This is not to deny that the process of categorization is itself an exercise of power, but the story is much more complicated and nuanced than that. First, the process of categorizing—or, in identity terms, naming—is not unilateral. Subordinated people can and do participate, sometimes even subverting the naming process in empowering ways. One need only think about the historical subversion of the category "Black" or the current transformation of "queer" to understand that categorization is not a one-way street. Clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming. And it is important to note that identity continues to be a site of resistance for members of different subordinated groups. We all can recognize the distinction between the claims "I am Black" and the claim "I am a person who happens to be Black." "I am Black" takes the socially imposed identity and empowers it as an anchor of subjectivity. "I am Black" becomes not simply a statement of resistance but also a positive discourse of self-identification, intimately linked to celebratory statements like the Black nationalist "Black is beautiful." "I am a person who happens to be Black," on the other hand, achieves self-identification by straining for a certain universality (in effect, "I am first a person") and for a concommitant dismissal of the imposed category ("Black") as contingent, circumstantial, nondeterminant. There is truth in both characterizations, of course, but they function quite differently depending on the political context. At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.

Vulgar constructionism thus distorts the possibilities for meaningful identity politics by conflating at least two separate but closely linked manifestations of power. One is the power exercised simply through the process of categorization; the other, the power to cause that categorization to have social and material consequences. While the former power facilitates the latter, the political implications of challenging one over the other matter greatly. We can look at debates over racial subordination throughout history and see that in each instance, there was a possibility of challenging either the construction of identity or the system of subordination based on that identity. Consider, for example, the segregation system in *Plessy v. Ferguson*.[183] At issue were multiple dimensions of domination, including cate-

183. 163 U.S. 537 (1896).

gorization, the sign of race, and the subordination of those so labeled. There were at least two targets for Plessy to challenge: the construction of identity ("What is a Black?"), and the system of subordination based on that identity ("Can Blacks and whites sit together on a train?"). Plessy actually made both arguments, one against the coherence of race as a category, the other against the subordination of those deemed to be Black. In his attack on the former, Plessy argued that the segregation statute's application to him, given his mixed race status, was inappropriate. The Court refused to see this as an attack on the coherence of the race system and instead responded in a way that simply reproduced the Black/white dichotomy that Plessy was challenging. As we know, Plessy's challenge to the segregation system was not successful either. In evaluating various resistance strategies today, it is useful to ask which of Plessy's challenges would have been best for him to have won—the challenge against the coherence of the racial categorization system or the challenge to the practice of segregation?

The same question can be posed for *Brown v. Board of Education*.[184] Which of two possible arguments was politically more empowering—that segregation was unconstitutional because the racial categorization system on which it was based was incoherent, or that segregation was unconstitutional because it was injurious to Black children and oppressive to their communities? While it might strike some as a difficult question, for the most part, the dimension of racial domination that has been most vexing to African Americans has not been the social categorization as such, but the myriad ways in which those of us so defined have been systematically subordinated. With particular regard to problems confronting women of color, when identity politics fail us, as they frequently do, it is not primarily because those politics take as natural certain categories that are socially constructed but rather because the descriptive content of those categories and the narratives on which they are based have privileged some experiences and excluded others.

Along these lines, consider the Clarence Thomas/Anita Hill controversy. During the Senate hearings for the confirmation of Clarence Thomas to the Supreme Court, Anita Hill, in bringing allegations of sexual harassment against Thomas, was rhetorically disempowered in part because she fell between the dominant interpretations of feminism and antiracism. Caught between the competing narrative tropes of rape (advanced by feminists) on the one hand and lynching (advanced by Thomas and his antiracist supporters) on the other, the race and gender dimensions of her position could not be told. This dilemma could be described as the consequence of antiracism's essentializing Blackness and feminism's essentializing womanhood. But recognizing as much does not take us far enough, for the problem is not simply linguistic or philosophical in nature. It is specifically political: the narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experience of Black men. The solution does not merely entail arguing for the multiplicity of identities or

184. 397 U.S. 483 (1954).

challenging essentialism generally. Instead, in Hill's case, for example, it would have been necessary to assert those crucial aspects of her location that were erased, even by many of her advocates—that is, to state what difference her difference made.

If, as this analysis asserts, history and context determine the utility of identity politics, how then do we understand identity politics today, especially in light of our recognition of multiple dimensions of identity? More specifically, what does it mean to argue that gender identities have been obscured in antiracist discourses, just as race identities have been obscured in feminist discourses? Does that mean we cannot talk about identity? Or instead, that any discourse about identity has to acknowledge how our identities are constructed through the intersection of multiple dimensions? A beginning response to these questions requires that we first recognize that the organized identity groups in which we find ourselves in are in fact coalitions, or at least potential coalitions waiting to be formed.

In the context of antiracism, recognizing the ways in which the intersectional experiences of women of color are marginalized in prevailing conceptions of identity politics does not require that we give up attempts to organize as communities of color. Rather, intersectionality provides a basis for reconceptualizing race as a coalition between men and women of color. For example, in the area of rape, intersectionality provides a way of explaining why women of color have to abandon the general argument that the interests of the community require the suppression of any confrontation around intraracial rape. Intersectionality may provide the means for dealing with other marginalizations as well. For example, race can also be a coalition of straight and gay people of color, and thus serve as a basis for critique of churches and other cultural institutions that reproduce heterosexism.

With identity thus reconceptualized, it may be easier to understand the need for and to summon the courage to challenge groups that are after all, in one sense, "home" to us, in the name of the parts of us that are not made at home. This takes a great deal of energy and arouses intense anxiety. The most one could expect is that we will dare to speak against internal exclusions and marginalizations, that we might call attention to how the identity of "the group" has been centered on the intersectional identities of a few. Recognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all. Through an awareness of intersectionality, we can better acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.

PUBLIC INTEREST LITIGATION IN SOUTH AFRICA

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DEDICATION

For my mother and father, Joan and Jeremy,
who taught me that every struggle depends on love, solidarity and comradeship,
and good music,
and who have always found my choice of law just a little strange.

8.5 CONCLUSION

South Africa is facing profound questions that will have an impact on the delivery of health care and other services. There is a lack of urgency in relation to the continued delivery of these. And many fear that both access to and quality of health care services will continue to deteriorate as the economic climate becomes more volatile and more difficult.

It is likely that there will be an increasing number of violations of the negative aspects of the right to health. This will have a knock-on effect on programmes that have been put in place to achieve incremental improvements in health care service delivery. In other words, both the building blocks of progressive realisation of the right to health, and the foundation on which they are built, may well become more unstable.

In addition to an economic recession, the current political climate brings with it a level of uncertainty. It highlights cases of erosion of accountability, respect for the rule of law and good governance. We see this conduct in decisions regarding the availability of health care services, in the award of tenders for the delivery of these services, and in the failure to hold to account those who act in breach of their obligations. In addition to violating the foundation on which our Constitution is built, these cases will affect the day-to-day living of millions of people.

As such, legal strategies to advance the right of access to health care services are not just about those health care services. It will likely not be enough to focus on progressive realisation of the right to health. It will also likely not suffice to address the positive and negative obligations arising from the right to health without addressing closely related issues such as corruption and financial mismanagement. Finally, it is necessary to hold all forms of power to account, in the public and private sectors, to ensure that health care users' rights come first.

Litigation on the realisation of the right to health care services therefore appears to be entering a different phase. The road towards access to quality health care services is a long one and will require sustained and concerted efforts to make health rights a reality.

Chapter 9

HAPPY (N)EVER AFTER? PUBLIC INTEREST LITIGATION FOR LGBTI EQUALITY

Kerry Williams and Melanie Judge[1]

9.1 INTRODUCTION

The Constitution of the Republic of South Africa, promulgated in 1996, was the first in the world to entrench lesbian, gay, bisexual, transgender and intersex (LGBTI) equality through prohibiting unfair discrimination on the grounds of sexual orientation.[2] This prompted almost a decade of legal victories and the incremental development of equality law for LGBTI people in post-apartheid South Africa, including the legalisation of same-sex marriage.[3] On paper, the

[1] Melanie Judge acknowledges the support of the National Research Foundation's South African Research Chairs Initiative (SARCHI) Chair in Security and Justice, in the Faculty of Law at the University of Cape Town. The authors extend thanks to Kate Hofmeyr for her thoughtful comments on the chapter.

[2] Section 9(3) of the Constitution, commonly referred to as the equality clause, provides: '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.' Section 9(4) of the Constitution provides: '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.'

[3] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC) [NCGLE was the first applicant and CALS was admitted as *amicus curiae*, represented by Wits Law Clinic] (*National Coalition I*); *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) [LRC acted for the applicant] (*National Coalition II*); *Satchwell v The President of the Republic of South Africa and Another* [2003] ZACC 2; 2003 (4) SA 266 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20; 2003 (2) SA 198 (CC) [Wits Law Clinic acted for the applicants and for Lesbian and Gay Equality Project, which was admitted as *amicus curiae*]; *J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3;

equal treatment of LGBTI people is affirmed, including their right to human dignity. However, over the last decade LGBTI public interest litigation (PIL) has confronted forms of institutionalised violence, inequality and discrimination that are difficult to address using the jurisprudence that developed out of the Constitution's protection and promotion of equality and dignity. PIL concerning LGBTI peoples' rights after the legalisation of same-sex marriage in South Africa has been primarily concerned with bringing seemingly intractable patterns of violence and exclusion before the courts. This approach, which seeks to bring the lived, embodied experiences of LGBTI people to the fore, has faced numerous socio-legal challenges. In trying to apply the law to the social spheres where pernicious forms of stigmatisation, prejudice and othering continue—despite legal protections against these—there has been an attempt, through LGBTI PIL, to prevent normalised forms of exclusion and discrimination that are often left undisturbed in the law's formal conferral of the right to dignity and equality.

This chapter will focus on PIL in the period after the legalisation of same-sex marriage, the social impact of which, we argue, was somewhat overestimated[4] despite the significant contribution of prior strategic litigation to expanding equality jurisprudence in South Africa.[5] The reasons for this overestimation are complex but include the following: (i) the achievement of marriage rights came to symbolise a consummation of sorts between the right to equality and LGBTI rights, (ii) as a legal gain, it came at the end of a period of (over) optimism about

2003 (5) SA 621 (CC) [LRC acted for the applicants]; *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (1) SA 524 (CC); *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* [2005] ZACC 20; 2006 (1) SA 524 (CC) [Lesbian and Gay Equality Project as an applicant and Doctors for Life International was admitted as first *amicus curiae*]. Also see, Jonathan Berger 'Getting to the Constitutional Court on time: A litigation history of same-sex marriage' in Melanie Judge, Anthony Manion & Shaun de Waal (eds) *To Have and to Hold: The Making of Same-sex Marriage in South Africa* (2008) 17–28; Steven Budlender, Gilbert Marcus SC & Nick Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' *The Atlantic Philanthropies* (2014), last accessed on 24 October 2017 from <http://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>.

[4] This is by no means intended to underestimate the importance of the legalisation of same-sex marriage, including that equal marriage rights enable same-sex couples to access the same benefits and protections as married heterosexuals; that the right to marry is a civil right and therefore an entitlement of citizenship; and that the symbolic significance of extending marriage to same-sex couples has a positive impact on democratic inclusivity. For more on debates around marriage, see David Bilchitz & Melanie Judge 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' (2007) 23 *SAJHR: Sexuality and the Law: Special Issue* 466-99; Kerry Williams '"I do" or "We won't": Legalizing same-sex marriage in South Africa' (2004) 20 *SAJHR* 32–63.

[5] Former Deputy Chief Justice Moseneke puts it thus: 'I think I should just pay tribute to gay and lesbian structures that actually helped wittingly and unwittingly in the development of equality jurisprudence in this country. All those struggles around rights of gay and lesbian people have in many ways allowed the [Constitutional] Court and allowed our Constitution and many other people to be able to express themselves around issues of equality.' Dikgang Moseneke 'Opening of the 13th Out in Africa Gay and Lesbian Film Festival' *[Audio file] Cape Town, South Africa* 1 March 2007.

the extent of South Africa's transition from apartheid to democracy; and (iii) it relied on an assumption that formal legal advances constitute social advances for all LGBTI people in equal measure. Representing the 'grand prize'[6] of the strategic litigation process towards LGBTI formal equality, the marriage victory had tempted a happily-ever-after fate. Yet, after this point, LGBTI PIL became increasingly difficult as attention turned to the persistence of social discrimination and exclusion[7] facing LGBTI communities as *social* problems, rather than as formal legal problems (such as the unfair discriminations that are a product of unjust laws). So, while the law overall acknowledges the dignity of LGBTI people and no longer formally discriminates (or is no longer permitted to formally discriminate) against LGBTI people, it still falls short of enabling contextual understandings of the experiences of social discrimination and exclusion to be fully articulated through law.[8]

This failure partly has to do with the difficulty of framing forms of social discrimination and exclusion as breaches of the right to equality or dignity. It also points to how, amongst other reasons, the law as a social institution continues to reinforce LGBTI inferiorisation. The law at once opens space for marginalised groups to contest oppressive hegemonies, yet, in the same moment, the law reproduces the very relations of power on which such hegemonies turn. This violent side of law,[9] and in particular its implications for justice in the context of LGBTI identity politics,[10] has not been adequately considered in strategic litigation efforts. This is significant precisely because the continuities of colonialism and apartheid, and how these play out in present-day interpretations and practices of law,[11] form part and parcel of the contemporary realities that shape sexual and gendered realities.

[6] Berger (note 3 above).

[7] 'Social discrimination and exclusion' include reference to the structural and institutionalised modes through which LGBTI people are denied full access to, and expression of, social, economic and political life, frequently through various forms of violence. We are referring here to something different to direct discrimination in South African equality jurisprudence. Forms of social discrimination were evident in the three cases that are discussed in this chapter. Social discrimination involves forms of violence and exclusion that are *not* rooted in formal unequal or differential treatment of LGBTI people. Instead, social discrimination is about the experience of violence, exclusion, and oppression which is at the centre of the lived experience of inequality.

[8] South African equality jurisprudence (first set out in *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC) para 53) requires the isolation of differential treatment and then a determination as to whether such differential treatment amounts to unfair discrimination. If the differential treatment is on a ground listed in s 9(3) of the Constitution, then discrimination is established. Once discrimination is established it becomes necessary to embark upon a contextual analysis underpinning the discriminatory treatment to finally determine if the differential treatment is prohibited *unfair* discrimination. This contextual analysis looks at the impact on the complainant and others in the same situation.

[9] Walter Benjamin 'Critique of violence' in *One-way Street and Other Writings* (1978) 132–54; Robert M Cover 'Violence and the word' (1986) 95 *Yale LJ* 1601.

[10] Chandan Reddy *Freedom with Violence: Race, Sexuality and the US State* (2011).

[11] On this point, Cover (note 10 above) argues that 'legal interpretation takes place in a field of pain and death' in which the violent side of the law is implicated.

Consequently, there are multiple forms of violence directed at LGBTI communities, some of which are the focus of the PIL discussed in this chapter.[12] In sum, LGBTI people continue to experience severe physical violence, psychological violence and state violence.[13] Physical violence is usually criminal and involves LGBTI people being targeted because of their sexuality or gender. Psychological violence concerns the mental health of LGBTI individuals, and the negative impact of inferiorisation, stigmatisation and pathologisation on their well-being.[14] State violence is meted out through the systemic exclusion or marginalisation of LGBTI people within and through the various systems and apparatuses of state governance. By way of example, when LGBTI people encounter state machinery, they might face the denial of the full entitlements of citizenship by homophobic or transphobic officials who use bureaucratic and state-sanctioned power to stymie access to resources, recognition and rights. The experience of these forms of violence, as instrumental to how social discrimination and exclusion take effect, does not easily lend itself to framing a legal complaint as a formal breach of the right to either equality or dignity.

9.2 CRITICAL LITIGATION AND LITIGATING CRITICALLY

Between 1996 and 2005 there were numerous cases litigated in the name of LGBTI equality.[15] A number of these were spearheaded by the National Coalition for Gay and Lesbian Equality which later became the Lesbian and Gay Equality Project. With the benefit of hindsight this course of legal action has been presented as a conscious and strategic approach to litigating LGBTI equality.[16] The result of these cases was almost full formal legal equality,[17] yet the so-called strategic

[12] Vulnerabilities to violence are affected by race, class and gender differentials such that black and gender non-conforming LGBTI people are rendered disproportionately vulnerable.

[13] Juan Nel & Melanie Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' (2008) 21 *Acta Criminologica* 19–36; Graeme Reid & Teresa Dirsuweit 'Understanding systemic violence: Homophobic attacks in Johannesburg and its surrounds' (2002) 13 *Urban Forum* 99–126; Helen Wells *Overall research findings on levels of empowerment among LGBT people in KwaZulu-Natal* (unpublished report, OUT LGBT Well-being, 2006).

[14] Juan Nel 'South African psychology can and should provide leadership in advancing understanding of sexual and gender diversity on the African continent: Editorial' (2014) 44 *S Afr J Psychol* 145 at 145–8; Juan Nel & Duncan Breen 'Victims of hate crime' in Robert Peacock (ed) *Victimology in South Africa* 2 ed (2013).

[15] Note 3 above.

[16] It has been described as a 'well-developed litigation strategy' purposefully designed around a 'shopping list' of law reform goals (See, Berger (note 3 above) 18), largely influenced by Cameron's application of constitutional rights to sexual orientation (Edwin Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *SALJ* 450–72.

[17] The Civil Union Act 17 of 2006, in having introduced a separate piece of legislation that grants the same rights and obligations as the Marriage Act 25 of 1961, probably constitutes a constitutional infringement in establishing a 'separate but equal' legal marriage regime for same-sex couples who remain excluded from the Marriage Act.

LGBTI litigation has also been the subject of significant critique, in particular for not having adequately considered the interests of black and poor LGBTI people.[18] Since 2005 the focus of legal activism has shifted from challenging unequal laws to grappling with forms of violence that continue to delimit the possibilities of LGBTI people leading lives of equal value and worth in both private and public spheres. This has been challenging for PIL, raising a host of issues at the interface of law and society.

In exploring these challenges, we draw on three cases which have been litigated by Webber Wentzel on behalf of various parties,[19] and which all concern forms of physical, psychological and/or state violence directed at LGBTI people. We refer to these cases as *Mazibuko*, *Qwelane* and *Semugoma*, respectively. In summary, *Mazibuko* concerned a hate crime, in the form of assault with intent to do grievous bodily harm, against a young gay man, Deric Mazibuko, at a 'tavern' in a suburb on the East Rand of Gauteng. Mazibuko survived the attack by three men. Mazibuko was determined that the perpetrators be brought to justice, and approached OUT LGBT Well-being (OUT)[20] for assistance, which then in turn approached Webber Wentzel. *Qwelane* involved the publication of an article by Jon Qwelane, a journalist and political figure, in the *Sunday Sun* newspaper in which he expressed support for Robert Mugabe's views on gays;[21] Mugabe had said that being gay was unnatural and compared same-sex marriage to people marrying animals. In his article, Qwelane argued that gay and lesbian equality rights should be removed from the Constitution, prompting the South African Human Rights Commission (SAHRC) to seek an apology from him. The SAHRC instituted a claim against Qwelane, arguing that his words amounted to hate speech and harassment as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the Equality Act). The Psychological Society of

[18] See Mary Hames 'Lesbians and the Civil Union Act: A critical reflection' in Melanie Judge, Anthony Manion & Shaun de Waal (eds) *To Have and to Hold: The Making of Same-sex Marriage in South Africa* (2008) 258–67; Natalie Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the Equality Project' (2007) 32 *Signs* 649–69.

[19] The co-authors of this chapter have variously been involved in the cases discussed in this chapter. Kerry Williams (together with Nurina Ally) was the attorney responsible for *Qwelane* and *Mazibuko*. Melanie Judge has been integrally involved in the *Mazibuko* and *Qwelane* matters on behalf of OUT and PsySSA, respectively. Tshego Phala, a partner at Webber Wentzel, was the attorney responsible for *Semugoma*. The chapter does not consider or examine other LGBTI PIL cases which may have been litigated in the period post 2005.

[20] OUT is a non-governmental organisation that provides health services for LGBTI people and communities.

[21] In his article, Qwelane wrote that 'there could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those'. Mugabe's views on homosexuality include referring to it as 'inhumane', and stating that 'gays have no human rights' and are 'worse than dogs and pigs'. See. Michael K Lavers 'Zimbabwe president describes homosexuality as "inhuman"' *Washington Blade* 28 March 2014, last accessed on 9 November 2016 from <http://www.washingtonblade.com/2014/03/28/zimbabwe-president-describes-homosexuality-inhuman/>.

South Africa (PsySSA)[22] was concerned with the effects that Qwelane's words had had on the psychological well-being of LGBTI people. The organisation believed it was important that the psychological impact should be the focus of the case brought by the SAHRC against Qwelane in the Equality Court. PsySSA accordingly approached Webber Wentzel to pursue an *amicus* application on their behalf. *Semugoma* involved the unlawful detention and threatened deportation by the Department of Home Affairs (DHA) of Paul Semugoma, a Ugandan national, to Uganda on his re-entry into South Africa. At the time Uganda was poised to pass the Anti-Homosexuality Bill and so there was a legitimate concern that Semugoma would be prosecuted as an openly gay man. Several South African non-profit organisations, together with Semugoma's partner, approached Webber Wentzel to act on his behalf. Each of these cases featured forms of physical, psychological and/or state violence, and their constructions as strategic legal interventions, as well as the course each took, offer valuable insights into what it means to conduct LGBTI PIL in South Africa at this time.

(a) Constructing the cases

Although LGBTI equality and dignity were at the centre of all these cases, an allegation that there was a breach of the right to equality or dignity was not. In *Mazibuko*, given that the trial was criminal in character, the room to raise breaches of Mazibuko's rights to equality and dignity was limited. The perpetrators were clearly deeply homophobic and targeted Mazibuko because he was gay. In choosing the most appropriate cause of action, it was apparent that the criminal conduct of the accused could not easily be framed in litigation as breaching Mazibuko's rights.[23] For this reason, it made strategic sense to allow the prosecutor to attain the criminal conviction and to then introduce the effects of the homophobic component of the crime in the sentencing phase of the trial.[24] It was

[22] PsySSA is a non-profit organisation that represents psychology professionals in South Africa.

[23] It also would not have been possible to construct a case around developing the criminal law (which is common law) to accord with the protections the rights to equality and dignity offer, as the elements required to establish a crime do not call for such development. It is arguable that an appropriate development may be that the onus of proof should shift to the accused if it is alleged that a crime is accompanied by hate speech. However, this is where the formal offerings of constitutional law and the reality of practicing law and protecting the interests of clients, part ways: for Mazibuko to feel a sense of justice he wanted the accused to be punished for their conduct, which hurt him both physically and emotionally, rather than having the onus shifted. Interestingly, at a point in the litigation when the criminal trial was being delayed, he considered instituting a civil claim in delict for damages arising out of the assault, which would have more directly implicated the rights to dignity and equality. If pursued, this could have led to the development of the common law in ways which may accord with the protections the right to equality and dignity offer.

[24] These effects included: (i) the psychological impact of a hate crime on the victim: such victims are at risk of developing mental health problems including depression, anxiety and post-traumatic stress disorder; (ii) the secondary victimisation which follows a hate crime when the victim turns to service providers, such as the criminal justice officials or health care service providers, for support; (iii) that where a person is victimised as a result of his or her sexual orientation, the incident acts as a reminder that it is not safe to make his or her sexual orientation known, which may lead to internalised homophobia; (iv) the trauma of the victimisation on the basis of prejudice and stigmatisation has a significant impact on the victim's relationship with his or her family, including that the victim's family may fear for their own safety; (v) that hate crimes as message crimes have an effect on the community to which the victim belongs, including that other LGBTI people in the community understand that the crime sends a message that they too are unwelcome and unsafe in that community, which contributes to a climate of stress and fear.

believed (perhaps naively) that criminal law could ameliorate the way in which the crime undermined equality and thereby promote equality, albeit indirectly. The decision to intervene in the sentencing phase was intended to forefront the context in which the crime was perpetrated and give prominence to the lived experience of LGBTI people, including Mazibuko, so as to ensure that they and he were not left unseen nor unaccounted for in the criminal justice process despite its focus being on the acts of the accused.

In *Qwelane*, the emphasis was on the Equality Act, promulgated to, inter alia, prevent hate speech and harassment and give effect to the rights to equality and dignity. Although the claim instituted by the SAHRC did not directly involve an assertion that Qwelane had infringed LGBTI peoples' rights, it is clear that the Equality Act's prohibition of hate speech and harassment is intended to protect and promote equality and dignity through an acknowledgement that such conduct undermines equality and dignity. When the SAHRC instituted its claim, it was evident that its approach did not articulate the full nature of the harm caused by hate speech and harassment on LGBTI embodied experiences in a context where LGBTI people are already vulnerable to various forms of violence. As a result, PsySSA believed it imperative that this experience and context be placed before the court. This became all the more pressing when Qwelane challenged the constitutionality of the hate-speech provisions of the Equality Act, suggesting (incorrectly) that they infringed the right to freedom of expression and were vague and overbroad. With this came the risk that the case would centre on Qwelane's rights to express harmful words rather than their harmful effects. It appeared to PsySSA that without a court being fully apprised of the psychological and social effects of homophobic hate speech, it would not make a just decision in relation to the breach of the provisions nor their constitutionality.[25]

[25] PsySSA's intervention was therefore aimed at placing evidence before the court on the harm caused by Qwelane's article. The harms included evidence that hate speech directed at LGBTI people makes them significantly more vulnerable to a range of psychological harms such as depression, suicidal ideation (thoughts about suicide) and internalised homophobia Homophobic hate speech also affects the immediate community in that other LGBTI people in the community experience a lowered self-esteem and high levels of fear (which in turn creates a vulnerability to depression and anxiety) as a result of the hate speech. Finally, homophobic hate speech, like other forms of hate speech, has a detrimental impact on society at large as it actively polarises communities by reinforcing prejudice and existing divisions with the risk that it translates into animosity and sometimes even violence. PsySSA further argued that the Equality Act's prohibition of hate speech was a justifiable limitation on the right to freedom of expression as it was intended to protect the dignity and psychological integrity of those who had experienced historical disadvantage.

In the context of LGBTI PIL since the legalisation of same-sex marriage, it is not surprising that the strategies adopted for the cases relied neither on conventional breaches of the right to equality or dignity nor on the Equality Act's prohibition of unfair discrimination.

The wake of optimism left by the legalisation of same-sex marriage momentarily blinded LGBTI strategic litigators to the possibility of the Constitution, and laws developed by the Constitution, having limitations for the LGBTI community. Relying on criminal law and the Equality Act, and tangentially invoking the right to dignity,[26] were strategies intended to assist in addressing forms of social discrimination and exclusion. The hope was that criminal law and the Equality Act would do the work of LGBTI equality. With the benefit of hindsight, it appears that these legal mechanisms fall short for LGBTI people, demonstrating the difficulty of law[27] per se to address these forms of violence.

(b) Litigating from the margins

In both *Mazibuko* and *Qwelane* the key public interest litigants were *amici curiae*. In *Mazibuko*, one of the early challenges was to create new law to allow an *amicus* to intervene in a criminal trial in the Magistrates Court.[28] OUT intervened as an *amicus* in the sentencing phase of the criminal trial to place evidence before the court on the effects of homophobic hate crimes on the victim, the community and society at large, the purpose of which was to influence the court's assessment of an appropriate sentence for the accused. In *Qwelane*, PsySSA applied successfully to intervene as an *amicus* as the organisation was well-placed to put evidence before the court about the deleterious impact of homophobic hate speech on psychosocial well-being. In both these cases, conducting PIL as an *amicus* had significant implications for the experience of the litigants and the degree to which LGBTI interests could be centred in the trial proceedings. In *Mazibuko* there was a persistent anxiety about overstepping the 'proper role' of an *amicus*, conscious that in an adversarial system (as opposed to an inquisitorial system) criminal procedure is premised on the state's prosecution of those accused of crimes. The legitimacy of this system depends on the balance struck between the accused (the bearer of certain protective criminal justice rights) and the state (the bearer of inordinate power intended to protect the public through prosecution of criminals). Consequently, there was a clear intention not to upset this balance both in respecting the system and in recognising that any such upset might limit the ability

[26] In *Qwelane*, PsySSA's evidence showed the impact of homophobic hate speech including the impact that such speech has on self-worth (which implicitly suggested that homophobic hate speech infringes LGBTI peoples' right to dignity). Additionally, PsySSA argued that the prohibition of hate speech in the Equality Act was constitutionally justified as it gives effect to the right to dignity.

[27] Here we refer to law in its broadest sense and to include the rules, systems, structures and practices of law in society.

[28] The magistrate admitted OUT as an *amicus curiae* in the criminal matter on the basis that rule 28 of the Magistrates' Courts Rules allows such admission.

of *amici* interventions in future cases. However, this required an exceptional degree of patience in *Mazibuko,* as it took just over four years for the accused to be brought to trial and convicted. At great cost, in both time and resources, OUT conducted a watching brief throughout this period, and then only when the accused were convicted did the organisation apply to intervene as an *amicus*.[29] This created further anxiety about whether this was an effective and efficient use of PIL resources. In *Qwelane*, PsySSA initially conducted itself like a conventional *amicus*. Having been admitted to give particular evidence before the court, the organisation followed the lead of the SAHRC as it conducted the litigation. However, following this lead became increasingly difficult over the years as the SAHRC failed to pursue the case with any urgency and Qwelane used procedural devices to effect inordinate and justice-denying delays. Eight years after having initiated legal proceedings, the SAHRC finally obtained a court date. However, on the eve of the commencement of the trial Qwelane brought an application to postpone his day in court on the basis of alleged ill-health. It was PsySSA's view that this application was effectively *not* for a postponement, but rather for a permanent stay as according to the evidence available to the Court, Qwelane's condition was presented as chronic and degenerative and therefore unlikely to improve.[30] Judge Moshidi granted Qwelane's postponement application without granting PsySSA or the SAHRC the opportunity to answer the application and put up evidence demonstrating that Qwelane was unlikely to recover. Had they been allowed to present this evidence, it would have shown that Qwelane's deteriorating medical condition was not a reason to postpone the trial but, rather, to start it with haste. PsySSA, as a result, decided to approach the Constitutional Court with an application for leave to appeal the High Court's postponement. The Constitutional Court declined to hear the appeal but in doing so issued a judgment which

[29] The trial took over a year to commence, as initially the prosecuting authority decided not to prosecute the accused, arguing it was 'just a tavern fight'. OUT accordingly applied to the National Director of Public Prosecutions to internally review the decision not to prosecute in terms of s 179(5)*(d)* of the Constitution and s 22(2) of the National Prosecuting Authority Act 32 of 1998. The application was successful. Thereafter OUT conducted a watching brief from the moment the accused made their first appearance to the date of their conviction, in the hope that the court would act diligently as a result of being reminded of the LGBTI interests at stake.

[30] Qwelane's treating physician, Dr Seedat, indicated that Qwelane was hypoxaemic and chronically required oxygen. He also had a combination of Chronic Obstructive Pulmonary Disease (COPD) and pulmonary fibrosis with right heart failure. PsySSA's expert physician, Dr Richards, who considered Qwelane's medical report, indicated that his professional view was that Qwelane's condition 'will not improve' and 'his long term prognosis is also very poor . . . For hypoxaemix COPD alone, less than 70% of sufferers survive more than a year, and less that 20 to 40% survive up to 5 years . . . Dr Seedat's report however indicates that Mr Qwelane suffers not only from hypoxaemic COPD, but also pulmonary fibrosis and right heart failure and a co-existent vascular disease. These additional conditions make Mr Qwelane's prognosis of survival even lower'. (para 15 of PsySSA's application for leave to appeal, the order of the High Court postponing the trial, to the Constitutional Court, case no 226/16).

supported the matter finally proceeding in the High Court in March 2017.[31] The court further pointed out that postponements were '*not merely for the taking*'[32] and had to be properly justified and that it was a denial of fair process when the High Court refused to hear PsySSA's evidence and granted the postponement.[33]

In both *Mazibuko* and *Qwelane*, the law taking its course had effectively marginalised the defence of LGBTI interests. An *amicus* plays a different role to an applicant and is by no means *dominus litis*. Much of the preoccupation of the *amici* parties in these cases was in grappling with how to enable LGBTI interests to be wholly considered, while litigating from the margins. This is undesirable as the LGBTI experience itself is frequently marginalised, and it is thus problematic when litigation against such marginality begins to mirror, rather than contradict, that positioning. In this sense the cases reflect somewhat of a double-margin: the *amicus* interventions were launched on behalf of a marginalised community appealing to the law for recourse against prejudice; at the same time these appeals are made from the margins in that *amici* occupy a relatively de-centred position from which to shape the interpretation and application of law in the legal process. Yet at the same time, and through these cases, LGBTI voices were brought before the law and the courts, through for example the giving of expert testimony on the embodied experiences of sexual and gender discrimination, thus serving to draw these material realities more firmly into the legal frame.

(c) Reproducing homophobia

In each of the cases, the manner in which the litigation unfolded exposed how law, the legal system, and those who enforce it (such as court officials), are implicated in the exercise of discriminatory power. This relates to the gendered, heteronormative and racialised dynamics that are embedded in the production and practice of law, and in relation to which, in complex ways, LGBTI people are both regulated and resistant.[34] As a result, the law and its apparatuses (including the systems and subjects that keep it in place) constitutively re-enact the sexual, gendered and racial marginalisations that LGBTI people face. An example of this is how, in response to the litigation in *Mazibuko*, *Qwelane* and *Semugoma*, the kinds of homophobic behaviour that the litigation was attempting to challenge, were reproduced during the legal proceedings.

This reproduction of homophobia was most notable in *Mazibuko* where one of the accused arrived in court wearing a t-shirt displaying the words 'Dip me in

[31] *Psychological Society of South Africa v Dubula Jonathan Qwelane and others* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC).

[32] Ibid para 30.

[33] Ibid para 39.

[34] See Ruthann Robson *Lesbian Out Law: Survival Under the Rule of Law* (1992); Catherine MacKinnon 'Difference and dominance: On sex discrimination' in Will Kymlicka (ed) *Critiques and Alternatives* (1992); Kimberlé Crenshaw 'Race, gender, and sexual harassment' (1992) 65 *S Cal L Rev* 1467–76.

chocolate and throw me to the lesbians'. This can be read as a brazen expression of the accused's non-repentance, a sentiment similarly expressed by Qwelane, who wrote in the article that was the subject of the case against him, '[B]y the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views'. The presence of the t-shirt in court in *Mazibuko* can also be interpreted as a direct provocation toward gays and lesbians through a mocking display that, metaphorically, pushes the accused back onto 'the lesbians' in the form of a sexual threat. Astoundingly, the magistrate conducted the court proceedings making no mention of the t-shirt. This reflects the normalisation and a tacit legitimation of the exercise of hetero-patriarchy in the courtroom, the very kind of power that fuels violence against LGBTI people in the first instance.[35] The court was therefore complicit in exposing gays and lesbians to a renewed threat and provocation by the accused's wearing of the t-shirt, allowing its words to be publicly directed at the LGBTI bodies and interests in the courtroom. Fortunately, the complainant himself was not in court that day. However, a clear message was sent to his attorneys, and to everyone in court, that the legal system would not, in the course of justice, protect the complainant from revictimisation. The conduct of the accused and the magistrate on that day confirmed that the welfare of LGBTI people was overlooked in legal proceedings. In the sentencing phase of the trial, the *amicus* argued that the wearing of the t-shirt had demonstrated a clear lack of remorse and that this should be taken into account in sentencing the accused.[36] This argument was disregarded, reflecting the court's inability, perhaps unwillingness, to recognise and respond to its own perpetuation of prejudice. The magistrate handed down a sentence which was unduly lenient, and which included imposing an obligation on '*the LGBT group*' (who remained unnamed and unspecified) to

[35] See Nonhlanhla Mkhize et al *The Country We Want to Live in: Hate Crimes and Homophobia in the Lives of Black Lesbians* (2010); Andrew Martin et al 'Hate crimes: The rise of "corrective" rape in South Africa' *ActionAid* (2009).

[36] Advocate Kate Hofmeyr, representing Mazibuko, argued as follows: 'We submit that the wearing of that T-shirt represents a number of things, it represents a disdain for this process and a refusal to be remorseful about the conduct that accused 3 and indeed the other accused perpetrated. We submit that it is deeply offensive to wear such a T-shirt in this public setting where the purpose for us all gathering together is to assess the guilt of three men accused of brutally attacking a man because he was gay. It is also, we submit, a confirmation of the very prejudice that motivated that attack, it is a confirmation that those were not just words that crept into accused 3's mouth when he said, he is gay he does not deserve to live, those words were representative of a view that certain people are less worthy than others and that certain people do not deserve as much respect as others and the T-shirt simply confirmed that prejudice. We also submit that that representation of that prejudice was not confined to accused 3, none of his co-accused convinced him not to wear it or told him it was inappropriate, they acquiesced by their silence in the message that was sent to everyone in that courtroom and that was a message of intolerance' (pages 103–4 of the transcript of the trial on 27 January 2012).

provide '*awareness programmes*' to the accused.[37] This is, symbolically speaking, yet another act of 'throwing' the accused back to the gays and lesbians. Moreover, the magistrate had made no contact with said 'LGBT groups' (presumed to be the *amicus* organisation itself) before formulating her order to consider if it was indeed implementable. Underlying the order was the dangerous and endangering assumption that it is appropriate for LGBTI organisations—established for the benefit of LGBTI people—to use their limited resources for the benefit and rehabilitation of homophobic criminals. This court-sanctioned directive, given effect to without the consent of the 'LGBT groups', does violence to them. It also absolves the state from its mandated responsibilities to punish and prevent violence in ways that work against, rather than in support of, secondary victimisation. Worse still, the accused never attended the so-called awareness programmes (read rehabilitative programmes) that had been fancifully imagined by the court as readily available to homophobic criminals from the very people towards whom their violent prejudice was directed in the first instance.[38]

Another feature of *Mazibuko* and *Qwelane* was the extraordinarily long duration of the matters: it took just over four years for the accused in *Mazibuko* to be convicted and sentenced and in *Qwelane* it took approximately nine years before the trial commenced in the High Court, his article having been published in 2008, the SAHRC having instituted its claim in December 2009, and the trial finally proceeding in 2017.[39] The inordinate length of both matters can primarily be attributed to the offending parties and their respective attorneys having used

[37] The three accused were required to participate in 'awareness programmes of gays and lesbians' or 'awareness programmes of the LGBT group' for between two and three years, and to submit a certificate of attendance to the clerk of the Germiston Magistrates Court.

[38] The clerk of the Germiston Regional Magistrates Court confirmed that the accused did not place a certificate of attendance in the court file proving their attendance of the 'awareness programmes of gays and lesbians' (written correspondence between Webber Wentzel and the clerk of the Court, dated 19 October 2016, on file with authors).

[39] Some of the delay may be attributed to procedural complications arising out of Qwelane's decision to challenge the constitutionality of the Equality Act. In June 2012, while the matter was running in the Magistrates Court, he applied to the High Court for an order declaring s 10 of the Equality Act constitutionally invalid and requesting the Equality Court proceedings in the Magistrates Court be stayed pending the determination of his constitutional challenge in the High Court. In response the parties agreed that the Equality Court proceedings be transferred to the High Court and they jointly filed an application for transfer (the Magistrates Court then transferred the matter on 11 September 2012). However, Qwelane withdrew his constitutional challenge and then, 15 months later, changed course again. On 27 September 2013 he thus reinstituted his constitutional challenge, applying for an order declaring ss 10(1) and 11 of the Equality Act inconsistent with s 16 of the Constitution and sought a stay of the Equality Court proceedings (see, *Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) paras 6–8, which explains this history of the matter). As a result of the transfer of the Equality Court proceedings and Qwelane's constitutional challenge to the Equality Act, before the matter was able to proceed, the High Court was called upon to decide if it could hear both matters simultaneously (because there is no statutory provision enabling a High Court judge to hear Equality Court proceedings and High Court proceedings, in one consolidated case). The High Court on 21 November 2014 decided that it had inherent jurisdiction to hear both cases and ordered the cases be consolidated and be heard by a

procedural tactics to delay matters, taking advantage of a lethargic legal system that does not function optimally at the best of times, and that systematically fails those who are socially vulnerable.[40] Additionally, in *Mazibuko* the prosecuting arm of the state initially refused to prosecute, and, when it finally did, it failed to pursue the matter with the type of vigour one might reasonably expect.[41] As previously mentioned, in *Qwelane* the SAHRC failed to pursue the matter with a sense of due importance. It appeared that internal to the organisation the case had been handled by numerous people over the years, without anyone owning the case or its issues. Regardless of the reasons for the delays, it sent a strong social message that LGBTI discrimination is neither taken seriously nor treated with the urgency and importance it demands. When *Qwelane* did not proceed[42] in the High Court on the allocated trial dates in 2016, the distinction between how the courts address homophobic hate speech in comparison to racist hate speech became starkly apparent. As Juan Nel,[43] PsySSA's President (as he then was) stated at the time:

> Recent cases of racist hate speech,[44] for example statements that have likened black people to animals, have been dealt with far more swiftly by our courts, and rightfully so. Failure to actively condemn harmful insult sends a strong social message that it is in fact acceptable to dehumanise gays and lesbians and to liken them to animals, as Qwelane wrote in his article.

single judge of the High Court who was also an Equality Court judge (*Qwelane v Minister of Justice and Constitutional Development and Others* [2014] ZAGPHC 334; 2015 (2) SA 493 (GJ) para 11).

[40] See Lisa Vetten et al 'Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng' *Tshwaranang Women's Legal Centre, Medical Research Council and the Centre for the Study of Violence and Reconciliation* (July 2008) last accessed on 13 March 2018 from <https://www.csvr.org.za/docs/tracking_justice.pdf>; Civil Society Prison Reform Initiative, Just Detention International & Lawyers for Human Rights 'Thematic alternate report on criminal justice and human rights in South Africa: Submitted to the African Commission on Human and Peoples' Rights in response to South Africa's Second Periodic Report under the African Charter on Human and Peoples' Rights, to be reviewed at the 58th Ordinary Session of the African Commission on Human and Peoples' Rights' (March 2016), last accessed from <http://southafrica.justdetention.org/wp-content/uploads/2016/05/ACHPR-shadow-report-criminal-justice-FINAL.pdf> on 9 November 2016.

[41] The role that OUT played in reviewing the prosecutor's initial decision not to prosecute is described at note 29 above.

[42] On the eve of the court hearing, Qwelane presented himself in person at a police station to commission an affidavit applying for a postponement, arguing that, due to a progressively degenerative medical condition, he was unable to present himself in person in court.

[43] Juan Nel was also one of the expert witnesses in *Mazibuko* who gave expert testimony on the effects of homophobic hate crimes. In *Qwelane* he spearheaded PsySSA's application to intervene as *amicus curiae* and gave expert testimony on the effects of homophobic hate speech.

[44] Less than three months before the date set for the commencement of the *Qwelane* trial, a woman who had uttered hurtful words about black people, was found to have breached s 10 of the Equality Act. Within eight months of her public utterances, which drew unprecedented public attention to racist hate speech, the woman was fined R150 000 and ordered to issue a public apology, with which she complied. See *ANC v Sparrow* [2016] ZAEQC 1.

The symbolic violence[45] of state lethargy in regard to homophobic crimes and speech reinforces the social and legal conditions in which such crimes and speech continue, largely undisturbed.

The unintended and ironic consequence of this litigation was that the attempt at *remedying* homophobia had given rise to *reproducing* it instead. This is a difficult dynamic to navigate and requires that the attorneys working for LGBTI litigants take extra measures to protect their clients from further violence, be that physical, psychological or state-driven.

(d) A state of contradiction

A further feature of LGBTI PIL has been managing the contradictions of the state, which take various forms. Mention has already been made of the role of the prosecutor in *Mazibuko* and the SAHRC in *Qwelane*, pointing to: in the former, the support of the *amicus curiae* intervention with the simultaneous abdication of responsibility for pursuing the homophobic dimension of the crime; and in the latter, an inconsistent commitment to the case which contributed to the delayed hearing in the High Court. The High Court judgment in *Qwelane*[46] also displayed some contradictions. It was a stunning victory for the SAHRC, PsySSA and the LGBTI community in that it acknowledged, unequivocally, the context in which Qwelane's statements were made as well as the harm and hurt that they caused.[47] However, the judge opted for an overly narrow interpretation of s 10 of the Equality Act suggesting that to establish hate speech an applicant would have to show that the speech was hurtful, harmful (or incites harm) *and* promotes or

[45] Symbolic violence refers to the processes by which existing relations of domination are produced and maintained through the exercise of symbolic power—Pierre Bourdieu 'Social space and symbolic power' (1989) 7 *Sociological Theory* 14–25. For how symbolic power operates in relation to gender-based violence see, Karen Morgan & Suruchi Thapar Björkert '"I'd rather you'd lay me on the floor and start kicking me": Understanding symbolic violence in everyday life' (2006) 29 *Women's Studies International Forum* 441–52.

[46] *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ) [FXI and Psychological Society of South Africa were admitted as *amici curiae*].

[47] At para 46 Moshidi J finds as follows: 'The offending statements uttered by the applicant, when evaluated objectively, in content and context, speaks ill of the gay and lesbian community, and went further by suggesting that the next step for South Africa will be allowing people to marry animals. It can never be acceptable, in the context and content of the legislation, and our democratic society, to equate human beings to bestiality or animals or suggest to them that they are "other" or "unnatural". It severely undermines their ability to feel that they belong and have support, which is essential to psychological health and well-being of all humans. . . . It is common knowledge from the evidence of Nel [PsySSA's expert witness] and the other witnesses of the [Human Rights] Commission that gay and lesbian people, who constitute a vulnerable group in society, and have been subject to societal discrimination purely on the ground of sexual orientation. They are a permanent minority in society and have suffered in the past from various patterns of disadvantage. . . . The evidence, in particular that of Mokoena and MN, showed convincingly that the offending statements were deeply hurtful and harmful to the victims and targeted group.' (para 49)

propagates hatred[48] (a bar that limits the utility of the provision and undermines its potential to promote equality and dignity).[49]

Another striking contradiction is illustrated in encounters with the Department of Home Affairs' (the DHA) in responding to LGBTI-related litigation. The DHA is intimately involved in LGBTI lives: amongst other things, it registers births and regulates adoptions (and hence must acknowledge same-sex parents), it issues marriage certificates (and hence must acknowledge same-sex marriages or civil unions), it controls entry to and exit from South Africa (and its recognition of same-sex relationships is essential for this function), and it issues new identity documents for transgender people (and is therefore required to recognise sex and gender re-assignment).

In its response to LGBTI PIL, the DHA has adopted a variety of inconsistent positions.[50] In *Semugoma* particularly, the DHA's disregard for the rule of law demands scrutiny. Semugoma was detained by DHA officials on 17 February 2014 on the basis that his work permit had expired and that the official document the DHA had issued (allowing travel while work permits were being renewed), was not valid.[51] The DHA indicated that they intended deporting Semugoma to Uganda despite the very real threat of his prosecution under the Anti-Homosexuality Bill,[52] the passing of which was imminent at that time. As a result, an urgent application was launched on the day of Semugoma's detention, in response to

[48] Ibid para 60.

[49] PsySSA argued that 'the prohibition in section 10(1) is aimed at combating three different and distinguishable effects hate speech may have. It may be "hurtful"; it may be "harmful or . . . incite harm" or it may "promote or propagate hatred". All three of these have subtly different meanings and engage different negative effects. We therefore support a disjunctive reading of s 10(1). If it is not read disjunctively, the prohibition would not address the variety of ways in which "hate speech" can and does impact a target group, including by way of (individual or communal) psychological or mental harm; societal marginalisation or rupture of the body politic' (Heads of argument in the Constitutional challenge, para 47).

[50] First, in *National Coalition II* (note 3 above) para 27 the DHA argued that it had an absolute discretion to exclude foreign nationals which meant that it could exclude foreign nationals who were in same-sex partnerships with South Africans without regard to the Constitution and its right to equality and dignity. Then in *J and Another* (note 4 above) para 11 the DHA decided not to argue that the statutory provisions, which denied recognition of same-sex parents who conceived by artificial insemination, constituted a justifiable limitation of constitutional rights. And finally, in *Fourie* (note 3 above) para 35, the DHA suggested that it was fair to exclude same-sex couples from being allowed to marry.

[51] The DHA officials who detained Semugoma and who corresponded with Webber Wentzel indicated there was a policy in place explaining that this document did not allow travel. They were, however, never able to produce the policy or explain why they issued the document in the first place with the explanation that it allowed travel.

[52] The Bill was enacted as the Anti-Homosexuality Act, 2014. The Act creates the criminal offences of 'homosexuality', 'aggravated homosexuality' and 'attempt to commit homosexuality' (amongst others) and makes offenders liable on conviction to life imprisonment.

which the High Court ordered his immediate release.[53] The DHA refused to comply with the court order and, instead, held Semugoma overnight at an unknown location, applied for leave to appeal the order, and continued threatening to deport him the following day. Finally, on the third day of Semugoma's detention, and when the application for leave to appeal was about to be heard, the DHA offered to settle. Even though a settlement offer was made, Semugoma's attorney was met with antagonism as the DHA's senior counsel suggested she should 'wipe the smirk off [her] face'. In another show of state resistance, when Semugoma's partner and his legal team went to collect him from the airport, they were initially refused access and only later able to secure his release.

The DHA, and more particularly its officials, has been similarly obstructionist in instances when transgender people have attempted to have their sex changed in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 (Sex Status Act).[54] South African law allows for transgender people to change their sex description both on birth registers and on identity documents.[55] However, the experience of submitting an application to the DHA is more often than not a humiliating affair characterised by bureaucratic obstacles designed to frustrate transgender and intersex people from accessing legal entitlements and thus constituting a violation of their rights.[56] Nadia Swanepoel, for example, went on a hunger strike in 2014 in order to try to force the DHA to comply with its own laws by issuing an identity document reflecting her sex as female. She had been waiting for an identity document for three years, and had faced consistent rejections, including suggestions that her application had been lost, and then finally a refusal to consider the application until she had genital surgery.[57]

[53] The urgency of the matter was such that Webber Wentzel and counsel did not have time to draft papers and approached a judge in chambers.

[54] The Act enables intersex persons to change their legal sex without having to undergo surgical or medical treatment.

[55] Section 2(1) of the Sex Status Act.

[56] The lack of proper administration of the Act has been attributed to a misreading of the legislation as requiring proof of genital surgery from applicants who wish to change their sex designation; the absence of national directives for the Act's implementation resulting in lengthy delays; no reasons being furnished when applications are denied; and the absence of measures to protect the marriages of transgender or intersex persons who change their sex descriptor after getting married. See Robert Hamblin & Mzikazi Nduna 'Alteration of Sex Description and Sex Status Act and access to services for transgender people in South Africa' (2013) 9 *New Voices in Psychology* 50–62; Legal Resources Centre, Iranti-Org & Gender Dynamix 'Report on the civil, political and socio-economic rights of transgender and intersex persons in South Africa under the African Charter on Human and Peoples' Rights in response to the Second Combined Periodic Report of the Government of South Africa and the initial report under the Protocol to the African Charter on the Rights of Women in Africa' (April 2016), last accessed from <http://lrc.org.za/art_external/pdf/2016%2004%20ACHPR-Trans-gender-and-Intersex-Shadow-Report.pdf> on 12 March 2018.

[57] Sipho Kings 'Transgender woman goes on hunger strike over ID application' *Mail & Guardian* 9 October 2014, last accessed on 9 November 2016 from <http://mg.co.za/article/2014-10-09-transgender-goes-on-hunger-strike-over-id-application>.

Such disregard for court orders and the rule of law from a state department is condemnable, particularly given the recent public stance of senior DHA officials on LGBTI-related discriminations whereby constitutional commitments to equality were publicly endorsed and enforced.[58] These contradictions can be understood in a number of ways: first, the officials responsible for implementing laws have personal views and values that do not accord with the Constitution or the law.[59] Second, the DHA is engaged in both domestic and international politics, which means that positions for or against trans/homophobia are also pressure points for political manoeuvres. The paradoxical positions taken on LGBTI rights also reflect geopolitical dynamics in which contradictions between domestic and international stances reflect the state's double-game on sexual orientation and gender identity issues.[60]

9.3 CONCLUSION

The litigation experiences in the three cases discussed in this chapter illustrate the difficulties of using the law in promoting, defending and advancing equality and dignity for LGBTI people post the legalisation of same-sex marriage. Importantly, for the purpose of progressing LGBTI PIL, the constraints in the practice and application of law prompt the need for unconventional tactics when litigating with—and in some ways against—these realities. The cases also demonstrate the pernicious ways in which social discrimination and exclusion feature not only in the merits of a particular matter around which litigation is fashioned, but also in the very legal processes by which that litigation is then pursued. In this sense, the legal system is a contested terrain where LGBTI people use law to resist social injustices, yet are confronted, and at times defeated, by the injustices of law in practice. This raises various conundrums for litigation strategies related to the

[58] In refusing Pastor Anderson, a renowned homophobe, entry into South Africa on the grounds that the Immigration Act 13 of 2002 prohibits admission of foreigners likely to promote hate speech or advocate social violence, the Minister of the DHA stated that, '[I]t is a constitutional imperative for organs of state and society at large to protect and jealously defend the rights of all people'. He also went on to concede that 'Home Affairs has also had instances in the past wherein our own officials had treated LGBTI persons in a manner that is inconsistent with our laws'. 'Minister Gigaba's statement at the media briefing on the decision on Pastor Anderson's visit to South Africa' *Department of Home Affairs* 13 September 2016, last accessed on 9 November 2016 from <http://www.dha.gov.za/index.php/statements-speeches/853-minister-gigaba-s-statement-at-the-media-briefing-on-the-decision-on-pastor-anderson-s-visit-to-south-africa>.

[59] Worryingly, the legalisation of same-sex marriage included a legislative sanction for officials holding personal views about homosexuality which entitles them to escape the obligation to solemnise same-sex civil unions. Section 6 of the Civil Union Act 17 of 2006 allows a marriage officer to object to solemnising a civil union between same-sex partners on the grounds of 'conscience, religion and belief' and to write to the Minister to inform him or her of this objection so as not to be required to effect same-sex civil marriages.

[60] Melanie Judge 'SA's abstinence on UN sexual and gender rights vote is reckless' *Mail & Guardian* 6 July 2016, last accessed on 9 November 2016 from <http://mg.co.za/article/2016-07-06-00-sa-reckless-on-un-gender-and-sexual-rights-vote/>.

pursuit of social justice. For one, the realisation of equality stretches far beyond the remit of law, and, in some instances, as we have argued, the practice of law might thwart its realisation. Also, when LGBTI people and the organisations that support them come before the legal system, prevailing prejudices frequently come into play. The experiences in the three cases suggest that LGBTI *amici* or applicants should plan for the systemic injustices and violence of the law in practice and develop principled approaches to guide appropriate litigious and political responses.

Moreover, PIL for LGBTI equality has largely been left over (or handed over) to LGBTI people and communities themselves. This reflects a broader context in which identity-based equality claims are dependent on specific claimants firmly defined by the very identities that are the basis of their claims. While this has been highly productive in furthering the rights of marginalised social groups (for example, people living with HIV and AIDS, refugees, the disabled), it can restrict rights-based legal struggles to singularised identities[61] amongst and between which, frequently, there is limited political solidarity. Identity-driven litigation can also be divisive as it appears to only protect the particular category of applicant around which the legal case is constructed. Viewing experiences of discrimination as intersectional[62]—as encompassing, for example, race, class, gender and sexual oppressions that are mutually reinforcing—requires legal strategies that take cognisance of how sexuality-based discrimination does *not* occur in isolation to other forms of discrimination. Consequently, litigation tactics ought to consider how multiple and intersecting forms of marginalisation produce uneven vulnerabilities to violence and injustice, and what the implications of this might be for litigation. For one, it might require the untangling of the discreet identity categories (that is, of sexuality and gender identity) on which many LGBTI equality cases have been so reliant. It might also require that LGBTI public interest cases be underpinned by facts that illustrate the diversity of LGBTI experiences across class, race, and health statuses, amongst other differentials, which may in turn invite the intervention of additional parties or *amici*. Future PIL will benefit from situating LGBTI experiences firmly in a social context, so that the sexual and gender dimensions of discrimination are but two of multiple dimensions to be pursued when litigating.

It might also mean that statutory bodies should be urged to play a more active role in PIL. Alongside the ongoing and necessary PIL spearheaded by non-

[61] This refers to how a legal case against discrimination might be based on a person's sexual orientation, gender, nationality or health status as singular and unconnected identities, but rarely in combination, even though the discrimination they face might be as a result of more than one identity factor. For example, a black lesbian, who might also be a refugee, could be subject to prejudice linked to her race, sexual orientation and refugee status.

[62] Kimberlé Crenshaw 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' (1991) 43 *Stanf Law Rev* 1241–99.

governmental organisations and LGBTI individuals, perhaps it is time to 'throw the gays and lesbians' to the Chapter 9 institutions, which despite a constitutional mandate, have, in recent years, done little to systematically pursue litigation that gives succour to the defence of formal rights and the promotion of substantive equality. This is particularly concerning given the significant powers of these statutory bodies to institute special investigations, public hearings, commissions of enquiry, and to litigate directly on constitutional rights.

Finally, the three cases demonstrate the weakness of relying on the common law or the Equality Act to bring the full weight of constitutional protections to bear on LGBTI-related claims in the post same-sex marriage period. It may well be necessary for strategic litigators to i) revisit the right to dignity and consider how to develop the jurisprudence underpinning this right; and ii) reconsider how to develop the jurisprudence underpinning the right to equality so that the protections offered by the Equality Act's prohibition of unfair discrimination may be expanded to address the multiple forms of violence, exclusion and discrimination faced by LGBTI people. In this regard, the focus of inequality or unfair discrimination claims in future should move away from an analysis of differential or discriminatory treatment and towards a demand for social and legal systems that accommodate and advance difference[63] and that are attuned to intersectional forms of oppression. The reflections provided in this chapter also call for critical engagements with the constraints of the law, and how to address these in the pursuit of justice within the legal system. This requires lawyers and activists to develop new tactics that are directed both at winning cases and at building legal processes that promote rather than undermine dignity and equality. Whatever form future litigation in the public interest might take, it is vital that the practice and application of law affirms LGBTI people as full and equal citizens within the legal system itself.

[63] Sachs J in *Fourie* (note 3 above) para 60 planted the seeds of this idea when he explained in a section entitled '*A right to be different*' as follows:

> Equality means equal concern and respect across difference. It does not presuppose 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 or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.

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To my mother, for her radical moral courage;

and to my father, for being the ultimate feminist

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INTERNATIONAL INSTRUMENTS

Abbreviations

AIR	All India Reports
BCHRT	British Columbia Human Rights Tribunal
BCLR	Butterworths Constitutional Law Reports
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CNR	Canadian National Railway
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
DCLD	Discrimination Case Law Digest
DLT	Delhi Law Times
DUP	Duke University Press
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECR	European Court Reports
ETS	European Treaty Series
EWCA	England and Wales Court of Appeal
GPH	Gyan Publishing House
HL	House of Lords
HM	Her Majesty's
HRTO	Human Rights Tribunal of Ontario
HUP	Harvard University Press
ICR	Industrial Cases Reports
IRLR	Industrial Relations Law Reports
KTP	Kitchen Table Press
MEC	Member of the Executive Council
NASWP	National Association of Social Workers Press
NSR	Nova Scotia Reports
NYUP	New York University Press
OJ	Ontario Judgments
ONCA	Ontario Court of Appeal
OUP	Oxford University Press
PUP	Princeton University Press
RUP	Rutgers University Press
SA	South Africa
SACC	South African Constitutional Court
SC	Supreme Court
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SEP	South End Press
UKEAT	United Kingdom Employment Appeal Tribunal

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UKET	United Kingdom Employment Tribunal
UKSC	United Kingdom Supreme Court
USCA	United States Court of Appeals
UUP	Uppsala University Press
WLR	Weekly Law Reports

Introduction

> *The difficulty has been in finding a method to incorporate intersectionality into a legal framework premised upon the single dimension and zero sum logic. While there is clearly a will, a way has yet to be found.*[1]

Iyiola Solanke makes a poignant statement. In the three decades since 1989, when the term 'intersectionality' was coined by Kimberlé Crenshaw,[2] two things have happened. First, as Solanke indicates, there has developed a clear will to address intersectionality. This is discernible in the way intersectionality has gained purchase over the years. It has become the go-to metaphor and theory for understanding the complexity of interaction between multiple forms of disadvantage based on race, colour, ethnicity, religion, caste, sex, gender, sexual orientation, disability, age, etc. Its historical arc spans from over two centuries of Black feminist thought to more contemporary fields of Critical Race Theory, Critical Race Feminism, and Postmodernism in the last thirty years. The idea has been widely explored across disciplines in history, literature, sociology, anthropology, psychology, and philosophy. The varied theoretical and practical engagements with intersectionality, along with its strident critiques, have transformed the idea into a field of its own. Yet, secondly, in spite of its long and rich intellectual trajectory, intersectionality remains largely exterior to its site of syntactic origin—discrimination law. In the intervening decades since 1989, intersectionality has seen slow growth within discrimination law around the world. Guarantees of equality and non-discrimination seldom refer to intersectional discrimination or discrimination based on more than one ground, and judges have resisted the idea of responding to such claims. The result is that discrimination continues to be conceived of and adjudicated along a single categorial axis of racism, sexism, casteism, homophobia, ageism, ableism, etc. at a time. The result persists despite the steady interest of discrimination lawyers in addressing complex forms of

[1] Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart 2016) 133.

[2] Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

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discrimination. Articles, even books, have been spent in finding ways of translating intersectionality theory into the precincts of discrimination law practice. Despite this, the framework of discrimination law has proven to be too resistant to have been able to transform the will to address intersectionality into a way of redressing it in discrimination law. Thus, the project of transforming the will into a way may be reimagined as the project of transforming discrimination law per se. Instead of having intersectionality awkwardly fit the single-axis model, discrimination law could be re-centred around intersectionality. If so, then how should non-discrimination guarantees be articulated and interpreted? Who should they protect? How should discrimination be defined? How should it be proven? Which remedies should be ordered? In other words, how can discrimination law practice be reimagined to realize intersectionality?

This is the subject of this book. It aims to find a way to transform intersectionality theory into discrimination law and transform discrimination law in turn. In particular, it seeks to close the gap between the prolific developments in intersectionality theory and the dominant single-axis model of discrimination law. To this end, it presents a conceptual and doctrinal account of 'intersectional discrimination', that is, the category of discrimination which incorporates the insights of intersectionality theory into discrimination law. The book refers to discrimination laws of some of the leading jurisdictions which have grappled with intersectionality (including the US, the UK, Canada, South Africa, and India), as well as the jurisprudence of the UN treaty bodies (in particular, the Human Rights Committee, the Committee on the Elimination of All forms of Discrimination Against Women, and the Committee on the Rights of Persons with Disabilities) and the European courts—the Court of Justice of the European Union and the European Court of Human Rights. The comparative references help us to understand both why intersectionality remains at the fringes of discrimination law and how it can be effectively included in the discourse.

The central argument of the book is threefold. First, that the category of intersectional discrimination demands an appreciation of intersectionality theory as a framework representing: **the dynamic of sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, and in their full and relevant context, with the purpose of redressing and transforming them**. Secondly, this category of intersectional discrimination can be **qualitatively distinguished from other ways of understanding discrimination which have been developed by courts across jurisdictions, including single-axis discrimination and multiple, additive, and embedded forms of discrimination**. Thirdly, in order for claims of intersectional discrimination to succeed, one would have to **recalibrate each of the central tools of discrimination law, including the text of legislative and constitutional non-discrimination guarantees, the grounds of discrimination and test for identifying analogous grounds, the understanding of direct and indirect discrimination, the substantive meaning of discrimination,**

comparators, the standard of review, justifications, the burden of proof, and remedies. The appreciation of intersectionality in discrimination law thus requires both a theoretical framework and the comprehensive application of that framework to the doctrinal aspects of discrimination law.

In sum, the book advances the claim that no single manoeuvre can single-handedly make discrimination law respond to intersectionality. Instead, we should imagine the apparatus of discrimination law as a giant wheel composed of several interconnected cogwheels where each of the cogs will have to independently and simultaneously respond to a claim of intersectional discrimination (i.e. a multi-ground claim of discrimination which reflects intersectionality). Thus, the effort has to be comprehensive and concrete at the same time in order to make a difference. The ultimate purpose, or the difference this project hopes to make, is to challenge the traditional ways of thinking about discrimination, and opening up the field for understanding and addressing the structural and dynamic consequences of disadvantage which is multi-causal in the way it transpires.

The book is organized in four chapters. The first chapter, 'The Project: Realizing Intersectionality in Discrimination Law', outlines the journey the book seeks to undertake. It begins by setting out the current status of intersectionality across different jurisdictions. Although each jurisdiction's engagement with intersectionality has been unique, the survey concludes by pointing out the continuing legislative and judicial struggles in successfully claiming intersectional discrimination based on more than one ground. This prepares the stage for the current intervention. The chapter goes on to define the central argument of this work and the parameters within which it unfolds. In particular, it explains the choice of comparative jurisdictions and the wide range of materials employed in making a case for intersectional discrimination.

The next three chapters then set about the journey of translating intersectionality into discrimination law in three ways—theoretically, conceptually, and doctrinally.

At the outset, it is important to understand what intersectionality theory really is in order to understand how it shapes the category of intersectional discrimination. Chapter 2, 'The Theory: Outlining the Intersectional Framework', distils the theoretical framework of intersectionality for this purpose. It identifies the core of intersectionality as comprising several mutually reinforcing strands, which include the simultaneous focus on sameness and difference, interest in explicating patterns of group disadvantage, an appreciation of integrity of identity and context, and the final aim of transformation. In the process of delineating these key strands, the chapter responds to some of the most pertinent and persisting critiques of intersectionality theory. Taking the example of Dalit feminism in India, the chapter then goes on to illustrate the relevance of intersectionality theory in discursive spaces. With this, the chapter develops, defends, and applies the framework of intersectionality which helps unravel the distinct nature of intersectional discrimination.

Chapter 2 serves as the backbone of the book in that it is the framework developed therein that is referred to throughout the book when referring to intersectionality and the nature of intersectional discrimination. It is indeed this understanding that we want to see realized in discrimination law.

Chapter 3, 'The Concept: Understanding the Category of Intersectional Discrimination', turns to comparative doctrine to examine how the conceptual category of intersectional discrimination has been understood therein. The analysis reveals that courts across jurisdictions have understood complex claims of discrimination based on more than one ground not only as claims representing intersectionality (i.e. as a matter of intersectional discrimination) but also in various other ways, such as single-axis discrimination, multiple discrimination, additive discrimination, and embedded discrimination. The chapter explains how, while all these approaches capture one or another facet of the experience of intersectional discrimination, they fail to capture it in its entirety. It thus consolidates these different judicial responses along a spectrum and maps the qualitative differences between these categories as against the category of intersectional discrimination. It is argued that the differences matter diagnostically in that only the category of intersectional discrimination explains the causality in intersectional discrimination based on multiple grounds.

Chapter 4, 'The Practice: Establishing an Intersectional Claim', finally considers how this conceptual understanding of intersectional discrimination (chapter 3) based on the framework of intersectionality (chapter 2) transpires within discrimination law practice. That is, it asks how does one actually prove an intersectional claim? The argument here is that the conceptual grounding of intersectional discrimination is necessary but not sufficient for intersectional claims to succeed in discrimination law; much more is required. The chapter thus traverses the labyrinth of discrimination law doctrine to understand how each of its central features interacts with an intersectional claim. In particular, it considers the framing and interpretation of legislative and constitutional texts of non-discrimination guarantees, the test for identifying analogous grounds, the difference between direct and indirect intersectional discrimination, substantive touchstone(s) for wrongful intersectional discrimination, the use of comparison in establishing intersectional disadvantage, the standard of review and burden of proof employed, and lastly the choice of remedies to redress intersectional discrimination.

Comparative jurisprudence shows the intricate issues involved in resolving each of these debates. However, given the lack of 'model' examples of claims of intersectional discrimination in any jurisdiction, there is no easy doctrinal solution to be offered. This chapter then aims to unravel the issues to indicate where the points of resolution may lie at best. The doctrinal analysis thus points towards normative positions which may be preferred in respect of each of these central features, rather than provide normative positions in discrimination law definitely. It opens

up academic, political, legislative, and judicial possibilities for future engagement with intersectionality in discrimination law in a much more considered and precise way.

The conclusion draws together the key insights from the book. In the final analysis, it reiterates that there is no magic bullet for transforming the discourse in discrimination law for the purposes of intersectionality. The effort has to be multidimensional, touching upon all aspects of both intersectionality theory and discrimination law practice. The book is one such attempt at a multidimensional effort.

1
The Project
Realizing Intersectionality in Discrimination Law

Introduction

This book is about making intersectionality visible and viable in discrimination law. It involves two parallel inquiries: first, how has intersectionality—an idea which explains the disadvantage suffered on the basis of two or more grounds of race, colour, ethnicity, caste, class, culture, religion, sex, gender, sexual orientation, disability, age, etc.—been conceived in discrimination law until now; and secondly, how should it be conceived in a way that truly represents its core principles. Both inquiries simultaneously and discursively feed into the central aim of drawing together an account of 'intersectional discrimination' which translates intersectionality theory into the practice of discrimination law.

This chapter introduces this project. It opens by taking stock of the engagements with intersectionality in international and comparative discrimination law. The survey reveals that the fate of intersectionality in discrimination law has been patchy. Discrimination law across jurisdictions remains largely single-axis. That does not mean that the effort to change this has been wanting or that the accomplishments have been small. In fact, three decades of dynamic effort have gone into trying to make intersectionality viable in discrimination law. It is these efforts, along with their successes and failures, which make challenging the single-axis paradigm plausible and ever more urgent. The chapter sets out this background, the terms of the project, and the main claims made in this book.

Section 1 outlines what intersectionality's foray into discrimination law has been like. The concepts of intersectionality or intersectional discrimination are not introduced in any meaningful way until the next chapter. Instead, this chapter uses the terms loosely to refer to developments in discrimination law beyond its single-axis model. At this stage, all that is being done is to expose the reader to the compounding issues which confront claimants and judges when they attempt to transcend the traditional mould of discrimination law in even the slightest way, let alone in a way intended to address intersectionality as we come to define later. For this purpose then, this section invites the reader to consider a hypothetical claim mentioned by Lord Phillips in *R v JFS*.[1] It takes the reader on an imaginary

[1] [2009] UKSC 15.

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expedition through the discrimination laws of the US, UK, Canada, South Africa, India, EU, and Council of Europe, and the jurisprudence of the UN treaty bodies—to identify the array of conceptual and doctrinal issues involved in responding to the hypothetical claim. The sheer bulk of these issues highlights the relevance of this project in trying to systematize and respond to the challenges of reimagining discrimination law to suit intersectionality.

Section 2 then proceeds to consolidate these issues into three clusters—theoretical, categorial, and practical. First, the theoretical dimension relates to understanding what intersectionality itself is, in order to be translated into the category of intersectional discrimination. This involves identifying the key strands of intersectionality theory which have been developed and defended over time. Secondly, the conceptual dimension is about understanding how the category of intersectional discrimination transpires in discrimination law practice. The category is just one in the continuum of responses to discrimination claims. It is thus important to delineate it conceptually as distinct from other forms of discrimination, including single-axis, multiple, additive, and embedded discrimination. Thirdly, the practical dimension is about recalibrating the key concepts in discrimination law to relate to and redress claims of intersectional discrimination. These include—the construct of grounds, the test for analogous grounds, the concepts of direct and indirect discrimination, the substantive test of discrimination, proof and justification of discrimination, and remedies. The rest of the book is dedicated to exploring these dimensions successively in chapters 2, 3, and 4.

Section 3 defines the caveats which make this project possible. In particular, it explains some of the important choices made in pursuing this project which include—the choice of jurisdictions, the purpose and scope of comparative analysis, the focus on judicial thought, and the reference to an eclectic set of materials and sources.

1. Intersectionality in Discrimination Law

1.1 An Example

Since transitioning from the House of Lords, the UK Supreme Court decided its first discrimination claim, in fact its first case as the Supreme Court, on 16 December 2009. The then President, Lord Phillips, noted (in passing) a hypothetical situation to illustrate the difficulties in ascertaining the relevant ground in discrimination claims:

> A fat Black man goes into a shop to make a purchase. The shop-keeper says 'I do not serve people like you'. To appraise his conduct it is necessary to know what was the fact

> that determined his refusal. Was it the fact that the man was fat or the fact that he was Black? In the former case the ground of his refusal was not racial; in the latter it was.[2]

Lord Phillips was interested in cracking the typical problem of causation in discrimination: given that a person was treated unfavourably, what was the cause or ground of such treatment? According to Lord Phillips the cause could only be connected to a single ground of discrimination at a time, that is, the person was denied purchase either because he was fat or because he was Black. This normative conception of discrimination signifies the either/or model of single-axis discrimination where multiple possibilities can only lead to discrimination based on *either* one ground *or* the other but never both or together. In couching the problem in these terms, Lord Phillips excluded intersectionality (i.e. the possibility that the man could have been discriminated against on the basis of both fatness and Blackness at the same time).

Intersectionality's troubles with discrimination law begin with this simple but settled normative idea of discrimination based on no more than a single ground. But the difficulties then start compounding. Even if Lord Phillips had admitted the possibility that discrimination in this case was multi-causal, he would have found no ground like weight, fattism, corpulence, or such in UK discrimination law. Under the atomized structure of the UK's discrimination law at the time, each ground was protected separately under dedicated legislation like the Sex Discrimination Act 1975 or the Race Relations Act 1976. The Equality Act 2010 consolidated these anti-discrimination statutes and recognized nine grounds or 'protected characteristics' though not including weight. Lord Phillips would have had considerable difficulty in imagining weight or its variants as grounds given the legislative silence on the matter. He would have found no precedent for recognizing an analogous ground for protection under the Equality Act either. Perhaps he would have set a new trend in this regard and found a way of reading in weight as part of another ground (say, disability). This would then have opened up the possibility of breaking through the barrier of single-axis discrimination and recognizing that discrimination could have been based on more than one ground. But he would have been stopped in his tracks discovering that Section 14 of the Equality Act, although it recognizes 'combined discrimination' based on two grounds including race and disability, has not been brought into force.[3] The lack of legislative

[2] Ibid [21].

[3] Section 14 of the UK Equality Act 2010 provides that: 'A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.' In 2011, the government cited prohibitive costs of enforcing it, especially on businesses. Section 14 was thus dropped from consideration in the list of legislative provisions to be eventually brought into force. HM Treasury, 'The Plan for Growth' (March 2011) 53.

will would have ultimately thwarted him in recognizing such a form of discrimination judicially.

Assuming Section 14 was in fact in force, how would Lord Phillips have gone about establishing the claim then? In order to find for combination discrimination, he would have had to ask if the hypothetical claimant was treated less favourably than the shopkeeper treats or would treat others. He would have found several possibilities of comparing the claimant's treatment to lean Black men, lean white men, corpulent white men, lean Black women, corpulent Black women, lean white women, and corpulent white women. By which measure would he have picked one or more of these as appropriate comparators for establishing the claim? Would such comparison have helped in appreciating the substantive implications of being denied purchase by the shopkeeper? For example, did the treatment entrench historical patterns of group disadvantage suffered by those in the claimant's position? The claimant and the court would have had to go beyond the formal equality basis implied in 'less favourable treatment' as a standard of discrimination to a more substantive meaning of direct discrimination which speaks to a wider basis of violations in discrimination law. But then what burden of proof would the claimant have borne in proving such discrimination? What standard of review would the court have applied in turn? Could the shopkeeper have justified such discrimination nonetheless just like some other forms of direct discrimination, viz. based on disability under Section 15 of the Equality Act? Had the claimant still prevailed, what remedies could he have been entitled to—general remedies relating to Black and fat persons alike or specifically in relation to those who are both Black and fat like the claimant? Could he have claimed aggravated damages because the discrimination was based on more than one ground? And finally, would the answers to this trail of questions have changed if the case were one of indirect rather than direct discrimination?

The breathless account of concerns appears interminable. The concerns multiply and change form in different contexts. Applied in relation to individual grounds, peculiar legislative frameworks, and diverse doctrinal backgrounds across jurisdictions, intersectionality poses unique challenges in every given set of circumstances. In the specific case of the UK, the wilful unenforcement of Section 14 impedes any real consideration of intersectional discrimination by the courts. The UK Supreme Court has thus never explicitly considered an intersectional claim based on two or more grounds of discrimination under the Equality Act. One may argue that the Supreme Court has given an implicit nod to direct discrimination based on both race and sex in *Hewage v Grampian Health Board (Scotland)*.[4] The Court decided the appeal in relation to two issues—the legality of using a white male comparator to establish a claim of direct discrimination against a British woman of Sri Lankan

[4] [2012] UKSC 37.

origin; and the reversal of burden of proof when a prima facie case is established by the claimant. While the Court did not precisely consider the claim *as a matter of intersectional discrimination based on the grounds of race and sex*, in confirming the use of a white male comparator to establish that the claimant was subjected to bullying and harassment because of her race and sex, it did not dispute the plausibility of such a claim. The implied assumption that such claims exist and can be effectively established even under different legislative provisions—at the time, under the Sex Discrimination Act 1975 and the Race Relations Act 1976—may encourage future litigants and courts to claim and find for intersectional discrimination respectively. The Employment Tribunal[5] and Employment Appeal Tribunal[6] have exploited this possibility in finding for discrimination under two or more grounds. The higher appellate courts have been rather inhibited though by the unenforced Section 14, despite the favourable implications of *Hewage*. The result being that the 2004 Court of Appeal decision in *Bahl v The Law Society*[7] remains the only decision to date which explicitly considered and denied a claim of intersectional discrimination based on race and sex. In *Bahl*, Peter Gibson LJ of the Court of Appeal had found that the Employment Tribunal had omitted to: 'identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination' and that it would have been 'surprising if the evidence for each form of discrimination was the same'.[8] He insisted that for a claim of race and sex discrimination to succeed, the claimant should be able to prove both sex and race discrimination separately such that discrimination was based on 'either race or sex'.[9] The either/or approach to multi-ground discrimination established in *Bahl* has neither been overridden legislatively via Section 14 nor been challenged judicially in any considered way.

The conceptual understanding of discrimination in terms of the either/or model has a knock-on effect on matters of proof when a claim is being argued on more than one ground. First off, there is no clarity over which comparators to use to establish each ground of discrimination. The implication of the either/or model seems to be that each ground must be established separately with respect to a comparator who does not share the relevant ground in question. This means that for establishing the ground of race in *Bahl*, Dr Bahl could have compared her treatment to a white woman, who did not share her race but was otherwise similarly situated, including with respect to her sex. However, the Court of Appeal instead chose to apply a hypothetical comparator of a white man for both the grounds of

[5] *O'Reilly v BBC* [2010] UKET/2200423/2010; *Ali v North East Centre for Diversity and Racial Equality* [2005] UKET/2504529/03; *Mackie v G & N Car Sales* [2004] UKET/1806128/03; *Acharee v Chubb Guarding Services* [2000] DCLD 43 (UKET).

[6] *Tilern de Bique v Ministry of Defence* [2009] UKEAT/0075/11/SM; *Perera v Civil Service Commission* (No 2) [1982] ICR 350 (UKEAT).

[7] [2004] EWCA Civ 1070 (UK Court of Appeal).

[8] Ibid [137].

[9] Ibid [115]–[137].

race and sex equally. This was later confirmed by the Supreme Court in *Hewage*. However, the logic is clearly amiss when the same courts insist on establishing each ground separately. A white male comparator is certainly not the only comparator for someone like Dr Bahl who was both Black-Asian and female. If her race claim had to be established separately, she could have been compared to white women, as much as white men.[10]

Under the *Bahl* and *Hewage* approach to claims based on multiple grounds, it seems that our hypothetical claimant too would have to turn to a single comparator of a lean white man to establish his claim as based on race and weight separately. This raises serious issues of comparability when everyone looking to establish discrimination on more than one ground must compare themselves to the gold standard of a white male who is presumed to be privileged in every way possible and hence non-disabled, heterosexual, of a majority religion etc.[11] There is little by way of relatability for such a comparison to actually illuminate the ground or the particular disadvantage at play. Given that the burden of proof at this stage may be borne by the claimants themselves, the burden itself seems insurmountable in constructing a single comparator capable of establishing the claim on both grounds but separately. The standard of review of justifications in turn drops rather low in the absence of a formidable case from the claimant. Even when justifications are not permitted, say for direct discrimination in cases like that of the hypothetical claimant, the proof itself may be so arduous that justifications may ultimately creep into the discrimination analysis to defeat any possibility of making a plausible case of discrimination. This was in fact what transpired in *Bahl* when the case was rationalized as 'just her' and nothing really to do with the race or sex of the claimant. Ultimately, the question of remedies does not even arise given the diminished odds of winning. Though one may certainly wonder what remedies could have been awarded had the claim been established at all. For example, if the hypothetical claimant does win, can he be awarded aggravated damages if he succeeds in establishing his claim on multiple grounds in fact? Or should the remedies be naturally structural, sensitizing people to complex forms of discrimination and challenging the very stereotypes and prejudices which give rise to such discrimination? Should remedies relate to all grounds and disadvantaged groups (Black persons, fat persons, and fat Black persons) or just to the hypothetical claimant and those in his position (fat Black persons)? Rarely, if ever, have UK courts reached this point of consideration. The UK courts' tryst with intersectionality thus terminates prematurely given the characterization of multi-ground claims as limited to the either/or model of single-axis discrimination.

[10] Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 Modern Law Review 723. See, also, Solanke's response to Peter Gibson LJ's disbelief that white women could potentially discriminate against other women at all, including Black women. Ibid 731, 735. The problem with comparators in intersectional claims is explored in detail in chapter 4, section 5.

[11] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 11, 168.

1.2 A Survey

What about other jurisdictions? How would they respond to the hypothetical claimant's situation? What follows is an illustrative guide to the unique encounters the claimant may have in each jurisdiction. The purpose is to provide a taster of what discrimination law practice in courts looks like when it comes to actual or potential intersectional claims. This should help underscore the endemic nature of problems for intersectionality in discrimination law across jurisdictions.

It may be that intersectional claimants have it easier outside of the UK. This is certainly true of the US—the original site of asserting intersectionality in discrimination law. The equality guarantee under the US Constitution is open-ended and provides that no one shall be denied equal protection of the laws. Despite this expansive constitutional right, the bulk of the litigation has been at the statutory level under Title VII of the Civil Rights Act 1964 which prohibits employment discrimination on the basis of sex, race, colour, national origin, and religion. Whilst age and disability are protected separately under the Age Discrimination in Employment Act 1967 and Americans with Disabilities Act 1990, grounds like sexual orientation and weight are notably absent from statutory protection. Cases of intersectional discrimination have thus largely been limited to the grounds listed in Title VII rather than relying on grounds across legislation or reading analogous grounds into the existing legislation. The jurisprudence, much like in the UK, is limited to two grounds per discrimination claim. This has been the result of the decision in *Jefferies v Harris County Community Action Association*[12] which had interpreted intersectionality in a claim brought by Black women as a category of either 'race-plus' or 'sex-plus' discrimination. *Jefferies* was interpreted in *Judge v Marsh*[13] as limiting such discrimination to two grounds, ostensibly for preventing employment discrimination from turning into a 'many-headed Hydra' which splintered Title VII 'beyond use and recognition' by protecting 'subgroups . . . for every possible combination of race, color, sex, national origin and religion'.[14]

But even in this limited form, the US approach appears a step ahead of the either/or model in the UK in that it at least recognizes both grounds as forming the basis of discrimination. Though the US approach ultimately prioritizes one ground as the 'main' and the other as a 'plus' factor in discrimination, thus contradicting the stance that discrimination was in fact a result of two grounds equally. To wit, say the hypothetical claimant had evidence that the shopkeeper had just served his friend, a fat white man. His wife, a lean Black woman, had also been readily served in the past. So, it was not that the shopkeeper disliked fat people or that he was racist but that he particularly disliked those Blacks who were fat. A weight-plus or

[12] 615 F2d 1025 (5th Cir 1980) (USCA) 1033.
[13] 649 F Supp 770 (1986) (United States District Court, District of Columbia).
[14] Ibid 780.

race-plus classification in this case misconstrues the causality as mainly triggered by one ground and only aided by another. The likelihood of success of the claim then depends on choosing between the two grounds in a way that makes it easier to prove discrimination as eventually having been caused by the main ground.

This strategic choice has been at the heart of the US jurisprudence which operates with its own conceptual limitation of two grounds in a race-plus or sex-plus format. Given this, the development of intersectional discrimination in the US has been largely fortuitous. Whilst some complex claims like discrimination suffered by Black men based on the stereotypes associated with their gender and race have been successful,[15] other, more straightforward claims brought by Black women continue to struggle.[16] As Catharine MacKinnon describes, the upshot of the US courts' engagement with intersectionality oscillates between 'truly getting it' and 'truly missing it'.[17] But much like the UK, the conceptual limitation in understanding what intersectionality means is not the only hurdle in the way of intersectional claims. The US courts are steadfastly committed to proving discrimination through the heuristic of comparison which has thrown up insurmountable barriers for claimants of intersectional discrimination.[18] Could the hypothetical claimant compare his treatment to the more favourable treatment meted out to his fat white friend, or his wife, a lean Black woman? Would the fact that one of the comparators, his wife, has a different gender make her an inappropriate comparator for discrimination based on weight? Or would the court insist on a comparator who shares none of the relevant personal characteristics of the claimant—of being Black and fat—and is similar in every other way, such that the only relevant comparator was a lean white man? All of these options have been explored in the US case law, with little consensus on the right approach to comparison in intersectional claims.[19]

The reception of intersectionality in Canada has met with similar challenges. The general equality guarantee—Section 15(1) of the Canadian Charter of Rights and Freedoms ('Canadian Charter')—provides 'equality before and under law and equal protection and benefit of law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'. Further, the Canadian Human Rights Act (CHRA) under the heading 'multiple grounds of discrimination' prohibits discrimination 'based on one or more prohibited grounds of discrimination or on

[15] *Kimble v Wisconsin Department of Workforce Development* 690 F Supp 2d 765 (2010) (United States District Court, Eastern District of Wisconsin).

[16] See *DeGraffenreid v General Motors* 413 F Supp 142 (1976) (United States District Court, Eastern District of Missouri); *Moore v Hughes Helicopters, Inc* 708 F 2d 475 (9th Cir 1983) (USCA); *Lewis v Bloomsburg Mills, Inc* 773 F 2d 561 (4th Cir 1985) (USCA); *Daniels v Church's Chicken* 942 F Supp 533 (1996) (United States District Court, Southern Division of Alabama); *Shazor v Professional Transit Management Ltd* 744 F 3d 948 (6th Cir 2014) (USCA).

[17] Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38 Signs 1019, 1022.

[18] Suzanne B Goldberg, 'Discrimination by Comparison' (2011) 120 Yale Law Journal 728.

[19] Ibid.

the effect of a combination of prohibited grounds'.[20] Although not as clear as the CHRA language of 'multiple grounds' and 'one or more prohibited grounds of discrimination', Section 15(1) of the Canadian Charter seems general and broad enough to include intersectional claims based on multiple grounds. However, the Supreme Court of Canada has never adjudicated a discrimination claim based on multiple grounds, although it has alluded to the possibility under Section 15(1).[21] The record of other appellate courts is better. For example, the oft-cited case of *Falkiner v Ontario*[22] appears more advanced than the UK and the US position in finding that discrimination against single mothers on social assistance was based on a combination of grounds of marital status, receipt of social assistance, and sex. The hypothetical claimant in Lord Phillips' example may well succeed in arguing his claim as based on more than one ground. But once the hurdle of adding multiple grounds to a discrimination claim is crossed, the conceptual hurdle of understanding multiple grounds intersectionally emerges. In *Falkiner*, the Court went about establishing the claim by taking up evidence with respect to one ground at a time, thereby promoting an understanding that discrimination based on multiple grounds operated independently on each ground rather than interactively.[23] Thus, despite seeming intersectionality-friendly, *Falkiner*'s understanding of an intersectional claim appears no more sophisticated than that of the UK courts per *Bahl*. Further, the Canadian courts have also encumbered intersectional claimants with a relatively higher burden of proof in comparison with those claiming on a single ground, applied too low a standard of review of justifications, and even used intersectionality as a defence or justification for discrimination.[24] The Supreme Court of Canada's uninterrupted view of Section 15(1) claims as based on a single ground alone is telling of the continuing struggles of intersectionality in an otherwise open and progressive anti-discrimination regime.

The South African story, though, appears genuinely promising. Section 9(3) of the South African Constitution prohibits both direct and indirect unfair discrimination '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'. The explicit recognition of 'one or more' grounds allows for multi-ground claims to be argued. But as the US and the Canadian experiences have shown, multi-ground claims are often considered simply as multiple claims of single-ground discrimination. The South African Constitutional Court has been cognisant of not limiting multi-ground claims in

[20] Canadian Human Rights Act (RSC, 1985, c H-6) [3.1].

[21] *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) 582; *Withler v Canada* [2011] 1 SCR 396 (SCC) [58].

[22] [2002] OJ No 1771 (Ontario Court of Appeal).

[23] Diana Majury, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 Osgoode Hall Law Journal 297, 334.

[24] See these arguments explored in reference to *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (SCC), in chapter 4.

this way and has adopted many different approaches to such claims, including approaches which can be dubbed as truly intersectional. This conceptual shift has been possible due to the substantive developments in constitutional doctrine in South Africa. For example, to mention one significant development alone, the South African jurisprudence on what 'unfair discrimination' under Section 9(3) actually means in substantive terms has provided real depth to appreciating hard cases of discrimination. This includes intersectional cases like *Hassam v Jacobs*[25] where the exclusion of Muslim women in polygynous marriages from inheritance was deemed to be unfair discrimination on the basis of marital status, religion, and gender. The Constitutional Court explicated the complexity of discrimination in that case as being a result of intersecting patterns of group disadvantage associated with patriarchy, the lower status of polygynous marriages, and the historical discrimination against Muslims and Muslim culture and traditions. The elaborate perusal of historical, sociological, statistical, and economic evidence of discrimination helped appreciate such intersectional discrimination. The strides in understanding intersectional discrimination substantively are in turn aided by a doctrine which is well-equipped to transcend single-axis discrimination and cater to more complex cases. Thus, for example, the use of comparators in South African discrimination law—not only to identify the ground(s) of discrimination but also to appreciate the patterns of group disadvantage themselves by studying the comparison more closely and contextually—allows for intersectional discrimination to be established with far greater ease. For example, the use of a set of comparators proposed by the claimant in *Hassam*—widows married in terms of the Marriage Act, widows in monogamous Muslim marriages, and widows in polygynous customary marriages—revealed not only that discrimination against Muslim widows of polygynous marriages was based on religion, gender, and marital status but that such discrimination was both different from that faced by certain other similarly situated groups, but also in some ways familiar to them in as much as they too experienced forms of patriarchy, religious bias, or disadvantages from being outside of the traditional monogamous marriage.[26] What is clear is that the judicial strides made in addressing section 9 claims, both conceptually and practically, have provided useful cues for attending to intersectionality.

This is a particularly important lesson for jurisdictions like India, where intersectionality had, until recently, been defeated by judicial interpretation. The constitutional non-discrimination guarantee under Article 15(1)—'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'—has been understood as protection *only* from discrimination based on a single enumerated ground despite the concluding phrase 'or any of them'.[27] In fact, discrimination based on, for example, age and sex has been

[25] *Hassam v Jacobs* 2009 (5) SA 572 (SACC).
[26] See the discussion on use of comparators in *Hassam* (ibid) in chapter 4, section 5.
[27] *Air India v Nargesh Meerza* AIR 1981 SC 1829 (Supreme Court of India).

used as a justification for sex discrimination given that Article 15(1) has been interpreted as being limited to *only* the prohibition of sex discrimination and *not* discrimination which is based on sex 'and other considerations'.[28] This interpretation is aided both by the limited number of enumerated grounds, and the reluctance of courts to admit sexual orientation, disability, and age as analogous grounds of discrimination under Article 15(1).[29] As a result of this counterintuitive and rigid interpretation, Article 15 has contributed to, rather than alleviated, widespread discrimination against groups like Dalit women, Muslim women, and disabled women.[30] However, in the 2018 Supreme Court judgment which decriminalized sodomy,[31] the individual opinion of one of the justices finally admitted that: '[t]his narrow view of Article 15 strips the prohibition on discrimination of its essential content [because it] fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context'.[32] According to Chandrachud J, '[s]uch a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics'.[33] This is a leap of faith. Only an intersectional claim may test the true resolve of such a statement which would require courts in India not only to read the constitutional text to include intersectional discrimination but also to supply that interpretation with doctrinal tools like the test for reading in analogous grounds. There is promise in the latest discrimination jurisprudence that this could be done.

The hypothetical claimant may look beyond countries to international law for inspiration. Take, for example, the case of Dalit women in India who have vigorously pursued transnational activism as a means for having intersectional discrimination and violence based on their gender, caste, and class recognized and redressed at home.[34] They have thus participated at the Fourth World Conference on Women leading to the Beijing Declaration (1995), the First World Dalit Convention at Kuala Lumpur (1998), and the UN World Conference in Durban (2001); established the International Dalit Solidarity Network in Copenhagen (2000); and adopted the Hague Declaration on the Human Rights and Dignity of Dalit Women (2006). It is advocacy from groups like these that has led to the

[28] Ibid. Cf Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) ch 1 (arguing that there may be signs of recognition of multi-causal discrimination in early jurisprudence).

[29] Cf *Navtej Singh Johar v Union of India* (Writ Petition (Criminal) No 76 of 2016) (decided on 6 September 2018) (Supreme Court of India) (hereafter *Navtej Johar*); *National Legal Services Authority v Union of India* (2014) 5 Supreme Court Cases 438 (Supreme Court of India); *Naz Foundation v Government of NCT* (2009) 160 DLT 277 (High Court of Delhi).

[30] See for an extended analysis, Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence Under Article 15' (2016) 16 Equal Rights Review 160.

[31] *Navtej Johar* (n 29).

[32] Ibid [36] (Chandrachud J).

[33] Ibid.

[34] Upasana Mahanta, 'Social Movements in a Neo-Liberal Era' in Heidi Moksnes and Mia Melin (eds), *Global Civil Society: Shifting Powers in a Shifting World* (UUP 2012).

international recognition of multiple and intersecting forms of disadvantage that has progressively solidified within the UN treaty body jurisprudence.[35]

Intersectionality appears most distinctively in the text of the UN Convention on the Rights of Persons with Disabilities (CRPD).[36] The preamble recognizes that persons with disabilities suffer from 'multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'. The CRPD further adopts a 'twin-track' approach which speaks of disabled persons generally throughout the text of the Convention and also specifically of women and girls with disabilities, children with disabilities, and disabled poor at specific points.[37] The diversity of disadvantage suffered by persons with disabilities is the bedrock of the meaning of discrimination in the CRPD. This is now recognized in unequivocal terms in General Comment No 6 on 'Equality and Non-discrimination' which adopts the most comprehensive and detailed twin-track approach to intersectional discrimination in international law.[38]

A less detailed engagement with intersectionality appears in the text of the UN Convention on the Elimination of Discrimination Against Women (CEDAW) which declares that the 'eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women'; and refers specifically to pregnant women, mothers, rural women, and married women at various places.[39] Yet, the CEDAW Committee's record on intersectionality has been impressive, going beyond the limited text of the CEDAW and recognizing intersectional discrimination in its General Recommendations. For example, in General Recommendation No 28, the CEDAW Committee has declared that: '[i]ntersectionality is a basic

[35] See esp Report by the Secretary-General, 'Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies', 14–18 September 1998, HRI/MC/1998/6.

[36] United Nations Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3.

[37] Ibid pmbl, arts 6, 7, 18(2), 24(3), 28(2), 30(5).

[38] CRPD Committee, General Comment No 6 on equality and non-discrimination, UN Doc CRPD/C/GC/6 (2018). See for example, para 19 which declares that '"Intersectional discrimination" occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status . . . Intersectional discrimination can appear as direct or indirect discrimination, denial of reasonable accommodation or harassment. For example, while the denial of access to general health-related information due to inaccessible format affects all persons on the basis of disability, the denial to a blind woman of access to family planning services restricts her rights based on the intersection of her gender and disability. In many cases, it is difficult to separate these grounds . . . Intersectional discrimination refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination.' See also [3] [11] [21] [22] [32] [33] [36] [37] [55] [63] [67] [71] [73].

[39] United Nations Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. See pmbl, arts 4(2), 11(2), 12(2), 14, 16.

concept for understanding the scope of the general obligations of States parties [to CEDAW]'.[40] Similar observations have previously been made by the Human Rights Committee established under the International Covenant on Civil and Political Rights (ICCPR) and the Committee on the Elimination of Racial Discrimination established under the UN Convention on Elimination of All Forms of Racial Discrimination (CERD).[41] The Human Rights Committee (HRC) in its General Comment No 28 acknowledged that '[d]iscrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status'.[42] Similarly, the CERD Committee in General Recommendation No 25 noted that: 'racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.'[43] These acknowledgements have gone a long way in addressing intersectionality juridically, especially before the CEDAW Committee and the HRC under their individual complaints procedures.[44] Much can be said about the jurisprudence which grapples with intersectional disadvantage of claimants especially the CEDAW Committee's decisions in *Alyne da Silva Pimentel Teixeira v Brazil*,[45] *Kell v Canada*,[46] and *RPB v Philippines*;[47] and the HRC's decisions like *Lovelace v Canada*[48] and *LNP v Argentina*.[49] In a swath of single-axis claims decided by them, these decisions mark successful pursuits of claims brought by, respectively—a Black woman in Brazil, an aboriginal woman in Canada, a young disabled girl in Philippines, another indigenous Canadian woman, and a young indigenous girl in Argentina. Several things stand out in these decisions especially in contrast with domestic discrimination laws. First and foremost, these decisions are not formally 'legally binding' even though they indicate the most specific interpretations of the

[40] CEDAW Committee, General Recommendation No 28: Core Obligations of States Parties Under Article 2, UN Doc CEDAW/W/C/GC/28 (2010) [18].

[41] United Nations International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

[42] United Nations Human Rights Committee, General Comment No 28: Article 3 (The Equality of Rights Between Men and Women), UN Doc CCPR/C/21/Rev.1/Add.10 [30].

[43] Ibid [3].

[44] See for the analysis of CEDAW Committee and HRC respectively: Shreya Atrey, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5 Oñati Socio-Legal Series 1512; Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35 Nordic Journal of Human Rights 220.

[45] CEDAW Committee, Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008 (views adopted on 25 July 2011).

[46] CEDAW Committee, Communication No 19/2008, UN Doc CEDAW/C/51/D/19/2008 (views adopted on 28 February 2012).

[47] CEDAW Committee, Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (views adopted on 21 February 2014).

[48] HRC, Communication No R6/24, UN Doc Supp No 40 (A/36/40) (1981).

[49] HRC, Communication No 1610/2007, UN Doc CCPR/C/102/D/1610/2007 (2011).

treaties and thus determine the legal obligations arising thereof.[50] That said, the adjudicative aspect of the Committees' work is much less formal and rather liberal especially in terms of burden of proof on the parties and standard of review applied. Secondly, the evaluation of these individual complaints is not always and only based on the right to equality and non-discrimination but based on equality *with respect to* enjoyment of human rights contained in different provisions of the treaties. This helps avoid arid issues of comparison which arise chiefly in discrimination claims. Thus, thirdly, this flexible and rather liberated space for redressing intersectionality provides a useful foil for evaluating the progress made in international law generally and, also, as against the record of the domestic courts.

Between the two ends of national and international discrimination laws, lie regional laws on equality and non-discrimination. In Europe alone, two sets of independent systems under the European Union law and the European Convention on Human Rights[51] (ECHR) have created a complex web of protections. EU non-discrimination obligations arise from Article 13 of the Amsterdam Treaty 1997, now Article 19 of the Treaty on the Functioning of the European Union 2007, which obligates the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. The EU Charter of Fundamental Rights prohibits discrimination under Article 21 on the basis of a much larger set of illustrative grounds including sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, and sexual orientation. More specific protections are variously scattered in the EU Directives dedicated to specific grounds, such as the Race Directive 2000/43/EC,[52] Framework Directive 2000/78/EC which covers religion or belief, disability, age or sexual orientation,[53] Gender Directive 2004/113/EC,[54] and the Gender Directive (Recast) 2006/54/EC on gender.[55] Although seemingly exhaustive in their scope, there is some leeway in reading in other grounds within each. For example, the Court of Justice of the European Union (CJEU) interpreted severe forms of obesity to be included within the ground of disability under the Framework Directive.[56]

[50] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (OUP 2014) [1.61] [1.69].

[51] European Convention on Human Rights and Fundamental Freedoms 1950 (opened for signature 4 November 1950, entered into force 3 September 1953) ETS 5.

[52] Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

[53] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[54] Council Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2003] OJ L373/37.

[55] Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[56] Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* [2014] ECLI:EU:C:2014:2463.

The hypothetical claimant in Lord Phillips' example may find it far easier to argue on the basis of weight, obesity, or fattism with this specific recognition, although he would have to surmount the fragmentation hurdle of arguing a claim on two grounds under two different directives. Fragmentation matters because, besides relating to different sets of grounds, the directives have differing material scope. The Race Directive applies to employment and occupation, education, social protection (including social security and healthcare), social advantages, and access to and supply of goods and services; the Framework Directive applies to employment and occupation; the Gender Directive applies to the access of supply of goods and services; and the Gender Directive (Recast) applies to the field of employment and occupation. So, whilst the Race Directive covers access to goods and services, the Framework Directive which includes disability does not cover the situation of the hypothetical claimant.

Notwithstanding the complex design of EU discrimination law, its conceptual foundations do seem to go beyond single-axis discrimination. Whilst the directives do not mention intersectionality explicitly, there are sporadic references to interaction of grounds in producing discrimination prohibited under the directives.[57] Recital 14 of the Race Directive and Recital 3 of the Framework Directive mandate the EU to: 'eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination'. Other references are less explicit. Article 6(2) of the Framework Directive provides that although age discrimination can be justified, it must not 'result in discrimination on the grounds of sex', thereby prohibiting the intersection of age and sex discrimination to be considered lawful. The Gender Directive (Recast) acknowledges discrimination against women in marriage, pregnancy, maternity, and child-care.[58] Article 6 further recognizes that the Gender Directive (Recast) applies not just between men and women but to 'members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers', thereby acknowledging the effects of illness, maternity, unemployment, and disability on women's equality. These provisions are considered sufficiently accommodating of intersectional discrimination.[59] The CJEU has been lauded for responding to single-axis claims based on sex or age in a manner which took into account multiple and crosscutting disadvantages of claimants.[60] Yet, it seems to have missed such disadvantages when

[57] Race Directive, recital 14; Framework Directive, recitals 2, 3, 10 and arts 4(2), 6(2); Gender Directive (Recast), recitals 3, 11, 23, 24 and arts 6, 8(2), 9(1)(c), 11(a), 13.

[58] Gender Directive (Recast), recitals 11, 23, 24.

[59] Gay Moon, 'Multiple Discrimination: Justice for the Whole Person' (2009) 2 Journal of the European Roma Rights Centre 5; Karon Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2012) 13 European Anti-discrimination Law Review 20.

[60] Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (2016) <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/07/

argued explicitly. The failure of the only intersectional case argued and decided as such by the CJEU confirms this.

Parris v Trinity College Dublin[61] was argued on two grounds—age and sexual orientation—under the Framework Directive.[62] The case concerned the denial of the survivor's benefit under an occupational pension scheme to same-sex partners who had not married or entered into a civil partnership until the member's sixtieth birthday. The member of the scheme in the case was unable to formalize his same-sex union before he turned sixty since same-sex civil partnerships were not recognized in Ireland before 2011. Therefore, the rule did not disadvantage younger gay couples who could enter into civil partnerships after 2011 and still meet the terms of the scheme or heterosexual couples who had a choice to marry before that date. The rule specifically affected older gay couples who had no chance of legalizing their unions before turning sixty because of restrictive marriage laws in Ireland. The CJEU found that there was no basis of finding such 'combined' discrimination when no discrimination existed on the basis of sexual orientation and age alone:

> while discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.[63]

In this way, the Court rejected the normative basis of intersectionality in EU discrimination law—finding instead that multi-ground claims exist only as claims of single-ground discrimination taken in succession. The first and only test case of intersectional discrimination in EU law thus falls in line with other jurisdictions which adopt a limited understanding of multi-ground intersectional claims as simply multiple claims of single-axis discrimination. Thus, our hypothetical claimant may fare no better in EU law which shows promising signs of embracing intersectionality in its legislative text and in cases argued on a single ground, but has finally rejected intersectionality when it came to it in *Parris*.

The case of the ECHR is slightly different. For starters, though there are forty-seven States Parties to the ECHR, it is not directly binding in the way that EU treaties and legislation are, which bind twenty-seven Member States. Yet, the ECHR

Intersectional-discrimination-in-EU-gender-equality-and-non-discrimination-law.pdf> (see esp the discussion on Case C-123/10 *Brachner v Pensionsversicherungsanstalt* [2011] ECR I-000). Cf Case C-555/07 *Kucukdeveci v Swedex GmbH & Co KG* [2010] ECR I-00365; Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-09981; Case C-77/02 *Steinicke v Bundesanstalt für Arbeit* 2003 I-09027; Case C-187/00 *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-2741.

[61] Case C-443/15 *Parris v Trinity College Dublin* [2017] ICR 313 (hereafter *Parris*).

[62] Cf Case C-227/04 *Maria-Luise Lindorfer v Council of the European Union* [2007] ECR I-6767 (argued on two grounds before the CJEU but not decided as such).

[63] *Parris* (n 61) [80].

is implemented through domestic legislation like the Human Rights Act 1998 in the UK and the judgments of the European Court of Human Rights (ECtHR) too are binding. As international law, the ECHR thus lies somewhere between the UN human rights treaties and the EU law in terms of enforceability. What is most peculiar, though, is the way the equality guarantee is set out. Article 14 of the ECHR provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

On the face of it, the right is 'parasitic' on other Convention rights, such that the discrimination complained of under Article 14 must be connected to the 'enjoyment of the rights and freedoms set forth in this Convention'. The ECtHR has started interpreting this link liberally—no longer requiring that the discrimination claim would only arise upon the 'breach' of another right but merely when the matter is within the 'ambit' of other Convention rights.[64] In any case, a self-standing equality guarantee was incorporated via Protocol 12 to the ECHR in 2000 which prohibits discrimination in relation to any 'right set forth by law'.[65] But no discrimination claim has been brought forward on two or more grounds under the Protocol, and it remains to be seen whether claimants would find it any easier to prove discrimination independent of other Convention rights. The concern arises because while several potential intersectional cases seem to have been decided under the ECHR, including challenges to a headscarf ban by Muslim women and to forced sterilization of Roma women;[66] these claims have seldom touched upon Article 14 itself. References to intersectionality have instead been confined to understanding the basis of violations of other Convention rights like the right to religion or the right to privacy. This opens up an intriguing prospect of arguing discrimination in the guise of other Convention rights, rather than in reference to Article 14 explicitly. It may provide a unique opportunity to our hypothetical claimant—the fat Black man—to challenge certain kinds of treatment which touch upon civil–political rights like life, liberty, and security. However, he will find it difficult to argue a 'classic' discrimination case like the denial of service by a private shopkeeper as a violation of another right for which a state or public authority is meant to be accountable. Even if the hypothetical claimant surmounts the parasitic nature of Article 14, there are further hurdles to confront.

[64] Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273.

[65] Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (adopted on 4 November 2000, entered into force 1 April 2005) ETS 177.

[66] *SAS v France* [2014] ECHR 695.

The list of enumerated grounds in Article 14 of the ECHR is non-exhaustive. In comparison with EU law, the enumerated grounds are greater in number, including language, political or other opinion, national or social origin, association with a national minority, property, and birth. Grounds such as disability, sexual orientation, and age, which were not included in 1950 when the Convention was adopted, have now been judicially recognized by the ECtHR.[67] The Court has also recognized immigrant status,[68] place of residence,[69] and prisoners[70] within 'other status' protected under Article 14. Though the Court has not yet considered weight-related grounds, its rather inclusive approach to grounds could be helpful for the hypothetical claimant in having them recognized as analogous to grounds in Article 14. But this rather liberal approach to grounds comes with a variable standard of scrutiny attached to different grounds. While some grounds, like race, sex, sexual orientation, and disability, attract a very high standard of scrutiny requiring 'particularly convincing and weighty reasons' for discrimination to be justified,[71] other grounds only attract a low standard of scrutiny, giving states a wide margin of appreciation to justify discrimination on a reasonable basis.[72] This throws up an unusual problem of choosing the appropriate standard of scrutiny for intersectional claims which are based both on grounds attracting a very high standard of scrutiny, viz. race, and on those attracting relatively lower levels of scrutiny, perhaps weight. No answer has been offered in doctrine and intersectional claims under the ECHR remain few and far between.

2. The Project

As the hypothetical claimant travels across jurisdictions his expectations recede. Not only are his problems in the UK mirrored in other jurisdictions, they multiply and change form from one regime to another. He notices some scattered bright spots in the jurisprudence, but nowhere does he find discrimination law practice on all fours with intersectionality. But can he use the lessons in comparative law to conceive of a successful intersectional claim which overcomes the recurring roadblocks to intersectionality, while also following the favourable signs in doctrine?

[67] For example, disability was recognized in *Glor v Switzerland* (2009) Application No 13444/04 (ECtHR); sexual orientation in *Kiyutin v Russia* [2011] ECHR 439, *Alajos Kiss v Hungary* (2010) Application No 38832/06 (ECtHR), and *Salgueiro Da Silva Mouta v Portugal* (2010) Application No 33290/96 (ECtHR); and age in *Schwizgebel v Switzerland* (2010) Application No 25762/07 (ECtHR).

[68] *Bah v United Kingdom* (2011) Application No 56328/07 (ECtHR).

[69] *Carson v United Kingdom* [2010] ECHR 338.

[70] *Laduna v Slovakia* (2011) Application No 31827/02 (ECtHR).

[71] *DH v* Czech *Republic* (2007) Application No 57325/00 (ECtHR); *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) Application Nos 9214/80, 9473/81, 9474/81 (ECtHR); *X v Austria* (2013) Application No 19010/07 (ECtHR).

[72] *Stec v United Kingdom* [2006] ECHR 1162; *Connors v United Kingdom* [2004] ECHR 223.

This book is dedicated to imagining such a successful account of a claim of intersectional discrimination.

The account of intersectional discrimination properly so called may be conceived along three dimensions: theoretical, categorial, and practical. The first and overarching concern is that there seems to be a gap between what is meant by intersectionality and how intersectional claims are understood. The gap is theoretical in that discrimination law does not appear to be abreast with the idea of intersectionality, let alone responding to a claim based on intersectionality successfully. So, what does it mean for someone to suffer intersectional discrimination? There is no consensus across jurisdictions as to what is meant by this. The first thing to do then is to explicate intersectionality theory itself to understand what it brings to discrimination law and to the category of intersectional discrimination.

What intersectionality *is* is a normative question. It is informed by over two hundred years of Black feminism and, more recently, since the 1980s, by Critical Race Studies, Critical Race Feminism, and Postmodernism in the United States. There are also indigenous framings of intersectionality which have existed and been developed without reference to 'intersectionality' as a trope. All of these together provide a rich resource for understanding what the theory stands for, thirty years after it was consolidated and christened 'intersectionality' by Kimberlé Crenshaw.[73] This understanding is at the heart of the present project. Once we know what intersectionality means, it is that understanding that we would like realized in discrimination law practice. Thus, what we want to know at the outset is what is the hypothetical claimant really saying when he says that he has suffered intersectional discrimination on the basis of his race and weight.

Secondly, how is this understanding different from the way in which discrimination is traditionally understood in law? The traditional paradigm of discrimination has been single-axis. This was the case when Crenshaw first mounted her critique in 1989 and remains the case today. In fact, Lord Phillips does not, even hypothetically, pause to consider that a fat Black man could potentially be discriminated on two grounds and only asks which of the two (race or weight) it is for it to be discrimination. But our short comparative survey shows that this is no longer the standard reaction to complex claims. Assertions of discrimination based on more than one ground have been interpreted beyond single-axis and variously as sex-plus, race-plus, multiple discrimination, and such. Cases like *Bahl, Jefferies, Falkiner*, and *Parris* show very different kinds of conceptual categorizations of multi-ground claims, different from both single-axis and intersectional discrimination. So how do we explain the difference and, importantly, how do we reinterpret

[73] Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139 (hereafter Crenshaw, 'Demarginalizing the Intersection').

these claims as claims of intersectional discrimination, if they really were that in fact?

At this point, we are both observing as well as closing the gap between intersectionality theory and how it manifests itself in discrimination law as a form or category of discrimination. This means conceptually delineating the different categories of thinking about discrimination, including single-axis discrimination and its variations (such as substantially single-axis, capacious single-axis, and contextual single-axis discrimination) as well as various forms of multi-ground discrimination (including multiple, additive as in combination or compound, embedded, and intersectional discrimination). The proliferation of categories of discrimination beyond single-axis is a promising sign for intersectionality. But it makes it all the more important, then, to be amply clear, diagnostically-speaking, as to what discrimination in each case entails.

Thirdly, and as the comparative survey made plain, the theoretical and categorial dimensions of intersectionality and intersectional discrimination respectively are not themselves enough in actually ensuring that intersectional claims succeed. They need to specifically resonate with the practice of discrimination law. This involves studying how each concept or cog in the wheel of discrimination law responds to an intersectional claim, including the text of the discrimination guarantees, the grounds of protection, the possibility of expansion of grounds, the scope of prohibition of direct and indirect discrimination, the test for discrimination, the use of comparators, the justification defences, the standard of scrutiny and burden of proof, and the possible remedies. It is only when each of these independently and simultaneously responds to intersectionality favourably that an intersectional claim may succeed.

In fact, the three dimensions of theoretical, categorial, and practical inquiries too are inevitably related and at points overlapping. It is their collective force which turns intersectionality from an independent theory into a category of intersectional discrimination in practice. For example, the theoretical and categorial dimensions reinforce each other in that the contours of intersectionality theory define the category of intersectional discrimination, and this categorization in turn shows the contrast with other ways of conceiving discrimination. The praxis further reveals that a theoretical and categorial understanding of intersectionality and intersectional discrimination respectively is insufficient for the project at hand. Realizing intersectionality in discrimination law thus requires a concerted effort which touches all aspects of discrimination law—theoretically, categorially, and doctrinally.

This project is such an effort. The next three chapters of the book unravel each of the dimensions of the project. The conclusions with respect to each contribute to the threefold central argument made in this book: that the account of intersectional discrimination—(i) is inspired by the idea of intersectionality, which illuminates the dynamic of sameness and difference in patterns of group disadvantage

based on multiple identities understood as a whole, and in their full and relevant context, with the purpose of redressing and transforming them; (ii) is conceptually and categorially salient in discrimination law, that is qualitatively different from the category of single-axis discrimination and also other forms of multi-ground discrimination such as substantially single-axis, capacious single-axis, contextual single-axis, multiple, additive, or embedded discrimination; and (iii) can be accommodated in discrimination law by recalibrating the chief features of discrimination law practice to align with it, including features like grounds, direct and indirect discrimination, test of discrimination, comparators, burden of proof, standard of scrutiny, and remedies.

The book is admittedly lopsided. It is just three chapters, each exploring the theoretical, conceptual, and doctrinal dimensions of the project. The chapters become lengthier as we proceed. This only reflects the uphill task intersectionality represents in terms of having it understood as a theory, then as a concept of discrimination, and finally having it redressed in discrimination law. The reader will have to cope with the surmounting roadblocks to intersectionality at each step. The steps are clearly outlined in subheadings for readers to browse independently. Though as a whole, it is useful to remember that it is only when each step along the way is well taken that we may finally arrive at a destination worth writing home about as intersectional discrimination.

3. The Parameters

As one would expect, a catholic account of intersectional discrimination of the kind offered in this book is constructed within certain parameters. It is important to explain what these are so that the account holds up and can ultimately do the work it is intended for in discrimination law.

First, a few remarks about the nature of the account are in order. The account is imagined as embodying what is necessary and sufficient for realizing intersectionality in discrimination law, in theoretical and doctrinal terms. Yet, it must be acknowledged that it is still a mediating and tentative account. All it does is take intersectionality theory and discrimination law as they have been developed in theory and practice and imagine intersectional discrimination within these discourses. It is thus, to draw some inspiration from Rawls, representing a state of 'reflective equilibrium' resting on the stilts of intersectionality and discrimination law.[74] This means that the account is internally consistent amongst the principles which give rise to it (intersectionality theory and discrimination law) and also consistent with the particular cases to which it is applied. In line with the Rawlsian

[74] John Rawls, *A Theory of Justice* (1st edn, OUP 1971) 20, 48–51.

approach, it is arrived at by first sketching an initial theoretical account (chapter 2), and then testing it against specific cases in discrimination law (chapters 3 and 4). The initial account is constantly reconsidered in light of its application to particular cases and its principles are accordingly open to revision. The book follows this discursive process of reasoning back and forth between theory and comparative doctrine. The emphasis on particular cases appreciates rather than suppresses the peculiarities of new cases which may belie a set formula and reflect their own complexities on the account. The possibility of revision upon reflection allows mediating accounts, like the present one, to continue to develop as more intersectional cases emerge. This is also the reason why the account is best described as tentative. It is consistent with Crenshaw's description of the original conceptualization of intersectionality theory in 1989 as 'provisional' and since then always as being a 'work-in-progress'.[75]

The account is also tentative in that it is non-particular. It is drawn from the failed and successful experiences of intersectional discrimination in many jurisdictions. The account which comprises theoretical, categorial, and practical matters seeks to represent the bare bones of intersectional discrimination which is common to the jurisdictions it is derived from but does not represent a full-bodied version of intersectional discrimination in any one jurisdiction. Instead, the skeleton can be filled in based on the peculiarities of both specific discrimination claims and particular laws which apply. I hope the book as a whole shows how this transition from comparative law to a general account and back can be made in contexts far and wide.

And lastly, it is a mediating account because it is not so much a complete reimagination of law, politics, or society but a critical restatement of discrimination law to accommodate, what is for itself a rather radical idea, intersectionality. The project neither dismantles the structure of discrimination law nor does it abandon it as a site of reform. It is thus an admittedly liberal account which nevertheless hopes to achieve radical transformation of both intersectionality, as in the patterns of disadvantage created by it, as well as discrimination law, which seems to neglect such patterns. Sceptics may rightfully find this line dissatisfying. That will just have to be, given that this project is about rendering intersectionality redressable in discrimination law *as it exists* in theory and practice. If they still do peruse the book, I hope that they at least reckon with the transformative utopia imagined as a result of realizing intersectionality in discrimination law. In fact, the present project may complement other interventions—political reform, social movements, and even the radical overhaul of discrimination law—that aim to achieve just this.

The restatement of discrimination law in this project is primarily concerned with the juridical realization of intersectionality, namely having people claim

[75] Devon W Carbado, Kimberlé Williams Crenshaw, Vickie M Mays, and Barbara Tomilson, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 Du Bois Review 303, 304.

intersectional discrimination successfully in courts. It is in line with discrimination laws which have developed through the common law route by adjudicators arriving at general principles from specific cases.[76] The focus on adjudication of intersectional claims is no small matter given the frequency with which intersectional claims fail. In fact, adjudication has a special link to justice, in that it is exactly the business of courts to impart justice.[77] Justice for individual victims of intersectional discrimination, like the hypothetical claimant in Lord Phillips' example, should thus be an imminent concern for discrimination lawyers, even if we agree that broader efforts to dismantle patterns of intersectional disadvantage need also be pursued. Therefore, the corollary of the prohibition of discrimination as positive discrimination, in the form of affirmative action, preferential treatment, or reasonable accommodation, should all be a part of the conversation for realizing intersectionality in discrimination law.

This brings me to offer an explanation for the choice of jurisdictions covered and the purpose of comparative analysis undertaken here. This project engaged with the discrimination laws of the US, UK, Canada, South Africa, India, and the EU and with the jurisprudence of the ECtHR and human rights treaty bodies including the CEDAW Committee, CRPD Committee, and the Human Rights Committee. The basis of selection is in equal parts dictated by purpose and practicality. The purpose of referring to these jurisdictions is to understand, explain, and learn from how courts in different jurisdictions have actually responded to actual or potential cases of intersectional discrimination. It gives real depth and meaning to the aim of arriving at a normative account that is embedded in practical experience and hence relevant in and sensitive to contexts to which it may be applied. Since the purpose of sketching a normative account here is for supporting actual cases of intersectional discrimination, testing it against existing doctrine provides an opportunity to reflect on, revise, and reaffirm the principles of the account, in line with the methodology of reflective equilibrium. In fact, the doctrine in these jurisdictions provides particularly rich fodder for the present inquiry because of their relatively mature discrimination laws as well as their engagement with intersectionality. The fact that the account of intersectional discrimination is inspired by comparative doctrine from these jurisdictions, which have some of the most progressive discrimination law practice, makes it both contemporary and compelling in redressing intersectional discrimination.

But what binds them ultimately is that these jurisdictions share some of the key features of discrimination law and a common language which provides consistency

[76] Denise G Réaume, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 Osgoode Hall Law Journal 113.

[77] John Gardner, 'Discrimination as Injustice' (1996) 16 Oxford Journal of Legal Studies 353, 354–55, who in fact argued that justice had a special link to adjudication, though perhaps the obverse is true just the same.

and feasibility to the project of considering them together. Their discrimination laws have a common premise in central concepts they employ, for example, direct and indirect discrimination, grounds, burden of proof, justification defences, etc. While there are substantial differences in how these concepts actually transpire within a particular jurisdiction, the differences do not defeat the allegiance to these central concepts per se. For example, even as direct discrimination under the UK Equality Act 2010 operates with a finite number of grounds in the form of a closed list unlike the Canadian and South African constitutional counterparts, the underpinning of 'grounds' itself seems to be a common one. Similarly, what is 'unfair discrimination' under the South African Constitution is 'discrimination' under the Canadian Charter and may be 'less favourable treatment'/'direct discrimination' and 'particular disadvantage'/'indirect discrimination' under the UK Equality Act 2010;[78] but the substantive explanations of these concepts confirm that the jurisdictions are in fact involved in a common project of addressing status-based disadvantages. Though inter-jurisdictional differences remain important to this project and are appropriately noted, they do not themselves make the choice of studying these jurisdictions together irreconcilable. In fact, inter-jurisdictional conversations[79] and cross-pollination of concepts[80] are very much a part of the methodology of doing discrimination law. For example, important concepts like indirect discrimination, analogous grounds, and even intersectionality as developed in the US have travelled trans-continentally and been embraced by jurisdictions around the world. The transatlantic borrowing from US law is particularly visible in the UK which in turn influenced the development of EU law. This is also characteristic of the way in which South African equality jurisprudence developed in reference to its Canadian counterpart.[81] Comparativism is thus a running thread in the fabric of discrimination law. It is important for a project on intersectional discrimination to speak to and profit from this feature.

Another practical concern is that because intersectional discrimination remains largely unrealized in discrimination law, most jurisdictions only have a handful of cases to offer on the subject. Lack of intersectional cases may be explained by the judicial resistance to them and to ask for more resilience in the face of such resistance would be asking for too much and in vain. While no single

[78] Constitution of South Africa 1997, s 9(3); Canadian Charter of Rights and Freedoms 1982, s 15(1); UK Equality Act 2010, ss 13, 14, 19.

[79] For similar projects which work with comparative doctrine from these jurisdictions, see Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011); Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015).

[80] See generally Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499.

[81] Albie Sachs, 'Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court' (1999) 5 Review of Constitutional Studies 76; Adam M Dodek, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 Supreme Court Law Review 309.

jurisdiction provides an extensive catchment of intersectional claims, comparative law comes in handy here in providing references to a diverse set of intersectional claims. From the number and kind of grounds involved, the categorization of direct or indirect intersectional discrimination, and methods relied on in proving discrimination to understanding the actual discrimination suffered by intersectional claimants and the eventual remedies they receive, the cases show the many permutations and combinations of issues involved in intersectional discrimination. The comparative references are not comprehensive in any sense, though. The selection of cases is meant to be purposeful, to shine a spotlight on some of the most knotty problems with intersectional discrimination and how they can be resolved, rather than to populate the ranks of cases for each point of discussion. The hope, then, is that the experience of these jurisdictions with intersectional discrimination will provide the necessary steer for imagining and initiating developments elsewhere, including non-Anglophone and civil law systems, and other areas of international law.

For all this, finally, it must be recognized that the book relies on an eclectic set of sources to make its case. Besides obvious references to intersectionality theory and comparative discrimination law, there is appropriate use made of feminist theory, Dalit feminism, identity theory, disability law, and philosophy of discrimination law. All of these have influenced the way in which both intersectionality and discrimination law have developed. But their contribution remains latent and is often missed. The purpose is to make these foundational influences evident and to ultimately have intersectional discrimination resonate with them. Kalpana Kannabiran explains this befittingly: 'The effort to use a plurality of sources points towards the existence of multiple locations of [discrimination] law in action, and to the need to span the entire range in order to grasp the complexity of the problem and its solutions.'[82] Given that intersectionality remains largely unrealized in discrimination law, this project is fairly liberated in taking its own form while remaining faithful to the foundational influences of both intersectionality and discrimination law. But it is not only better but expedient to go beyond the law at least. The reason is straightforward. It is only through these wider sets of sources, which go beyond law or strictly discrimination law, that we understand the lived reality of discrimination. The project of redressing discrimination of any kind will miss the mark if it does not actually understand what those experiences of discrimination really are. Thus, this book, especially in chapter 2, casts a wide net in appreciating discrimination for what it is, especially intersectional discrimination, through a variety of social, philosophical, and ethnographic material. It is a commitment to keeping it real in discrimination law.

[82] Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 43.

Conclusion

The fact that, thirty years after Crenshaw's seminal article describing intersectionality in US discrimination law,[83] this book still needs to be written is a paradox in discrimination law. That a body of law specifically designed to address inequality has missed the worst kind of inequalities which are constituted and compounded by their interaction seems astonishing. Those who are not discrimination lawyers may find it especially so. But why has discrimination law been so resistant to Crenshaw's major insights when intersectionality has proliferated in other disciplines rather successfully? Why would real or hypothetical claims continue to be construed as anything but claims of intersectional discrimination? Perhaps, as this chapter tried to show, the paraphernalia of discrimination law is too extensive and intricate to simply adjust itself to intersectionality. It is, in theory and practice, designed for single-axis discrimination per se. Intersectionality is fundamentally incompatible with this framework. So, what does it take to reimagine the framework as a whole? This chapter has introduced this project and defined its parameters. I hope the readers take away from this the significance and urgency of the project to embark on the three-dimensional journey through the theoretical, categorial, and doctrinal issues in resolving this inexplicable paradox.

[83] Crenshaw, 'Demarginalizing the Intersection' (n 73).

2
The Theory
Outlining the Intersectional Framework

Introduction

The first of three questions that this book sets out to answer is what exactly is intersectionality or the idea that forms the kernel of the category of intersectional discrimination? This chapter is concerned with that question. It outlines the framework of intersectionality, which serves as the backbone of the project of redressing intersectional discrimination because it tells us what it is about this category of discrimination that we want redressed through law. It thus prepares the ground for answering the next two questions about how this understanding of intersectional discrimination differs from other categories of discrimination and how it can be accommodated in discrimination law practice.

The present chapter aims to do three things: delineate, defend, and apply the principal strands of the framework of intersectional theory and praxis. Section 1 identifies five strands in particular: the attention to both sameness and difference (section 1.1), in relation to patterns of group disadvantage (section 1.2), considered as a whole or with integrity (section 1.3), in their full context (section 1.4), with the purpose of furthering broadly conceived and transformative aims (section 1.5). Each of these has been present, emphasized, and developed in intersectionality thinking over the years. I argue that together they represent the intellectual core of intersectionality, and in turn the core of the category of intersectional discrimination is defined by it.

Section 2 responds to some of the key critiques of intersectionality theory that have emerged in the last three decades. Prominent amongst these is the reliance of intersectionality theory on identity categories and identity politics. Section 2.1 explains this reliance as reflexive and thus critical of its limitations while enabling the potential for transformation. Section 2.2 shows that intersectionality's reliance on identity categories is one shared with discrimination law and hence not utterly out of kilter. An understanding of intersectionality critiques and the responses to them clarifies each of the strands further. It confirms the continuing relevance and mettle of intersectionality in analysing the complexity of disadvantage in the world and particularly in discrimination law. Section 3 extends the framework to the Dalit feminist discourse. Its relevance in explaining the disadvantage suffered on the basis of caste and sex in a wholly different context—of Dalit women

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in India—confirms the normative strength and global appeal of intersectionality beyond its paradigmatic case of Black women in the United States.

1. The Idea

Human lives are complex. Everyone has an ethnicity, gender, sexual orientation, age, marital status, and national or social origin; some are disabled, have political opinions or religious beliefs, are pregnant, or have parental responsibilities. All of these identities affect us in different ways and in the way we experience the world. The absence of disability helps some to navigate an able-bodied world efficiently. Belonging to a dominant race helps evade the negative stereotypes and prejudices suffered by racial and ethnic minorities. Practising a dominant religion helps people live undisrupted lives in a society which accommodates their preferences for working hours, holidays, grooming, clothing, and diet. Being male allows patriarchal privileges within structures of domination which have been conceived to subordinate and exclude women. Heteronormative assumptions similarly allow straight men and women to 'fit in' and be perceived as part of the mainstream culture. Straying from any of these positions of power brings well-known disadvantages associated with racism, sexism, homophobia, transphobia, ageism, ableism, etc. The anti-racism movement, feminism, LGBTQ advocacy, and disability activism have thus grown to resist the everyday injustices inflicted on disadvantaged groups and individuals around the world.

But human lives can be more complex still. Some people may not just belong to one of these disadvantaged groups but several of them at once. Those who are disabled can also be Black; those who are disabled and Black can be Muslims; some of these Black Muslims who are disabled will be women; and some of these Black Muslim women who are disabled can be gay. Disadvantage associated with each of these groups, and individuals belonging to them, will no longer be defined along a single categorial axis of racism, sexism, homophobia, transphobia, or ableism alone. The positions of these groups may represent a much more complex picture of disadvantage, caught between the throes of many movements at once.

Intersectionality is about cutting a wedge into this complexity. It helps understand the structural and dynamic consequences of interaction between multiple forms of disadvantage based on race, sex, gender, disability, class, age, caste, religion, sexual orientation, region, etc. In helping to understand this complexity, it opens up ways of addressing the disadvantage associated with it.

This basic idea of navigating complexity has itself developed into a complex body of intellectual thought and praxis. Intersectionality has been unmissable in the public discourse: from frequent references to intersectionality by the 2016 US presidential candidates Bernie Sanders and Hilary Clinton, its mounting relevance in the headscarf controversy embroiling Muslim women in Europe, and its

repeated invocation in the blazing Rhodes Must Fall campus movement at South African universities; to the swathe of signage embracing intersectionality during the recent Women's Marches around the world, its omnipresence in the #MeToo and #TimesUp movements, and its ubiquitous pop culture presence popularized by celebrities like Beyoncé and activists like Malala Yousafzai and adopted by online denizens alike. Movements around the world are animated with intersectional ideas even where the locution itself is absent. The Black feminist struggle in Brazil and Dalit women's resistance in India both work with intersectional frames in fighting multiple oppressions of race, caste, sex, gender, and class. The organization of microfinance and microcredit for rural women in the global south has similarly become increasingly attentive to intersectionality. Intersectional overtones have defined the discussions around the global refugee crisis, paying specific attention to the persecution and plight of women and children, disabled persons, and sexual minorities. Local and specific sites for applying intersectionality in practice have thus proliferated globally, elevating intersectionality to a level of international prominence.

Meanwhile, the intellectual project of intersectionality has also continued to flourish. Google Scholar alone returns tens of thousands of articles on intersectionality. But nowhere are its involute workings clearer and more consolidated than at its source in Kimberlé Williams Crenshaw's 1989 article where the term 'intersectionality' was first introduced.[1] Crenshaw used intersectionality to explain the disadvantage suffered by Black women on the basis of their race and sex. She showed how this combined form of disadvantage was similar to both the disadvantage suffered by white women on the basis of their sex and the disadvantage suffered by Black men on the basis of their race, as well as different from these forms of disadvantage, as disadvantage suffered by Black women *as Black women* on the basis of their race and sex both. The complexity of such disadvantage was lost on the discourses of three fields—discrimination law, feminism, and the civil rights movement in the US. All of them, Crenshaw argued, operated along a single categorial axis of either race or sex, thereby protecting only those who were disadvantaged *but for* their race or sex, viz. Black men and white women. They excluded from protection Black women, whose position of disadvantage was defined not by race or sex alone but by both of them at the same time. Crenshaw thus exhorted discrimination lawyers, feminists, and civil rights campaigners alike to rethink and recast the established analytical frames of understanding and redressing discrimination so that they included intersectionality.

The intellectual trajectory of intersectionality extends both backwards and forwards from Crenshaw's first intervention in 1989. Crenshaw drew from over

[1] Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139 (hereafter Crenshaw, 'Demarginalizing').

a century's worth of rich Black feminist thought and those after Crenshaw have continued to draw on Crenshaw as well as other seminal intersectionalists, including Patricia Hill Collins, Angela Harris, Adrien Katherine Wing, Mari Matsuda, Gloria Anzaldúa, Richard Delgado, Patricia Williams, and others, to develop intersectionality in diverse contexts. Initially conceived as a Black feminist critique, the theoretical engagements with intersectionality now go beyond its disciplinarily origins in Critical Race Feminism, Critical Race Theory, Critical Legal Studies (CLS), and feminist and postmodern jurisprudence and into literature, sociology, anthropology, gender studies, economics, history, psychology, political science, and political theory.[2] Its beneficiaries have multiplied beyond women of colour in the US, to Black women in Latin America, indigenous women in Canada, Roma women in Europe, and Muslim women, disabled women, lesbians, and transwomen around the world.[3] Intersectionality has thus transformed into a truly representative form of feminism capable of speaking to myriad systems of power and structures of domination in diverse contexts. It has also been used for intersectional groups beyond the intersections with sex to explicate the disadvantage suffered by, for example, disabled LGBTQ.[4] Improvisations to intersectionality have been offered in the forms of 'configurations',[5] 'assemblages',[6] 'cosynthesis',[7] 'symbiosis',[8] 'social dynamics',[9] 'interactions',[10] 'multidimensionality',[11] and

[2] For an exposition of the mixed origins and shared history of these discourses, see Adrien K Wing (ed), *Critical Race Feminism: A Reader* (2nd edn, NYUP 2003). See also Patrick R Grzanka (ed), *Intersectionality: A Foundations and Frontiers Reader* (Westview 2014) (hereafter Grzanka (ed), *Intersectionality*); Nina Lykke, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing* (Routledge 2010); Yvette Murphy, Valerie Hunt, Anna M Zajicek, Adele N Norris, and Leah Hamilton, *Incorporating Intersectionality in Social Work Practice, Research, Policy, and Education* (NASWP 2009).

[3] R Aída Hernández Castillo, 'The Emergence of Indigenous Feminism in Latin America' (2010) 35 Signs 539; Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Fernwood 1995) (hereafter Monture-Angus, *Thunder in My Soul*); Elvia R Arriola, 'Gendered Inequality: Lesbians, Gays and Feminist Legal Theory' (1994) 9 Berkeley Women's Law Journal 103; Mary Eaton, 'At the Intersection of Gender and Sexual Orientation: Towards a Lesbian Jurisprudence' (1994) 3 Southern California Review of Law and Women's Studies 183.

[4] Kate Caldwell, 'We Exist: Intersectional In/Visibility in Bisexuality & Disability' (2010) 30 Disability Studies Quarterly; Robert McRuer, 'Compulsory Able-Bodiedness and Queer/Disabled Existence' in Lennard J Davis (ed), *The Disability Studies Reader* (2nd edn, Routledge 2006).

[5] Kum-Kum Bhavnani and Krista Bywater, 'Dancing on the Edge: Women, Culture, and a Passion for Change' in Kum-Kum Bhavnani, John Foran, Priya A Kurian, and Debashish Munshi (eds), *In on the Edges of Development: Cultural Interventions* (Routledge 2009).

[6] Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (DUP 2007).

[7] Peter Kwan, 'Complicity and Complexity: Cosynthesis and Praxis' (2000) 49 DePaul Law Review 673.

[8] Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems' (2002) 71 UMKC Law Review 251.

[9] Davina Cooper, 'Intersectional Travel through Everyday Utopias: The Difference Sexual and Economic Dynamics Make' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish 2009).

[10] Rita Kaur Dhamoon, 'Considerations on Mainstreaming Intersectionality' (2011) 64 Political Research Quarterly 230.

[11] Darren Hutchinson, 'Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2000) 6 Michigan Journal of Race and Law 285.

'interconnectivity'[12] theories. From the basic idea of understanding the complexity of disadvantage associated with multiple identities, intersectionality has thus diversified and developed into 'a burgeoning field of intersectional studies' of its own.[13]

So, before turning to understand the complexity of disadvantage through intersectionality, it is necessary to understand the complexity of the theory and practice of intersectionality itself. What is the core of intersectionality which binds decades of developments in the field? The rest of this section is dedicated to answering this question and distilling the core from the voluminous and insightful scholarship on intersectionality. It is useful to iterate the findings here. I argue that intersectionality is composed of five principal strands: first, it is concerned with tracing both **sameness and difference** in experiences based on multiple group identities; secondly, it is concerned with tracing the sameness and difference in **patterns of group disadvantage** understood broadly in terms of subordination, marginalization, violence, disempowerment, deprivation, exploitation, and all other forms of disadvantage suffered by social groups; thirdly, in order to make sense of these same and different patterns of group disadvantage they must be considered as a whole, namely with **integrity**; fourthly, intersectionality can only be appreciated in its full socio-economic, cultural, and political **context** that shapes people's identities and patterns of group disadvantage associated with them; and lastly, the purpose of this intersectional analysis is to further broadly conceived **transformative** aims which remove, rectify, and reform the disadvantage suffered by intersectional groups.

This is no more a definite account of intersectionality than Crenshaw's original postulation, which was meant to be 'provisional'.[14] Intersectionality literature is too vast and variously applied to be simply 'defined' in a single stroke. Like other academic work on theories of justice, theories of human rights, theories of discrimination law etc., intersectionality is a broad church and has many theoretical or justificatory accounts which have contributed to the development of the field. This is merely one such account from the point of view of discrimination law. It unpicks the strands that have been central to intersectionality in the way it was initially set out by Crenshaw and has been developed by others over the last thirty years. Individually or together, the strands do not represent an exhaustive case of intersectionality. But they do present some of the chief features developed in intersectionality literature, which are in turn salient in developing an account of intersectional discrimination in this book. For this purpose, then, the claim is that:

[12] Francisco Valdes, 'Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities' (1995) 5 Southern California Law Review and Women's Studies 25.

[13] Sumi Cho, Kimberlé W Crenshaw, and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785 (hereafter Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies').

[14] Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1244–45 n 9 (hereafter Crenshaw, 'Mapping').

> Intersectionality illuminates the dynamic of sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, and in their full and relevant context, with the purpose of redressing and transforming them.

I elaborate on how each of the strands contributes to the idea of intersectionality below.

1.1 Sameness and Difference

Crenshaw set out to do two things in her 1989 piece: first, to explain what Black women's disadvantage or intersectionality was all about; and secondly, to show how their disadvantage was left by the wayside of dominant discourses in discrimination law, feminism, and the civil rights movement. The first inquiry was a precursor to the second. So, in order to critique the normative vision of discrimination law, Crenshaw had to explicate the normative vision of intersectionality itself. Three cases helped Crenshaw make this case: *DeGraffenreid v General Motors*,[15] *Payne v Travenol*,[16] and *Moore v Hughes*.[17]

In *DeGraffenreid*, Black female employees of General Motors challenged the 'last hired, first fired' lay off policy as discriminating against them on the basis of both their race and sex. The United States District Court of Missouri summarily dismissed the possibility that claims could be based upon two grounds. It interpreted the claim based on both race and sex as a demand for recognizing a 'new special sub-category' or 'special class' for the grant of a 'new "super-remedy" '[18] beyond the contours of Title VII of the Civil Rights Act 1964, which prohibits discrimination on the basis of race, colour, religion, sex, or national origin. It concluded that: 'this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both'.[19] Thus, according to the Court, Black women could be protected only to the extent that their experience coincided with either Black men or white women, but they had no cause of action of their own.

While General Motors had not hired Black women before 1964, it had hired white women for the same positions. The favourable hiring statistics for white women apparently negated any basis for indirect sex discrimination against Black women. Similarly, the Court dismissed the possibility of race discrimination

[15] *DeGraffenreid v General Motors* 413 F Supp 142 (1976) (United States District Court, Eastern District of Missouri) (hereafter *DeGraffenreid*).
[16] 673 F 2d 798 (5th Cir 1982) (USCA) (hereafter *Travenol*).
[17] *Moore v Hughes Helicopters, Inc* 708 F 2d 475 (9th Cir 1983) (USCA) (hereafter *Hughes*).
[18] *DeGraffenreid* (n 15) 143.
[19] Ibid.

1866

because it was seen as creating 'a new classification of "Black women" ' with a greater standing than Black men under Title VII.[20] The unique disadvantages suffered by Black women thus fell through the cracks of both sex and race discrimination, defined through the experiences of white women and Black men respectively.

In *Travenol*, Payne, a Black woman, challenged a host of Travenol's employment practices as being discriminatory on the basis of race and sex. She was certified to claim on behalf of the class of Black women and her claim was allowed in part. Payne challenged the decision, including the relief, on the basis that Black males were erroneously excluded from the class certified by the district court. The concerned Rule 23(a) of the Federal Rules of Civil Procedure provided that: 'the representative parties will fairly and adequately protect the interests of the class'. In reaffirming its corollary that 'a class representative may not head a class including persons whose interests substantially conflict with his or her own',[21] the Fifth Circuit Appeals Court dismissed the appeal upholding the district court opinion that a claim of sex discrimination necessarily denoted a conflict between men and women, notwithstanding their race. The Court denied the representation of Black males through Black females, and barred the possibility of Black females claiming for all Blacks as such. It failed to see Black women as capable of representing Blacks, just as Black men could represent all Blacks, including Black women. Even though the *Travenol* Court allowed Black women to claim *as Black women*, it isolated Black women's experiences into an uninteractive category of discrimination that had nothing in common with Black men's experiences of racial discrimination.

In the same vein, the case of *Hughes* revealed a judicial unwillingness to certify the class of Black women as representing all women. Tommie Moore, a Black female employee, had brought a complaint against Hughes Helicopters Inc, a manufacturer of commercial and military helicopters, for discriminating against Black females in the selection of supervisory and upper-level craft positions. The Court disagreed that Black women could represent all women since *only* Black women were potentially discriminated against. While *Travenol* forbade Black women from claiming on behalf of all Blacks, *Hughes* foreclosed the possibility of Black women claiming for all women. According to the Court, the claim did not concern the interests of women who were not Black, namely white women. Thus, it dismissed the lived realities of Black women's experiences *as* women's experiences. In doing so, the Court overlooked that Black women's experiences of sex discrimination could have been similar to the experiences of white women, or that the category of sex discrimination simply included all women irrespective of their race.

So, what is it that the courts missed in *DeGraffenreid, Travenol*, and *Hughes*? They missed the nature of Black women's disadvantage at the intersection of race and sex. Their disadvantage was one that was both similar to the disadvantage

[20] Ibid 145.
[21] *Travenol* (n 16) 810.

suffered by Black men and white women since they were both Black like Black men and women like white women, but also different in terms of being both Black and women at the same time and thus suffering disadvantage not just as Blacks or women alone but *as Black women*. In *DeGraffenreid* the Court denied that there was anything different about Black women as compared to white women and Black men, while in *Travenol* and *Hughes* the courts denied that Black women's disadvantage could be the same as the disadvantage suffered by white women and Black men. The lack of appreciation of this dynamic of sameness and difference in defining discrimination against Black women became the centrepiece of Crenshaw's critique and thus of intersectionality theory.

Though Crenshaw made her case with reference to legal claims brought under US discrimination law in the 1970s and 1980s, the lesson of focussing on sameness and difference at the same time appears in the Black feminist struggle of several generations prior to that. The attention to Black women's experiences within broader systems of disadvantage like racism and sexism, as well as their unique disadvantages suffered within these systems, has characterized Black feminist thought for almost two centuries. Sojourner Truth's raging speech in 1851 where she asked the epithetic Black feminist question 'Ain't I a Woman?'[22] and Anna Julia Cooper's appeal to the civil rights movement in 1892: 'Only if the Black women can say, when and where I enter . . . then and there the whole Negro race enters with me',[23] mark the early efforts for understanding Black women as having same and different experiences as women and Blacks generally. Ange-Marie Hancock in her recent work, *An Intellectual History of Intersectionality*, traces back this thought further to Maria Miller Stewart's *Religion and the Pure Principles of Morality* published in 1831 and, later, Harriet Jacobs's *Incidents in the Life of a Slave Girl* published in 1860.[24] Both Stewart and Jacob drew upon the experiences of Black women to critique slavery in broad terms as well as, in particular, the sexual exploitation of Black women within it. They showed how Black women not only suffered from state-sanctioned racism and slavery, and exploitation at the hands of their female masters, including sexual exploitation by white men, but also violence by Black men within their communities. Thus, while Black women suffered from patriarchal structures which inflicted white women (lower level of employment and wages, gender bias, sexual exploitation by men), and racial domination which subjugated Black men (slavery, segregation, lower level of employment and wages, racial stereotypes), they simultaneously also suffered racial and patriarchal violence at the hands of white women and Black men respectively. The former made their experience akin to the

[22] Sojourner Truth, 'Woman's Rights' in Beverly Guy-Sheftall (ed), *Words of Fire: An Anthology of African-American Feminist Thought* (New Press 1995) 36.

[23] Anna Julia Cooper, *A Voice from the South* (OUP 1988) 31.

[24] Ange-Marie Hancock, *An Intellectual History of Intersectionality* (OUP 2016) (hereafter Hancock, *An Intellectual History*).

experiences of white women based on their sex and Black men based on their race; the latter made their experience distinct in their own right.

The dynamic of sameness and difference has been reiterated in scholarship as the key to understanding the nature of discrimination based on multiple and interlocking systems of disadvantage. Barbara Smith declared this dynamic representing the 'simultaneity of oppressions' to be 'one of the most significant ideological contributions of Black feminist thought' as early as 1983.[25] Similarly, Crenshaw, in her survey of the field with Sumi Cho and Leslie McCall, notes that the 'insistence on examining the dynamics of difference and sameness' has been the running thread across varied disciplines and contexts in which intersectionality has been applied.[26] Vivian M May relates to this dynamic as one of the most basic takeaways from intersectionality throughout her work in *Pursuing Intersectionality, Unsettling Dominant Imaginaries*.[27] Jennifer Nash describes it as 'intersectionality's attention to difference while also strategically mobilizing the language of commonality'.[28]

What is interesting to note here, before we part with this idea, is that the simultaneous attention to sameness and difference is not unique to intersectionality but one known to discrimination law as well. Benjamin Eidelson alludes to this particular strand, when he defines wrongful discrimination, in his essay on 'Treating People as Individuals'.[29] He explains that one dimension of discrimination harm involves failing to treat people as individuals in two senses—first, in a way which recognizes that they share their individual-ness in being human; and second, in that they are both distinct and unique as individuals. Individuals are thus same and different at the same time. Failing to treat them as the same and unique on the basis of their membership in disadvantaged groups is what constitutes, for Eidelson, the wrong of discrimination. He recognizes that other paradigmatic forms of wrongful discrimination include: (i) 'those [which] express a kind of disrespect or contempt for the equal worth of those who are disfavoured'; (ii) those 'allocat[ing] opportunities unfairly, and, in doing so, entrench[ing] status hierarchies that warp our social structures'; (iii) that which can 'humiliate, stigmatize and demean'.[30] But Eidelson chooses to focus instead on what he believes is a hitherto neglected aspect in the moral case against discrimination.

Discrimination law and intersectionality theory thus coincide in their emphasis on the dynamic of sameness and difference as defining a particular kind of

[25] Barbara Smith (ed), *Home Girls: A Black Feminist Anthology* (RUP 2000) xxxiv (hereafter Smith (ed), *Home Girls*).

[26] Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies' (n 13) 787.

[27] Vivian M May, *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge 2015) 37, 70–71 (hereafter May, *Pursuing Intersectionality*).

[28] Jennifer C Nash, 'Re-thinking Intersectionality' (2008) 89 Feminist Review 1, 4 (hereafter Nash, 'Re-thinking Intersectionality').

[29] Benjamin Eidelson, 'Treating People as Individuals' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 203.

[30] Ibid 203, 205.

disadvantage that people suffer, based on their identity categories or grounds of discrimination. When multiple identities intersect to yield this dynamic, we can call it a case of intersectional discrimination.

1.2 Patterns of Group Disadvantage

When people belong to multiple disadvantaged groups, the disadvantage they suffer is intersectional in nature, that is, it is simultaneously both the same as and different from disadvantage suffered by members of the groups. Having established that identities intersect and result in a distinct form of disadvantage, intersectionality proceeds to answer what the sameness and difference in disadvantage actually refers or relates to.

The theme which animates the dynamic of sameness and difference, borrowing from O'Regan J, is that of 'patterns of group disadvantage'.[31] The phrase requires some unpacking. First of all, intersectionality conceives of 'disadvantage' broadly, including every kind of harm, oppression, powerlessness, subordination, marginalization, deprivation, domination, and violence. Moreover, the disadvantage is defined not by isolated or stray incidents but by its systemic or structural nature. It represents a pattern of historic motifs of disadvantage which have been entrenched over time. Such disadvantage is also not personally directed towards random individuals but suffered by individuals because of their membership in a social group. So, the focus is on disadvantage suffered by groups like women, disabled, Blacks, and gays, defined by their gender, disability, race, and sexual orientation, rather than individual choices or qualities viz. membership of a society, readership of a national daily, character, strength, morality etc. Furthermore, groups which matter are those which are relatively and substantially more disadvantaged (women, disabled persons, Blacks, gays etc.) compared to groups which are privileged (men, non-disabled people, white people, heterosexual people etc.).[32]

Thus, intersectionality, like discrimination law, is concerned with 'discrimination against people who are members of disfavoured groups [which] can lead to patterns of group disadvantage and harm'.[33] The difference lies in the fact that these patterns of group disadvantage, in the case of intersectional discrimination, are both simultaneously similar and dissimilar to patterns of group disadvantage associated with individual groups and also individual experiences within those groups. In this way, intersectional disadvantage is defined in terms of patterns of intergroup and intra-group disadvantage, which embody different kinds of substantive

[31] *Brink v Kitshoff NO* 1996 (4) SA 197 (SACC) (hereafter *Brink*).

[32] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 26–28, 138–39 (hereafter Fredman, *Discrimination Law*); Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) ch 2 (hereafter Khaitan, *A Theory of Discrimination Law*).

[33] *Brink* (n 31) [42] (O'Regan J).

harm in terms of oppression, powerlessness, subordination, marginalization, deprivation, domination, and violence. The dynamic of sameness and difference matters because it ultimately speaks to these patterns of group disadvantage suffered by those belonging to multiple disadvantaged groups.

Intersectionality's chief purveyors have maintained this emphasis on patterns of group disadvantage faithfully. Crenshaw used intersectionality to study similar and different experiences of violence against Black women. Far from looking for intentional harm perpetuated by single individuals, Crenshaw focussed on 'structures of domination', 'patterns of social power', and 'systems of subordination', which interacted with 'preexisting vulnerabilities' to reproduce Black women's disempowerment.[34] Crenshaw thus relied on identity politics to reveal how racism and sexism produced structural, political, and representational forms of violence against women of colour. Similarly, Patricia Hill Collins developed the 'matrix of domination' to understand how multiple forms of oppression are organized.[35] She identified four distinct but interrelated forms of oppressions as: structural, hegemonic, disciplinary, and interpersonal. Collins reshaped the thinking of systems of power as operating independently to one which always operated in an interlocking manner. Thus, oppressive systems of racism, sexism, homophobia, transphobia, ableism, ageism etc., are to be considered not as independent forms of oppression but in terms of their relationships with one another at every level of social organization, institutionally or interpersonally. bell hooks called this a 'politic of domination', which paid attention not only to the feminist movement's resistance to sexist domination but also to the racial, material, and cultural domination of all women.[36]

Even Adrien Katharine Wing, Mari Matsuda, and Angela Harris' highly ontological interventions querying the 'multiple consciousness' of those belonging to multiple identity-categories were concerned with consciousness of oppression in the first place: of awareness of concrete injustices suffered by those belonging to many disadvantaged groups at once. For Wing, once multiple consciousness—or intersectionality's dynamic of sameness and difference—is recognized, it is important to move on to recognizing its nature as residing in 'multiple layers of oppression'.[37] Similarly for Matsuda, what her jurisprudential method of multiple consciousness brought to the table was an appreciation of the 'reality and detail of oppression'.[38] Likewise, Harris argued for using multiple consciousness 'to describe

[34] Crenshaw, 'Mapping' (n 14) 1243, 1249, 1265, 1293.

[35] Patricia Hill Collins, *Black Feminist Thought* (2nd edn, Routledge 2009) 21 (hereafter Collins, *Black Feminist Thought*).

[36] bell hooks, *Feminist Theory: From Margin to Center* (2nd edn, SEP 2000) ch 2 (hereafter hooks, *Feminist Theory*).

[37] Adrien K Wing, 'Brief Reflections toward a Multiplicative Theory and Praxis of Being' (1991) 6 Berkley Women's Law Journal 181, 194, 196 (hereafter Wing, 'Brief Reflections').

[38] Mari Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 Women's Rights Law Reporter 7, 9.

a world in which people are not oppressed only or primarily on the basis of gender, but also on the bases of race, class, sexual orientation and other categories in inextricable webs'.[39]

The inextricability of these patterns of group disadvantage alerts us to two further things—that these patterns are mutually reinforcing, and, hence, that there is no hierarchy between them. The point about mutual reinforcement undercuts imagining racism, sexism, homophobia, transphobia, abelism, cultural supremacy etc. as separate spheres of disadvantage at all. As Devon W Carbado and Mitu Gulati observe: 'Fundamental to Intersectionality Theory [sic] is the understanding that race and gender are interconnected, and as a result, they do not exist as disaggregated identities'.[40] Intersectionality decries the idea of disaggregated identities and instead stresses their co-existing and co-constitutive nature, such that disadvantage associated with one could not be defined in isolation from other forms of disadvantage. This is true for those who are multiply disadvantaged as well as those who are not. For instance, Black women's disadvantage is one defined by similar and different patterns of group disadvantage based on their race, sex, and class. But their experience is also defined, say for those who are straight and non-disabled, by privileges attached to heterosexism and ableism. Similarly, saying that white women and Black men are disadvantaged only on the basis of their sex and race, respectively, actually means that the disadvantage they suffer is a product of harm based on sexism and racism *and* privileges attached with their race and sex respectively, including privileges based on their religion, disability, sexual orientation, age etc. There are thus 'no pure victims or oppressors'[41] because the patterns of group disadvantage created by multiple systems of power run along the axes of both privilege and disadvantage. Each form of disadvantage is 'always already imbricated within multiple axes of power'[42] such that axes of disadvantage and privilege cannot be individually dismantled without an appreciation of how they are mutually reinforcing.

This mutual reinforcement, though, cannot be captured in the idea of addition or multiplication or any other mathematical rendition. Once it is admitted that patterns of discrimination associated with grounds like race, sex, gender, sexual orientation, etc. are not one dimensional, it becomes clear that one cannot simply add, multiply, or divide identities to understand intersectional discrimination. Intersectionality defies such simple arithmetic and insists on viewing patterns of group disadvantage simultaneously.

[39] Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581, 587.

[40] Devon W Carbado and Mitu Gulati, *Acting White? Rethinking Race in 'Post-Racial' America* (OUP 2013) 71 (hereafter Carbado and Gulati, *Acting White*).

[41] Collins, *Black Feminist Thought* (n 35) 229.

[42] Vrushali Patil, 'From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We've Really Come' (2013) 38 Signs 847, 848.

Moreover, because the patterns of group disadvantage are mutually reinforcing, they are not ranked or arranged in any form of hierarchy. That is, there is no hierarchy of disadvantage. Intersectionality resists a race to the bottom in a kind of disadvantage contest where intersectional disadvantage is understood as worse or more important in a mathematical sense. The importance of intersectionality lies in the appreciation of qualitatively distinct explanations of same and different patterns of group disadvantage, rather than their quantitative rendition of sorts. As Grillo insightfully remarks: 'We have spent a lot of time arguing over whose pain is greater. That time would be better used trying to understand the complex ways that race, gender, sexual orientation, and class (among other things) are related'.[43]

Finally, since the patterns are mutually reinforcing and co-constituted, and there is no hierarchy between the different arrangement of patterns, there are also no pure sites of identities or oppressions such that there is nothing like an essentialized or isolated site of being a woman or experiencing sexism. More importantly, there is no pure site of intersectional identity as a Black woman, or of intersectional disadvantage composed of racism, sexism, and classism either. Sameness and difference remain relevant down to the bottom of their complexity. Carbado and Gulati's trenchant account of intra-group differences between Black women in identity performance cases helps with understanding this point about anti-essentialism.[44] When four Black women have been promoted as partners in a law firm, the case of 'the fifth Black woman', Mary, cannot simply be explained as sameness and difference in relation to white women and Black men. While the four Black women choose to 'cover' their identities by wearing non-ethnic clothes, having straight hair, and playing golf, Mary wears her traditional clothing, participates in minorities and diversity committees within and outside work, and lives in a Black neighbourhood. So while Mary may have experiences of sexism and racism similar to white women and Black men respectively, and also share the unique experiences of Black women who face both racism and sexism together, her experiences may be different from not just white women and Black men but also other Black women, exactly on the same basis (of racism and sexism), depending on how Black women choose to 'perform' their identities. In other words, there is no essential category of Black women's experience either. The example of identity performance highlights that intersectional identities or experiences of intersectional disadvantage cannot be essentialized. At the same time, this does not undermine the shared or common experiences of disadvantage where they exist. The project of uncovering complexity through intersectionality thus strengthens the case for both similar as well as different patterns, discarding neither in favour of another. The absence of either chips away at intersectionality.

[43] Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (2013) 10 Berkley Women's Law Journal 16, 27.

[44] Carbado and Gulati, *Acting White* (n 40) ch 3.

We thus return to the idea of complexity in intersectionality. To reiterate, the discussion on the simultaneity of the dynamic of sameness and difference in experiences matters because it ultimately reveals the complex patterns of group disadvantage associated with the dynamic. And herein lies the critical bite of intersectionality: that it beckons rich explanatory accounts of patterns of group disadvantage and discrimination suffered on an intersectional basis, as shown below in section 3 with the example of Dalit women. The epistemic depth in marshalling explanations of what same and different patterns of group disadvantage look like is what gives intersectionality its deserved relevance. The accounts or evidence in sociology, anthropology, psychology, feminist theory, political theory, economics, and other disciplines, explored from the vantage point of those disadvantaged because of their multiple identities, all provide germane fodder for understanding intersectional disadvantage qualitatively. Without an explanation of *what* intersectional disadvantage and discrimination actually are in terms of structures of power and relationships of domination, intersectionality would remain merely a rhetorical tool.

1.3 Integrity

The dynamic of sameness and difference in patterns of group disadvantage may give the impression of a highly variegated and fragmented reality of intersectional discrimination. As if an individual or a group lives through multiple realities where some experiences of discrimination are similar to, whilst others are different from, disadvantage associated with each ground individually. But, in fact, the ontological reality that intersectionality seeks to convey is exactly the opposite: that sameness and difference in patterns of group disadvantage make sense only when they are considered *as a whole* or with *integrity*.

Etymologically, integrity appears from the word 'integer', which means wholeness or perfect condition. Semantically, it conveys 'the state of being "undivided, an integral whole"'.[45] Integrity binds the multiplicity and complexity in intersectionality into a cohesive and complete understanding of discrimination suffered on the basis of several identities at the same time. This emphasis on considering intersectional identities or experiences of disadvantage associated with them as a whole or with integrity is widely dispersed throughout intersectionality literature.

Wing explains this eloquently: '[T]he experiences of black women . . . might reflect the basic mathematical equation that one times one truly does equal one . . . [Their] experiences . . . must be seen as multiplicative, multi-layered,

[45] Lynne McFall, 'Integrity' (1987) 98 Ethics 5, 7.

indivisible whole'.[46] Rosario Morales extends this to her own positionality and proclaims: 'I want to be whole. I want to claim my self to be puertorican [sic], and U.S. American, working class & middle class, housewife and intellectual, feminist, marxist, and anti-imperialist'.[47] Audre Lorde, Dianne Pothier, and Patricia Monture-Angus make similar points as a Black woman, a woman with disability, and as an indigenous woman respectively:

> As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self.[48]
>
> I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person.[49]
>
> I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that precedes my gender. Actually, if I am object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as woman.[50]

The idea is simply that: 'Women don't lead their lives like, "Well this part is race, and this is class, and this part has to do with women's identities" '.[51] Even though defined by multiple axes of disadvantage (and privilege), their identities, and hence their experience based on those, are indivisible. Intersectionality theory relies on this idea to emphasize that disadvantage based on multiple identities is experienced and thus can be understood only as one single whole.

Seen this way, intersectionality might seem presumptively double-edged. In one way it asks us to be nuanced and complex in our view of identities. This essentially

[46] Wing, 'Brief Reflections' (n 37) 182, 200.

[47] Rosario Morales, 'I Am What I Am' in Cherríe Moraga and Gloria Anzaldúa (eds), *In This Bridge Called My Back: Writings by Radical Women of Color* (KTP 1983) 91.

[48] Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press 1984) 114, 120.

[49] Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 Canadian Journal of Women and the Law 39, 59 (hereafter Pothier, 'Connecting Grounds').

[50] Monture-Angus, *Thunder in My Soul* (n 3) 177–78.

[51] Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990) 133–34.

requires us to study aspects of identities and their interactions closely and perhaps also disparately, analysing the constituent group identities for their individual and associated impact. In another way, it asks us to take a holistic view of identities by pressing on integrity. However, intersectionality embodies exactly this double-edged character. It emphasizes both complexity and completeness at the same time. Explanatory accounts of same and different patterns of group disadvantage are analysed in as much depth as possible. But they are not lumped together or understood in a piecemeal way. Intersectionality insists on considering them as a whole. Integrity supports complexity by providing the lens of completeness through which it is to be seen. Thus, integrity provides the epistemic perspective of wholeness for understanding the complex patterns of group disadvantage in line with their ontological experience.

In this way, integrity in intersectionality underscores that people should be treated *just as they are*. It fights the invisibility imposed on intersectional groups by making their oppression be seen for what it is, rather than just as a sum or fragments of experiences. As Davis declares: 'we [Black women] have a right to be who we are. We have a right to emerge together from the historically imposed invisibility to which we have been subjected.'[52] Sachs J makes a similar statement in the context of discrimination law:

> 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*.[53]

Integrity as being seen for *what you are* has been particularly relevant in the context of disability discrimination. Viewed as insufficient and lacking, disabled people fight the negative portrayal of their identities by substituting it with a positive assertion of the disabled body and life as complete. The use of the language and meaning of integrity undercuts the notions of disabled life as incomplete, abnormal, or deficient. It allows a disabled person to affirm her identity as a whole person.[54] Thus, integrity guarantees the space for asserting respect for bodies and lives dissimilar to our own. It undercuts the pejorative and patronizing way of looking at others and gives voice to the richness of the human condition and experience, specifically by valuing disability and disabled life. It allows for breaking through the essentialist prism of 'normal' and provides a lens for respecting identities that are complex and

[52] Angela Y Davis, 'Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Keynote Address' (1991) 43 Stanford Law Review 1175, 1177.

[53] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (SACC) [134] (emphasis supplied).

[54] United Nations Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008), art 17.

diverse. The relevance of integrity in the context of disability illuminates its appeal in relation to other personal characteristics, especially when they intersect.

Integrity also provides the opportunity and basis for groups like Black women to break through their image as victims and instead self-define themselves as whole and powerful. Jung recounts this process as: 'Conscious realization or the bringing together of the scattered parts [which] is in one sense an act of the ego's will, but in another sense [a] spontaneous manifestation of the self, which was always there'.[55] Similarly, Harris explains integrity as the will and creativity for groups like Black women to be masters of their destiny rather than victims of oppressions which undermine them. Because only they experience their multiple identities as an integrated whole, integrity is seen as an empowering tool for disempowered groups to define and fight their disadvantage. Thus, Black women use the idea of integrity in intersectionality to reconstruct their image 'as powerful, independent subjects'—resolute, resilient, and more than just women, poor, Black, mothers, wives, labourers, or slaves.[56] In the final analysis, integrity in intersectionality rejects viewing intersectional groups like Black women as simply '"multiply-burdened" entities subject to a multiplicity of oppression, discrimination, pain and depression' but those characterized by 'a multiplicity of *strength, love, joy* . . . and *transcendence* that flourishes despite adversity'.[57] Integrity humanizes the subjectivity of its intersectional subjects by appreciating them as a whole, as themselves, and as more than just objects for critical inquiry.

1.4 Context

The intersectional disadvantage associated with identities is a product of context. While Blacks and Muslims may not be disadvantaged *as* Blacks and Muslims in Nigeria and Tunisia respectively, they are disadvantaged as racial and religious minorities in the US and Europe. The reference to disadvantage associated with particular identities is thus not a universal claim but true of particular contexts. This holds for intersectional identities just the same. The demonization of Black women's hair and Muslim women's headscarves, while rife in contexts like the US and Europe, may not be so apparent in Nigeria or Tunisia. Other kinds of intersectional disadvantages might travel more easily. Dalit women in the UK face many of the disadvantages they face in India. Intersectional disadvantage thus is as much a product of intersecting identities and patterns of disadvantage as it is of contexts in which it exists.

[55] CG Jung, *Psyche and Symbol* (Violet Staub de Laszlo (ed), RFC Hull (trans), PUP 1958) 214.

[56] Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1998) 14 Signs 42, 72 (hereafter King, 'Multiple Jeopardy').

[57] Wing, 'Brief Reflections' (n 37) 196 (emphasis in original).

What makes up context is many things. As May describes, it includes 'contexts of structural inequality, affective economies, ideological forces, history, social location, material structures, philosophical norms and more'.[58] Context comprises of more than just processes of identity formation and immediate patterns of disadvantage, and includes knowledge of how identities and disadvantage associated with them operate within the historical, social, legal, economic, ideological, national, and transnational frames. In this way, context itself is intersectionally constituted. This intersectional context then provides a 360-degree or a multidimensional view of intersectional disadvantage that goes beyond the rubric of identities and disadvantage and into the environment in which they exist. It thus unravels the background conditions in which intersectional disadvantage ensues.

Context also helps go beyond generalizations and into the specific circumstances of groups and individuals within the groups. According to Catharine MacKinnon: 'That the location of departure and return for the analysis is on the ground, with the experience of a specific group, this group in particular, and not in universal generalizations or in classifications or abstractions in the clouds, even ones as potentially potent as race and sex, is the point [of intersectionality]'.[59] Collins and Bilge reflect a similar understanding: 'intersectionality as an analytical tool means contextualizing one's arguments, primarily by being aware that particular historical, intellectual, and political contexts shape what we think and do'.[60] They thus identify 'social context' as one of the core tenets of intersectionality, which grounds the intersectional analysis in structural, cultural, disciplinary, and interpersonal domains. Deborah King too recognizes that 'the relative significance of race, sex, or class in determining the conditions of Black women's lives is neither fixed nor absolute but, rather, is dependent on the socio-historical context and the social phenomenon under consideration. These interactions also produce what to some appears a seemingly confounding set of social roles and political attitudes among Black women.'[61]

Hancock refers to this as a kind of 'situational contingency'. In particular, she explains this in reference to the idea of choice and integrity. She argues that one way to understand intersectionality would be to imagine it as multiple criss-crossing forces which compel individuals to live their lives as warring souls. But, in fact, people's 'quotidian choices between analytically distinct multiple identities . . . reflect the consistency of an integrated identity, not an analytically fractured multiple category identity.'[62] In other words, Hancock uses the idea of choice for explaining that despite the multiple axes of oppression which afflict people, individuals make

[58] May, *Pursuing Intersectionality* (n 27) 99.
[59] Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38 Signs 1019, 1028.
[60] Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016) 28 (hereafter Collins and Bilge, *Intersectionality*).
[61] King, 'Multiple Jeopardy' (n 56) 49.
[62] Hancock, *An Intellectual History* (n 24) 113.

everyday choices about how they relate back and respond to those, and that is what makes the full situational context of their lived intersectional reality. For example, Muslim women's headscarves are symbolic of this sort of situational contingency of intersectionality where their position defined by forces of racism and sexism does not always imply oppression when they don the headscarf. But the insistence on seeing the choice of wearing the hijab as either a challenge to Western hegemony or coercive oppression misses the particular and sophisticated contexts that frame Muslim women's choices and lives. Their continuous negotiation with systems of power defines the *actual* situational context in which that choice is made, which symbolizes their intersectional position.

To this, Hancock adds the idea of 'time contingency' which 'marshals the continuities of structures of racism, sexism, classism, and homophobia while noting episodic interventions that may change in particular Black women's positionality and opportunity structure in their reference to "temporarily class-privileged Black women"'.[63] She thus warns against sweeping generalizations which discount the privileges members within certain groups come to enjoy over time and, thus, simply using membership in a group as a touchstone for suffering intersectional discrimination.

The need for what Hancock calls contingency or, more broadly, intersectional context is then one of specificity, which reflects the actuality of the intersectional disadvantage rather than some pre-packaged version of what it is like. It feeds into discrimination law's tort-like model which has an interest in assessing each situation most closely in relation to a broader category of wrongs but having its own unique specificities. It also reminds us that wrongs, especially of discrimination, take place outside of and beyond what come to be the narrow adversarial contexts of disputed claims. Appreciation of this broader intersectional context allows us not only to do discrimination law better in particular cases but to do it at all: because discrimination, like intersectionality, is nothing but a product of context. Sandra Fredman captures this aptly:

> Anti-discrimination law is necessarily a response to particular manifestations of inequality, which are themselves deeply embedded in the historical and political context of a given society. Discrimination laws are only effective if they are moulded to deal with the types of inequality which have developed in the society to which they refer.[64]

Context thus becomes both a methodological imperative and a substantive tool for understanding intersectional discrimination. Neither intersectionality nor

[63] Ibid 115.
[64] Fredman, *Discrimination Law* (n 32) 38.

discrimination law have a place aside from the actual discriminatory practices and contexts to which the theory and praxis of each refer.

In sum, the application of intersectional thinking in a specific context is a complex and unique process. The explanations of intersectionality will look different because of the different intersectional contexts which go beyond simply the difference in the identities intersectionality works with. Thus, explanations of intersectionality of Black women in the US will be different from Black women in Europe, where raciality does not immediately or does not only take on the historical context of slavery in the same way as in the US; or Black and indigenous women in South Africa who experienced settler colonialism in the reverse; and even newly arrived 'Black' immigrant women in the US who may not be deemed Black in their own countries. But they may all have something shared amongst themselves and with, as Hancock says, the 'intersectionality-like thinking' of other groups in different contexts. Section 3 below explores how these contextual analogies can be made in the context of Dalit women in India.

1.5 Transformation

Intersectionality aims to accomplish many things. As a form of critical inquiry, it seeks to challenge the received wisdom about identities and the disadvantage associated with them as running along a single categorial axis. It furnishes the basis for understanding, and hence including, multiple standpoints in identity politics, social movements, and social institutions with the aim of making them more inclusive and effective. This is an epistemic project. It enhances our knowledge of identity categories and their intersections, the resulting complexity of disadvantage, and the context in which they operate. It thus uncovers a certain blind spot in our normative conception of the world by illuminating its complexity.

Intersectionality also serves the ontological aim of giving space and voice for multiple identities to exist and thrive. It enhances the recognition and representation of those belonging to multiple disadvantaged groups. By allowing intersectional groups and their disadvantage to be seen as a whole and for what it is, intersectionality acknowledges the ontological plurality in people's existence and experiences.

The epistemic and ontological aims naturally flow into one another. As Sara Salem helpfully remarks: 'The aim of intersectionality is to listen to the voices of women and men on their own terms, in order to piece together narratives and unpack experiences that can help in understanding social life'.[65] In recognizing intersectional experiences we allow them to exist and be self-defined, and

[65] Sara Salem, 'Feminist Critique and Islamic Feminism: The Question of Intersectionality' (2013) 1 The Postcolonialist.

in allowing them to exist and self-define, we recognize them for what they are. Epistemic understanding and ontological plurality thus reinforce each other in intersectionality theory.

Intersectional praxis on the other hand is defined by these aims, as well as the aim of redressing intersectionality and the broader aim of transcending it. Those who use intersectionality as a tool of social reform use it with the purpose of removing the intersectional disadvantage the theory seeks to uncover. These efforts aim to break the cycle of the patterns of group disadvantage which afflict those belonging to multiple disadvantaged groups.

As Cho, Crenshaw, and McCall explain, what binds these diverse and ambitious aims of intersectionality theory and praxis is ultimately 'a motivation to go beyond mere comprehension of intersectional dynamics to transform them'.[66] Hancock identifies this as: '[i]ntersectionality's will to progressive social transformation [that] is indisputable throughout its history'.[67] She thus posits: '[i]ntersectionality challenges scholars and activists alike to partake in an analytic shift that transforms the questions to be asked, the evidence to be considered, and the methods with which we analyze it'.[68]

This book shares the transformative vision of intersectionality. Its immediate concern is to render redressable claims of intersectional discrimination. But it feeds into the larger and more emancipatory aim of intersectionality to transform the creation, sustenance, and reproduction of intersectional disadvantage. In this process, it hopes to transform discrimination law or law more generally, to attend to those who are multiply disadvantaged. It is thus premised on the conviction that:

> the reformist dimensions of intersectionality embodied interventions that addressed the marginalization of, for example, Black women plaintiffs, [and are] coextensive with a more radical critique of law premised in part on understanding how it reified and flattened power relationships into unidimensional notions of discrimination. Antidiscrimination doctrine and political discourses predicated on feminism and antiracism certainly do not exhaust the terrain of intersectional erasure, marginalization, and contestation.[69]

In this way, the project of realizing intersectionality in discrimination law, like intersectionality itself, pursues transformative goals that go beyond the successes of individual and specific claims of intersectional discrimination. In particular, the aim of transformation goes beyond the emancipation of Black women. It includes everyone, in that it hopes to eradicate all intersectional disadvantage and not just

[66] Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies' (n 13) 786.
[67] Ange-Marie Hancock, 'Intersectionality's will Toward Social Transformation' (2015) 37 New Political Science 620, 626.
[68] Ibid 622.
[69] Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies' (n 13) 791.

that of Black women. Even Black feminist scholarship frames intersectionality in these terms. This is reflected as early as 1896 when, upon the formation of the National Association of Colored Women's Club, their chosen motto was 'Lifting As We Climb'. It echoed the commitment of Black feminists to the uplifting of all sisters and indeed all dispossessed. Smith shared this all-inclusive vision for Black feminism in 1984 when she wrote:

> I have often wished I could spread the word that a movement committed to fighting sexual, racial, economic and heterosexist oppression, not to mention one which opposes imperialism, anti-Semitism, the oppressions visited upon the physically disabled, the old and the young, at the same time that it challenges imminent nuclear destruction, is the very opposite of narrow.[70]

Similarly, Austin urged 'Black female minority scholars to use their positions and their skills to promote the social and political standing of *all minority women*'.[71] King identified '[t]he necessity of addressing *all oppressions* [as] one of the hallmarks of black feminist thought'.[72] Crenshaw reiterated these commitments in her 1989 piece where she laid down the goal for intersectionality: 'to facilitate the inclusion of marginalized groups for whom it can be said: "When they enter, we all enter" '.[73] As she further clarified in her 1991 piece, the focus on the race and sex of Black women was only meant to highlight 'the need to account for multiple grounds of identity when considering how the social world is constructed'.[74] The case of Black women was thus illustrative rather than the whole of intersectionality. The whole of intersectionality's concern has been a complete and substantive transformation of all the relationships of power, structures of subordination, and systems of domination which disadvantage people on the basis of their multiple group identities.

These, then, were the five principal strands which run through intersectionality literature and make up the framework of the theory. By no means exhaustive or final, the framework is particularly relevant for the purposes of discrimination law and for the project of translating intersectionality theory into a redressable category of intersectional discrimination. But before turning to apply the framework to discrimination law, it is important to consider what criticisms have been levelled against it. It is useful to identify and respond to them to further clarify the framework, going beyond the apparent and uncontroversial aspects and querying some

[70] Smith (ed), *Home Girls* (n 25) 257–58.
[71] Regina Austin, 'Sapphire Bound!' (1989) Wisconsin Law Review (Fall 1989) 539 (emphasis supplied) (hereafter Austin, 'Sapphire Bound!').
[72] King, 'Multiple Jeopardy' (n 56) 45 (emphasis supplied).
[73] Crenshaw, 'Demarginalizing' (n 1) 167.
[74] Crenshaw, 'Mapping' (n 14) 1245.

of its underlying premises like its reliance on identity categories and identity politics. The next section sets out this defence.

2. A Defence

In the intervening decades since 1989, 'the burgeoning field of intersectionality studies' has continued to develop alongside a burgeoning field of intersectionality critiques.[75] These critiques have been far reaching, querying every aspect of intersectionality at the conceptual and practical level. Conceptually, intersectionality is attacked as lacking both depth and breadth. Depth-wise intersectionality is seen as too shallow in its reliance on identity-categories. This critique unfolds severally. Intersectionality is considered as addressing mainly locational, rather than material, structural, and relational systems of power. In particular, it is said to have ignored considerations of poverty and class, which sit uncomfortably against static cultural understandings of identity-categories like race and sex. Intersectionality is also seen as too categorial and essentialist in its assumption that independent identity categories exist and intersect, rather than being constantly in flux. In this way, it is considered exclusionary and not truly representative of disadvantages which defy intersectionality's linear view of identities. Intersectionality thus assumes away the categorial distinction between identities instead of challenging it. Moreover, intersectionality potentially suffers from the infinite regress problem that splinters identity categories into ever smaller sub-groups incapable of saying anything meaningful about structural disadvantage. It is viewed as too experiential and individual-centric to be a useful tool for group struggles. The point of these identity-related critiques is to show that intersectionality's conceptual reliance on identity categories is ultimately ineffective in carrying out the radical and transformative aims of the theory, which include transcending identity politics and group disadvantage.

Practically, even if all its theoretical challenges are met, intersectionality is critiqued for being toothless in actually realizing the vision it espouses. Not only do its legal roots limit the possibility of challenging law's deep-seated and narrow assumptions about identity and disadvantage, but there is also no methodological clarity in actually using intersectionality as a critical theory or as an instrument of social change beyond the strictures of law.

Similarly, breadth-wise, intersectionality is considered too narrow, focussed on the 'extreme' example of Black women, and hence having little of the generalizable and normative qualities supposed of a theory. Intersectionality, in its best form, is reduced to a rhetorical tool without any analytic traction or global appeal.

[75] Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies' (n 13).

So voluminous and vociferous are these challenges that, as May remarks, '[i]ntersectionality critiques have become something of their own genre—a form so flourishing, at times it seems critique has become a primary means of taking up the concept and its literatures'.[76] Thus, intersectionalists have had to not only develop and advance intersectionality on its own terms, but also, as a matter of priority, defend it from the onslaught. The recently published first set of monographs on the subject do this comprehensively and convincingly. Patricia Hill Collins and Sirma Bilge's *Intersectionality* (2016), Ange-Marie Hancock's *Intersectionality: An Intellectual History* (2016), Anna Carastathis' *Intersectionality: Origins, Contestations, Horizons* (2016), and Vivian M May's *Pursuing Intersectionality, Unsettling Dominant Imaginaries* (2015), provide formidable responses in defence of intersectionality's theory and praxis, in addition to scores of articles with pointed replies to every challenge. I do not mean to rehash the credible defences offered in these accounts. But I do wish to reiterate some of these defences, especially from the standpoint of discrimination law, because it is useful for the present project to do so. In particular, I wish to point out the shared, limited, but plausible identity-basis of intersectionality and discrimination law; and the general appeal of intersectionality theory beyond the context of Black women in the United States. Section 3 considers the latter. In this section, I want to consider the tension which exists between intersectionality, its reliance on identity categories, and its relationship with identity politics. This tension is at the heart of multiple critiques and its resolution, I argue, lies in recognizing the middle ground that intersectionality inhabits in both working with and being critical of identity categories and identity politics (section 2.1). This middle ground is one shared with discrimination law in its reliance on the construct of grounds (section 2.2). Neither intersectionality's reliance on identities nor discrimination law's reliance on grounds should detract us from addressing complex forms of disadvantage defined as broadly as possible, going beyond identity politics itself.

2.1 Intersectionality and Identity

The strongest theoretical challenge to intersectionality comes from the post-structural and Marxist critiques. As identified above, three challenges are particularly poignant: intersectionality's emphasis on social and cultural over material and structural inequalities; its overreliance on identity categories; and the infinite regress problem. The first critique considers intersectionality to be limited to the categories of race and sex, thus failing to engage with other categories like sexuality, weight, nationality, ethnicity, language, and class. For example, Crenshaw's

[76] May, *Pursuing Intersectionality* (n 27) 98.

work has been critiqued for: 'the wholesale abandonment of addressing how factors beyond race and sex shape Black women's experiences of violence [which] demonstrates the shortcomings of intersectionality to capture the sheer diversity of actual experiences of women of colour'.[77] The complaint is that, in keeping intersectional analysis limited to too few (two) and 'cultural' categories (like race and sex) alone, intersectionality falls short of its own promise of revealing truly complex systems of domination and structures of power. Even if one agrees that Crenshaw and other intersectionalists did echo, for example, the relevance of class inequality in examining systems of dominations, their class-consciousness was inevitably compromised by their primary focus on providing a 'total' account of oppressions defined primarily, if not exclusively, by social or cultural identities like sex and race.[78] According to this critique, material analysis has never been concretely pursued within intersectionality, given the lack of a conceptual framework for understanding the economic or redistributive forms of domination.

These critiques overstate the use of race and sex in intersectionality as giving epistemic priority to certain categories over forms of analyses, which are structural and multi-dimensional; while at the same time underplay how intersectionality pursues, for example, class analysis even if not on the same terms as, say, Marxist feminism. Class, poverty, material inequalities, and redistributive concerns have been writ large in intersectionality.[79] Angela Davis' *Women, Race and Class* (1981) and Spelman's *Inessential Woman* (1990) specifically interrogated not just the dynamics of race and sex but also class in entrenching Black women's disadvantage. Similarly, Austin led by example the 'research project based on the concrete material and legal problems of Black women'.[80] Thus, Austin not only charted similar and different patterns of group disadvantage between Black women on the one hand, and white women and Black men on the other, but also between groups of poor Black women and middle-class Black women, and Black teens and Black adults. Social movements like the Combahee River Collective kept material concerns at the heart of their agendas for improving the lives of Black women.[81] The bait to make intersectionality more class-aware, then, overlooks its extant resistance to capitalism and imperialism in the way it has been formulated and applied. Although class may not have been studied in exactly the same terms as social construction of 'identities' like race and sex, it has been a key component in examining how race is genderized and gender is racialized within conditions of material

[77] Nash, 'Re-thinking Intersectionality' (n 28) 9.

[78] Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish 2009) 17.

[79] See esp Kelly Coogan-Gehr, 'The Politics of Race in US Feminist Scholarship: An Archaeology' (2011) 37 Signs 83, 95.

[80] Austin, 'Sapphire Bound!' (n 71) 546.

[81] The Combahee River Collective, 'A Black Feminist Statement' in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997).

inequality. For example, while Scales-Trent studied Black women's position in the US as defined by 'disabilities of Blacks and the disabilities which inhere in their status as women', her research was informed by their material inequality, including the fact of being the lowest paid, least employed, and most poor group as compared to white women, Black men, and white men.[82] Class, especially poverty, has thus acted as the authoritative foil which has shaped the accounts of intersections in intersectionality theory.

Just as with class, analyses of structures and relationships of power have been central to intersectionality from early days. Austin's incisive critique of the decision in *Chambers v Omaha Girls Club*[83] illustrates this central focus. In *Chambers*, a US district court had upheld the employer's decision to dismiss a young unmarried Black pregnant woman for being a negative role model to Black teenagers at the Girls Club. Austin criticized the Court's condemnation of the choices of young Black women, rather than the structures which led them to this Hobson's choice between difficult teenage years and early pregnancy and single motherhood. Austin presented a multi-layered interdisciplinary account of evidence which revealed how identity categories like race, sex, gender, class, and age interacted with the lack of equal education, employment, and healthcare to severely curtail valuable life choices for Black teenagers and young adults. In the same vein, Crenshaw explained violence against Black women as a product of the interaction of Black women's multiple identities with multiple systems of power. She grouped these systems of power into three: structural, political, and representational. She built from the ground up an account of how each of these exacerbated the incidence, obscuring, and dismissal of routinized patterns of violence against Black women at home and beyond. Crenshaw's recent contribution on mass incarceration of minority women tows this familiar line.[84]

As I highlighted in the last section, intersectionality is interested in the simultaneity of similarities and differences between identity categories *because of* the social, cultural, political, and material inequalities organized around them. Identity categories like race and sex are thus meant to provide a foot in the door for understanding disadvantage, which in turn is understood broadly in terms of institutional, structural, and relational systems of power in the relevant historical, social, political, and economic context.

Post-structural critiques find even this provisional reliance on identity categories problematic. The problem for them lies not in the ignorance of certain identity categories, or their interaction with systems of powers, but in the use of

[82] Judy Scales-Trent, 'Black Women and the Constitution: Finding our Place, Asserting our Rights' (1989) 24 Harvard Civil Rights-Civil Liberties Law Review 9 (hereafter Scales-Trent, 'Black Women and the Constitution').

[83] 834 F 2d 697 (8th Cir 1987) (USCA).

[84] Kimberlé W Crenshaw, 'From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control' (2012) 59 UCLA Law Review 1418.

categories at all. Intersectionality is seen as belying its anti-essentialist roots, which consider the social construction of identities like race and sex to be inherently inadequate and exclusionary. Instead of challenging the use of identity categories per se, intersectionality is criticized for fetishizing identity categories by pointing out their intersections alone, rather than abandoning allegiance to them all together. The theory is ultimately seen as too conservative and inconsistent with its radical roots in anti-essentialism and its avowed aim of social reform.[85]

Diametrically opposite to this runs the infinite regress problem which troubles advocates of identity politics. Intersectionality is feared for splintering identities into ever so small sub-groups which have little in common. Mapping intra-group differences can thus devolve into nothing more than collating disparate accounts of individual experiences—annihilating the basis of groups as the primary sites of organizational politics. Within this critique, intersectionality is considered too open-ended and uncontainable, such that it is buried under its own weight of identity politics.

I think intersectionality's own position lies somewhere in the middle. Whilst post-structural critiques overstate intersectionality's provisional reliance on identity categories and underemphasize its critical outlook on them, identity-based critiques misunderstand intersectionality's inclination to map differences and gloss over the relationship of individual experiences with broader patterns of group disadvantage.

The insistence on recognizing Black women's experiences as defined by both race and sex does not perforce sanction an uncritical and rigid understanding of race and sex. In fact, part of intersectionality's theoretical project *is* to reorganize the boundaries regulating the social meaning of being of a particular race or sex to include those who have been previously excluded at the altar of essentialist definitions. This is also evident in the discussion on Dalit feminism in the next section—the claim being that intersectionality or intersectionality-like thinking accommodates an inclusive and fluid understanding of caste and sex both. In that sense, intersectionality takes on board the post-structural insight and insists on a critical treatment of identity categories. It thus embraces a kind of transversal identity politics, which lies in the middle of, and as an alternative to, both universalistic or assimilationist and abortive identity politics.[86] Crenshaw sums it up as:

> Recognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all. Through an awareness of intersectionality, we can better

[85] Leslie McCall, 'The Complexity of Intersectionality' in Grzanka (ed), *Intersectionality* (n 2); Barbara Risman, 'Gender as a Social Structure: Theory Wrestling with Activism' (2004) 18 Gender and Society 429.

[86] Nira Yuval-Davis, 'What is 'Transversal Politics'?' (1999) 12 Soundings 94.

> acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.[87]

Intersectionality's provisional reliance on identity categories is meant to be strategic and inclusive at the same time. It is strategic in that intersectionality refers to identity categories as useful markers of inequality which can be transformed and reclaimed as tools of resistance. Intersectionality thus furthers the epistemological project of uncovering and redressing the disadvantage associated with identities and, at the same time, creates space for the ontological project of asserting identities as 'ideologically powerful, experientially salient (but not essentialist), and as fluid'.[88] In contrast with the post-structural critique which imagines identity nihilism as its logical victory, intersectionality is a project with transformation by reclamation at its heart. Scales-Trent called this a project of 'self-definition'—of asserting rights *as Black women* by rejecting the definitions imposed by the powerful and setting forth our own.[89] This is why the Black feminist critique insisted on including Black feminist standpoints in mainstream feminism, the civil rights movement, and discrimination law, and thus transforming, rather than transcending, these movements and spaces. Much of intersectionality can be understood in terms not of renouncing but of rehabilitating identity politics.

One way in which intersectionality does that is by using individual and concrete accounts of intra-group experiences as always relating to broader patterns of group disadvantage. Intersectionality shows a strong and balanced interest in both individual as well as coalitional implications of identity categories. Individual experiences of people within sub-groups, like Black women, are important not just by themselves, but because they furnish concrete and instructive evidence of wider group-based patterns. The range of experiences within groups also helps to prevent making a certain kind of experience archetypical of the disadvantage suffered by all group members. This is what is meant by saying that intersectionality is concerned with both the universal and the particular. And this is why intersectionality dodges the infinite regress problem—because its concentration on minute and specific differences between individuals in specific groups and sub-groups always relates back to those groups and sub-groups to which they belong in terms of sameness and difference. An infinitely fractured vision of intersectionality thus remains speculative in light of a grounded and purposeful invocation of group identities.

In any case, intersectionality was never meant to be a totalizing theory of identity or a totalizing theory of any kind at all. It leaves enough space for other theories and methodologies, including exclusively post-structural, Marxist, and those wholly imbedded in identity politics, to chart their own course to social justice. For

[87] Crenshaw, 'Mapping' (n 14) 1299.
[88] May, *Pursuing Intersectionality* (n 27) 113.
[89] Scales-Trent, 'Black Women and the Constitution' (n 82) 43.

itself though, it has chosen a reflexive middle ground, which is both pragmatic and transformative at the same time. Evelyn Glenn describes this standpoint fittingly:

> As I struggle to formulate an integrated analysis of gender, race, and class, I have relied on a historical comparative approach that incorporates political economy while taking advantage of the critical insights made possible by post-structuralism. I use a social constructionist framework, which considers how race, gender, and class are simultaneously constituted in specific locations and historical periods through 'racialized' and 'genderized' social structure and discourse. I try to inhabit that middle ground . . . by looking at the ways in which race, gender, and class are constituted relationally.[90]

2.2 Intersectionality, Identity, and Discrimination Law

As a final point, it is useful to note that intersectionality shares the reflexive middle ground—of working with and being critical of identity categories—with discrimination law. Like intersectionality, discrimination law is based on identities or 'designations that are listed as prohibited grounds in anti-discrimination laws'.[91] Prohibited grounds such as race, religion, caste, sex, gender, disability, sexual orientation, age etc. are chosen based on a host of factors like immutability, historical prejudice, political powerlessness, and fundamental choice.[92] Much like intersectional identities, grounds are designated not just for their own sake or for the sake of discrimination law, but because they serve as relevant 'markers of the dynamics of power'.[93] In this way, grounds in discrimination law (and identities in intersectionality) are self-limiting: they are counted as grounds or identities *because* they signify patterns of group disadvantage which are historical, substantial, pervasive, and abiding.[94] So grounds like race, gender, disability, and sexual orientation protect groups like Blacks, women, those with disabilities, and gay people. Intersectional discrimination requires the protection of groups like Black women and disabled gay people who belong to groups otherwise protected and on the basis of grounds which are either already recognized or can be argued as analogous to recognized grounds. Recognition of their intersectional disadvantage in the form

[90] Evelyn N Glenn, 'The Social Construction and Institutionalization of Gender and Race: An Integrative Framework' in Myra M Ferree, Judith Lorber, and Beth B Hess (eds), *Revisioning Gender* (Sage 1998) 32.

[91] Suzanne B Goldberg, 'Identity-based Discrimination and the Barriers to Complexity' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 177.

[92] Robert Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 California Law Review 1.

[93] Pothier, 'Connecting Grounds' (n 49) 58.

[94] Khaitan, *A Theory of Discrimination Law* (n 32) 35–38.

of intra- and inter-group similarities and differences necessarily requires neither adding new grounds nor recognizing new groups per se in intersectionality or discrimination law. Thus, the fears imagined by the *DeGraffenreid* Court—of discrimination law devolving into a 'many-headed Hydra' and 'opening the hackneyed Pandora's box' to any kind of identity—remain unrealized and with good reason. Far from splintering identities into unrecognizable and unusable categories, the legal construct of grounds in discrimination law provides a site for thinking about individual and specific instances of intersectional discrimination within a wider context of grounds and groups and thus as a whole. Discrimination law, like intersectionality, furnishes this opportunity to assert the integrity of identities and experiences of discrimination suffered because of them. As Scales-Trent confirms: 'Thinking about and writing about the constitutional rights of black women [under the Equal Protection Clause which prohibits discrimination] has allowed me to pull those fragments of self back into a whole, focused and centered'.[95]

But, despite their reliance on identities or grounds, both intersectionality and discrimination law aim to do more than just provide adequate recognition, representation, and redress to disadvantaged groups. Their projects should be seen as much more ambitious, especially in terms of their redistributive, participative, and transformative aims. In the context of discrimination law, Fredman describes these overlapping dimensions as 'substantive equality', explained thus:

> First, it aims to break the cycle of disadvantage associated with status or outgroups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension.[96]

Intersectionality's social justice aims are perhaps even wider than discrimination law's goal of furthering substantive equality because intersectionality travels further than the domain of law and spurs wider possibilities of transformation through social movements. But neither of their aims are simply identity related or subsumed by transcendence or transformation of identity politics. In fact, the point of recounting the shared identity-basis of intersectionality and discrimination law is to drive home the plausibility of the vast and transformative pursuits of intersectionality and discrimination law by relying on a provisional understanding

[95] Scales-Trent, 'Black Women and the Constitution' (n 82) 42.
[96] Fredman, *Discrimination Law* (n 32) 25.

of identities which is inclusive and fluid. Identity or grounds are just the points of departure for what intersectionality and discrimination law are seeking: the end goal being the appreciation and redress of disadvantage suffered by people on the basis of these.

Of course, none of this denies the limitations of discrimination law, or even law per se, as a site for transformative politics and social justice. These limitations drawn up by Critical Legal Scholars are well known. The structure of discrimination law is highly formalistic, centred on adjudication, and triggered only ex-post by an individual claimant. The remedies, even if structural, are rather narrow, relating first and foremost to the specific claimant and fact situation at hand, and then only by extension to the broader group to which the claimant belongs. Added to these are difficulties in accessing—both in reality and ideologically—legal systems which literally operate from on high and are consequently too removed from some of the most insidious forms of discrimination like those captured by intersectionality. Discrimination law is thus considered too abstract to be able to truly relate to 'real people's real experiences'.[97] In fact, since many of Crenshaw's initial problems with discrimination law—of essentialism of grounds and the perception of discrimination as operating along a single-axis alone—continue to plague intersectionality, one is compelled to ask why they must continue to expend intellectual energy on intersectional discrimination anymore? Surely the resistance to reform is a sign that the idea of reform through law is itself misconceived. Postmodern scholarship makes this point forcefully.[98]

This book exhumes the project of realizing intersectionality in discrimination law practice by borrowing a healthy dose of scepticism from post-structuralism, post-modernism, and CLS. But it goes beyond what Harris calls their 'deconstructive excesses',[99] leading to total refutation of rights and identity politics, and towards reconstruction and transformation of these tools. This is the standpoint which reverberates through this book which hopes to make a small but significant contribution to rights scholarship by letting intersectional claimants, like the fat Black man in Lord Phillips' hypothetical scenario, succeed. Given the history of intersectionality's struggles and discrimination law's resistance, his success will be no mean feat. But, given the historical developments and current possibilities in the field recounted in the previous chapter, his claim is not a hopeless one either.

Thus, discrimination law need not be the only or even the primary site for engaging with intersectionality. Even for Crenshaw, whose earliest contribution in 1989 was concerned with the formal limits of discrimination law, it was but one of the ways in which she hoped and considered intersectionality to be relevant and

[97] See, for this critique in relation to Canadian discrimination law, Pothier (n 49).

[98] Anthony E Cook, 'Reflections on Postmodernism' (1992) 26 New England Law Review 751; Allan C Hutchinson, 'Identity Crisis: The Politics of Interpretation' (1992) 26 New England Law Review 1173.

[99] Angela P Harris, 'The Jurisprudence of Reconstruction' (1994) 82 California Law Review 741.

applicable. It is with an appreciation of discrimination law's limited capacity to address intersectionality, and the limits of intersectionality itself, that either can be made useful at all.

Does any of this help make intersectionality an idea of general applicability beyond its limited context of Black feminism in the United States? There is no doubt that 'intersectionality' originated in this specific context. But Black women were not supposed to be its sole protectorate, nor were race and sex mandated as the only categories to serve it. In fact, intersectionality has become one of the most successful 'travelling' theories of our times.[100] It has transcended national and continental boundaries, cementing itself in South America, Africa, and Asia; expanded to analyses beyond race and sex, including caste, nationality, age, disability, sexuality etc.; and applied across disciplines of literature, sociology, anthropology, psychology, gender studies, economics, history etc. This chapter closes by pointing out the wide presence and omnipotence of intersectionality and intersectionality-like thinking which existed even before the locution travelled. Intersectional analyses have been present, borrowed, applied, and hence been relevant in discursive environments. The example of Dalit feminism in India shines a spotlight on this.

3. An Illustration

It is time to see what the framework of intersectionality, composed of the five strands described in section 1, yields. What is the nature of disadvantage revealed by the framework? That is, what does intersectional disadvantage look like? Before turning to the example of Dalit women to answer this question, a word about caste in India may be helpful.

Caste, like race, is a social construction that signifies an entrenched form of segregation and hierarchy. The caste system divides all Hindus into four principal 'varnas' or caste—Brahmin (priests) at the very top, followed by Kshatriya (warriors), Vaishya (merchants and farmers), and Shudra (menials). Each caste is further divided into several sub-castes. Those outside of the fourfold caste system are known as outcastes or 'Untouchables' or the 'Scheduled Castes' per the Constitution of India, or—as a matter of assertive pride and resistance—'Dalits', which means those who have been broken or suppressed.

Although seemingly based on division of occupational labour, caste is determined by heredity not choice, and thus is designated upon birth. There is no possibility of change or conversion from one caste into another. In fact, even conversion to other religions means that caste travels into those religions such that Dalits

[100] See, for a discussion on the 'travels' of intersectionality, Helma Lutz, Maria Teresa Herrera Vivar, and Linda Supik (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011) (hereafter Lutz et al, *Framing Intersectionality*).

become Christian or Muslim Dalits upon conversion. The one exception to this is Buddhism which is meant to provide a wider berth for equality upon conversion. Nevertheless, by and large, caste as an ascription appears irreversible. This irreversibility is ensured by endogamy, or the practice of marrying within caste. Endogamy maintains the 'purity' of castes and thus supports and reinforces its hereditary character.[101]

The caste system locks people not only into ascriptive caste identities but also into an interminable cycle of disadvantages associated with the caste hierarchy. Being outside the caste system, Dalits have suffered the worst consequences of it in terms of a lower social status, reduced cultural capital, a lack of economic security, diminished political power, and heightened aggression and violence.[102] Dalit women have suffered this broad-based casteism along with patriarchal domination. They are thus considered 'Dalits amongst the Dalits', whose position is worsened by multiple and intersecting forms of oppression relating to caste, gender, and class.[103]

This section highlights the intersectional thinking in the Dalit feminist discourse. Section 3.1 explores the intersectional roots of Dalit feminism in India. It shows how other categories like caste, religion, creed, nation, and region have shaped women's gendered identity in India. The mediation of sex or gender by other identity categories cements an inherently intersectional understanding of these categories in the Indian context. The section traces the development of postcolonial Dalit feminism against this background and in response to their exclusion from the mainstream upper-caste, middle-class ('Brahminical') feminism, and the patriarchal, anti-caste movement.

Section 3.2 argues that even as there are obvious differences in context and an absence of the term 'intersectionality' in the Dalit feminist discourse, the shared language and explanations of the respective positions of disadvantage of Black women and Dalit women reveal their common conceptual foundations. Both were

[101] See, for a detailed account of caste, Nripendra K Dutt, *Origin and Growth of Caste in India* (vol 1, The Book Company 1931).

[102] There are of course notable exceptions to this, especially in relation to the rise of Dalit political parties like the Bahujan Samaj Party in the Indian state of Uttar Pradesh. For an analysis, see Radha Sarkar and Amar Sarkar, 'Dalit Politics in India: Recognition without Redistribution' (2016) 51 Economic and Political Weekly 14; Vivek Kumar, 'From Social Reform to Political Mobilisation: Changing Trajectory of Dalit Assertion in Uttar Pradesh' (2003) 53 Social Action 115.

[103] The term 'Dalit women' is used rather loosely, and hence inclusively. The position of women who are Dalit Christians and Dalit Muslims (or tribal and nomad women who remain at the fringes of the Dalit identity) cannot be squarely defined with reference to caste, gender, and class, without analysing the implications of religion (or tribe) separately. However, if we follow Galanter's associational view of caste, the composition of caste is characterised by a complex set of features including but not limited to religious features. 'Dalit' identity may then be extremely complex from within, such that the position of Dalit women can be studied taking their caste identity as simultaneously defined by multiple intersections and as intersecting with other identities. See Marc Galanter, 'The Religious Aspects of Caste: A Legal View' in DE Smith (ed), *South Asian Politics and Religion* (PUP 1966).

concerned with mapping the uniqueness of their positions *as* Dalit women and Black women, as well as what they shared *with* Dalit men and upper-caste women, and Black men and white women. They too use the dynamic of sameness and difference based on identity categories considered as a whole, to reveal broader patterns of group disadvantage with the aim of challenging and transforming such patterns. Though only one of them went on to develop intersectionality as *intersectionality*, their respective positions, rooted in their specific contexts, transcend contextual limitations, and confirm the global avail and normative fortitude of intersectionality-like thinking; and the usefulness of extending intersectionality as a framework developed in the context of Black feminism for understanding intersectional disadvantage and discrimination in diverse settings.

The overall takeaway is that marginalized discourses, whether of women or others, located anywhere in the world have or can resonate with intersectionality when they try to see patterns of group disadvantage associated with multiple identities as a whole. So, the present juxtaposition of Dalit feminism with Black feminism is not simply an attempt to illustrate an application of intersectionality, or even to show partnerships between postcolonial/Third World feminisms on the one hand and First World discourses on the other; it is also about the intersectional perspective of always looking for detailing, rather than simply the deployment of the locution. More importantly, it is about digging into accounts that provide a basis for pursuing intersectionality or discrimination law at all—of explicating the meaning of what we say when we say that individuals and groups suffered intersectional discrimination. Thus, in the end, this is an epistemic exercise which in turn supports an ontological or experiential one of understanding intersectional disadvantage with the purpose of relieving the lives that are suffering from such disadvantage.

3.1 Dalit Feminism

The roots of Black feminism's intersectional thinking lie in challenging the exclusionary tendencies in the feminist as well as the civil rights movement. Black feminists thus argued against an essentialist understanding of women and women's experiences as solely defined by sex or gender and in isolation of women's other identities of race, class, sexuality, disability, age etc. Similarly, they contested the monolithic category of Blacks inhabited by Black males, whose interests defined and trumped the interests of Black women in the civil rights movement.

In contrast, the intersectional thinking of Dalit feminists was inspired by a different legacy. For example, although they too had to confront the mainstream Brahminical feminism conceived mainly for upper-caste middle-class women, they had to do so against a backdrop of over-inclusive rather than exclusive rendering of sex and gender, populated by other categories of nationalism, community,

religion, caste, class, region, and sexuality.[104] Thus, before charting the trajectory of Dalit feminism as a response to the mainstream feminist and anti-caste movements, it is useful to briefly understand the background in which it developed—one which Anupama Rao describes as being saturated with the discourse of gender in everyday life.[105]

Women's identity in India has been the chief architectural motif in the construction of other identity categories like caste, nation, region, class, sexuality, and religion.[106] Caste serves as the classic case for understanding this process of production and reproduction of other identities *via* sex or gender. Caste, which operates through endogamy, is based on a strict regulation of women's sexuality. Patriarchy controls the sexuality of Brahmin or upper-caste women by regulating it with notions of purity and chastity, and thereby prohibiting marriage outside caste, while conceiving of Dalit women as loose and promiscuous, and thus using their bodies as sites of sexual exploitation. Both upper-caste and lower-caste women serve as the gateways of the caste system, through which they are in turn subordinated and oppressed.[107]

Thus, women in India have not just been affected by their exclusion but also by their appropriated inclusion. While Western feminism had to be alerted that the 'insistence upon a subject for feminism obscures the "social and discursive production of identities"',[108] Indian feminists began with a diametrically opposite challenge—that of delineating the gendered identity of women by analysing women's central role in the social and discursive production of identities. Similarly, while Western feminism was criticized for relegating differences between women to the 'embarrassed et cetera',[109] Indian feminists had to struggle with discerning the category of women at all, from the confines of the 'unembarrassed et cetera' like caste, nation, region, class, and religion. As Nivedita Menon remarks: 'Women's movements in the global South thus never started with the idea of some subtract Woman that they later needed to complicate with more and more layers. This identity of Woman was from the start located within Nation and within communities of different sorts.'[110]

[104] Irene Gedalof, *Against Purity: Rethinking Identity with Indian and Western Feminisms* (Taylor and Francis 1999) 183, 201.

[105] Anupama Rao (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005) 20 (hereafter Rao, *Gender and Caste*).

[106] See, for another example, the relationship between gender and religion which frames Muslim women's subordination in India: Flavia Agnes, 'From Shah Bano to Kausar Bano: Contextualizing the "Muslim Woman" Within a Communalized Polity' in Ania Loomba and Ritty A Lukose (eds), *South Asian Feminisms: Contemporary Interventions* (DUP 2012).

[107] Vidyut Bhagwat, 'Dalit Women in India: Issues and Perspectives—Some Critical Reflections' in PG Jogdand (ed), *Dalit Women in India: Issues and Perspectives* (GPH 1995) (hereafter Bhagwat, 'Dalit Women in India').

[108] Iris M Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19 Signs 713, 715–16.

[109] Judith Butler, *Gender Trouble* (Routledge 1990) 143.

[110] Nivedita Menon, 'Is Feminism about 'Women'? A Critical View on Intersectionality from India' (2015) 50(17) Economic and Political Weekly 37, 38 (hereafter Menon, 'Is Feminism about 'Women'?').

Just as Dalit feminism set out to articulate their subjective position of subordination due to their gender, caste, and class, the mainstream or Brahminical feminism too had to work with a gendered identity of women in relation to their religious, caste, and class identities. This was because both upper-caste women and Dalit women were oppressed by 'casteist patriarchies'.[111] Caste identity thus became central to the understanding of gender and patriarchy for both mainstream feminists and Dalit feminists. This seemingly 'intersectional' analysis of gender, though, was limited to understanding one's *own* position of disadvantage rather than the engagement with the disadvantage of *others*. It meant that although Brahminical feminists appreciated their own caste oppression (for example, in terms of strict regulation of their sexuality and choice in marriage), they did not appreciate the difference between their position and the oppression of Dalit women (for example, the sexual exploitation of Dalit women by both upper-caste and Dalit men). Even if gender and caste impacted all women, they impacted women in qualitatively different ways. The exploration and articulation of this qualitative difference gave rise to the postcolonial discourse defined by multiple and competing feminisms, rather than a plural but unified sisterhood. Supriya Akerkar captures this pithily:

> Indeed the different fragmented contexts of struggle suggest to us that there can be no 'one' feminism in the 'Indian' context or one way of understanding or locating women's oppression. This means that the context itself suggests a need for a plural expression of feminism around women's multiple oppressions, viz, class, caste, ethnicity, gender, sexual preference, etc. In some ways, the diverse responses to the women's oppression and existence of diverse groups reflect this plural reality of women's oppression. However, it appears that these different perceptions have not led to a celebration of the plural practice of feminism.[112]

Dalit feminism came to the fore against this background. Beginning in the 1970s and gaining momentum in the 1980s and 1990s, it emerged as a response to the exclusions of mainstream feminist and anti-caste movements. The postcolonial mainstream or Brahminical feminism had systematically ignored the plight of Dalit women. Just as white women were burdened by the 'pedestal' and its implications, such as lack of employment opportunities, dependency, and undervalued household work, so too, upper-caste middle-class women considered themselves burdened by their image as '[t]he good woman, the chaste married wife/mother, empowered by a spiritual strength'.[113] They espoused causes that related to their

[111] Tarabai Shinde, 'A Comparison between Women and Men: An Essay to Show Who's Really Wicked and Immoral, Women or Men?' in Rosalind O'Hanlon, *A Comparison between Women and Men: Tarabai Shinde and the Critique of Gender Relations in Colonial India* (OUP 1994).

[112] Supriya Akerkar, 'Theory and Practice of Women's Movement in India: A Discourse Analysis' (1996) 30(17) Economic and Political Weekly 2, 13–14.

[113] Samita Sen, 'Motherhood and Mothercraft: Gender and Nationalism in Bengal' (1993) 5(2) Gender and History 231, 232.

'status' vis-à-vis men, especially in relation to marriage, including concerns over consent, dowry, divorce, widowhood, inheritance, and domestic violence. These did not resonate with Dalit women who had a long history of internal critique and reform within Dalits and vis-à-vis Dalit men. By the end of colonial rule in 1947, Dalits had already popularized consent and choice in marriage, resisted dowry, and espoused marriage without priests and widow remarriage. Similarly, in the private sphere, though Dalit women were responsible for running the household just as upper-caste women were, they were neither pedestaled in their homes nor did they subscribe to *pata puja* or worshipping at the feet of their husbands. While they were domestically abused, they often retaliated against their husbands and families. At the same time, they had always occupied the public sphere since they had had to move out of their homes whether for accessing water from village wells, fetching logs for fire, or earning meagre wages for menial jobs. Yet, their employment was confined to degrading jobs meant only for 'Untouchables', like manual scavenging and cleaning of corpses, still receiving fewer wages than Dalit men for the same job. Coupled with their traditional duties of housekeeping, Dalit women considered themselves more 'overworked' than their male counterparts and upper-caste Hindu women.[114] They were ill-treated as the domestic servants of upper-caste women and sexually exploited by upper-caste men. Brahminical feminists had not just contributed to and in fact obscured this caste oppression, they had romanticized and overdetermined Dalit women's position: marriage reform was seen as a sign of equality, sexual exploitation was couched as sexual freedom, brave retaliation against sexual abuse was counted as evidence of power, and participation in precarious forms of employment was dubbed as an exercise of personal autonomy. Disregarded as lower-caste and misunderstood as more equal, Dalit women failed to make it into mainstream feminism in India.[115]

Nowhere is this more apparent than in the case of sexual assault and violence against Dalit women. The seminal case of Bhanwari Devi is instructive.[116] Bhanwari Devi was a grassroots worker employed as part of the Women's Development Project by the state of Rajasthan. She worked to convince local villagers to reject child marriage and had tried to frustrate the wedding of a nine-month-old girl in a powerful upper-caste Gurjar family in her village. In retaliation, she was gang raped by the upper-caste Gurjar men who penalized her for pursuing the cause against child marriage in their family. The District Judge who heard her rape complaint dismissed it on the basis that upper-caste men could not possibly have raped her, a Dalit woman. The issue flared up and was pursued by Indian feminists in the form of the demand for protection of women against sexual harassment at the

[114] Gail Omvedt, 'The Downtrodden among the Downtrodden: An Interview with a Dalit Agricultural Labourer' in Rao, *Gender and Caste* (n 105).

[115] See, for a longer analysis, Gabriel Dietrich, 'Dalit Movement and Women's Movements' in Rao, *Gender and Caste* (n 105) (hereafter Dietrich, 'Dalit Movement').

[116] *Vishaka v State of Rajasthan* (1997) 6 Supreme Court Cases 241 (Supreme Court of India).

workplace. They expedited their cause through public interest litigation in the Supreme Court of India. The Court began addressing the petition, which finally resulted in the Supreme Court Sexual Harassment in Workplace Guidelines in 1977 and Sexual Harassment of Women at Workplace Act in 2013 in these terms:

> The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and *no further mention of it, by us, is necessary*. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate . . .[117]

The characterization of the petition stemming from Bhanwari Devi's gang rape as merely a case of sexual harassment (not then a crime), rather than rape (a crime under the Indian Penal Code) perpetrated on the basis of caste, signified the oversights of mainstream feminists and judges alike. Couching Bhanwari Devi's gang rape as a broader issue of 'gender equality', not only hijacks a case which really belonged to Dalit women but also fails to fulfil the feminist promise of realizing gender justice for all women in fact. Furthermore, neither the Supreme Court Guidelines nor the succeeding Act of 2013 addressed the situation of Dalit women like Bhanwari Devi, targeted not just as women but specifically as Dalit women. Without directly addressing the nature of intersectional harm involved in sexual assault and harassment against Dalit women, cases like Bhanwari Devi's continue to be mischaracterized (e.g. sexual assault such as rape devolving into sexual harassment defined as unwelcome sexual contact) and overlooked (as cases of both caste oppression and sexual discrimination at the same time). The feminist undertaking of Bhanwari Devi's case marks the persistent sidelining of caste as a gender issue.

This sidelining is mirrored in the anti-caste movement. The Dalit liberation movement began in the early 1900s. Since its inception, Dalit women were active participants along with Dalit men.[118] But while early protagonists like Bhimrao Ambedkar, Jyotirao Govindrao Phule, and Periyar EV Ramaswami were conscious of Dalit women and their presence in the anti-caste movement, Dalit women's exploitation was never centre stage in their anti-caste struggles. For example, though Ambedkar included and encouraged Dalit women to participate in Dalit liberation, his appreciation of Dalit women's concrete reality was often imagined only from the perspective of caste rather than patriarchy. This is noticeable in his grandest anti-caste essay, *Annihilation of Caste* (1936), where he exhibits his intersectional thinking as he remarks: 'Religion, social status, and property are all sources of power and authority which one man has to control the liberty of another.'[119]

[117] Ibid (emphasis supplied).

[118] Meenakshi Moon and Urmila Pawar have excavated this prolific, though largely overlooked, history of women's participation in the Ambedkarite movement. Meenakshi Moon and Urmila Pawar, *Amihihi Itihaas Ghadawila: Ambedakari Chatatitil Streeyancha Sahabhag* (Stree 1989).

[119] BR Ambedkar, *Annihilation of Caste* (Verso 2016) 230.

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Gender or patriarchy though, was not independently considered a source of power or authority that controlled Dalits especially Dalit women. Observations on patriarchy, where made, were too generalist ('traditional supremacy of man over woman') to be meaningful in explicating the Dalit women's position. The Dalit movement and its leaders were thus too preoccupied with caste to articulate the specific ways in which general and broad-based forms of oppression including patriarchy, poverty, and casteism impacted Dalit women in particular. The assumption was that Dalit women's struggles were the same as those of Dalit men and hence simply caste based; the annihilation of caste would automatically defeat patriarchy and classism.

The tendency to subsume the issues of Dalit women within broader caste struggles cemented itself in the post-Ambedkar years. While Dalit women shared all forms of caste oppression with Dalit men, they also suffered distinct forms of sexism at the hands of upper-caste men and Dalit men, which were both similar to and different from the sexism suffered by non-Dalit women. As Bhanwari Devi's case showed, rape and sexual abuse were specifically targeted at Dalit women as a form of patriarchal and caste domination over them, as well as caste domination over Dalit men as a tool for disciplining them or teaching them a lesson by exploiting their wives and daughters. Access to Dalit women was not deemed inconsistent with the practice of untouchability or other forms of caste-based segregation. At the same time, Dalit women suffered from wife battering and desertion by Dalit men. Although they shared their poverty with Dalit men, they were often poorer—eating last and hence the least in the household, earning far less than Dalit men for equal work, and seldom having land or material resources of their own. Dalit women were also passed over for leadership positions in Dalit organizations like Dalit Panthers, which gained a wide base in the 1970s. Barred from participation, their issues were left unrepresented in the Dalit struggle, which was rendered chiefly male in its postcolonial incarnation. Dalit women were thus left 'doubly deserted' by both the women's and the anti-caste movement.[120]

The exclusion from the contours of both feminist and Dalit movements became key to the articulation of the Dalit women's position. Dalit feminism thus emerged as a response to the 'masculinization of dalithood and a savarnisation of womanhood'[121] ('savarna' meaning upper or high caste). In highlighting that Dalit women could not be collapsed into the unqualified category of 'women' in the women's movement or 'Dalit' in the caste movement, Dalit feminism sought to create an

[120] Dietrich, 'Dalit Movement' (n 115) 58.

[121] Sharmila Rege, 'Dalit Women Talk Differently: A Critique of "Difference" and Towards a Dalit Feminist Standpoint Position' (1998) 33(44) Economic and Political Weekly 39, 42 (hereafter Rege, 'Dalit Women Talk Differently').

alternate paradigm that more accurately represented and explained the realities of Dalit women. It was a plea neither for inclusion nor for representation but to re-examine the very core of these discourses—of how to conceptualize caste and gender subordination. Gopal Guru flagged the need for Dalit women to talk 'differently' in one of the first essays highlighting the reality of Dalit women's oppression, based on the 'external' (Brahminical forces regulating the issues of women) and 'internal' factors (the patriarchal domination within the Dalit movement).[122] Sharmila Rege further substantiated the salience of the Dalit feminist discourse by advancing the 'Dalit Feminist Standpoint', which:

> emphasises individual experiences within socially constructed groups and focusses on the hierarchical, multiple, changing structural power relations of caste, class and ethnicity which construct such groups . . . the subject/agent of dalit women's standpoint is multiple, heterogeneous and even contradictory, i.e., the category of 'dalit woman' is not homogenous. Such a recognition underlines the fact that the subject of dalit feminist's liberators knowledge must also be the subject of every other liberators project and thus requires a sharp focus on the processes by which gender, race, class, caste, and sexuality all construct each other. Thus, the dalit feminist standpoint itself is open to liberatory interrogations and revisions. The dalit feminist standpoint which emerges from the practices and struggles of dalit women may originate in the works of the dalit feminist intellectuals, but it cannot flourish if it is isolated from the experiences and ideas of other groups and must educate itself about the histories, preferred social relations, the utopias and the struggles of the marginalised. A transformation from 'their cause' to 'our cause' is feasible for the subjectivities can be transformed. By this we do not argue that non-dalit feminists can 'speak as' or 'for the' dalit women but they can 'reinvent' themselves as dalit feminists.[123]

Rege's exposition deserves unpacking. First, Rege, like Guru, was speaking of culling out differences *between* individual experiences but *within* disadvantaged groups, thus highlighting the need to speak to both individual differences as well as shared group disadvantage. Rege thus characterized the Dalit feminist standpoint as concerned with 'historically locating how all our identities are not equally powerful, and about reviewing how in different historical practices similarities between women have been ignored in an effort to underline caste-class identities or at other times differences ignored for "the feminist cause".'[124] Uma Chakravarti too

[122] Gopal Guru, 'Dalit Women Talk Differently' in Rao, *Gender and Caste* (n 105) 80–81.
[123] Sharmila Rege, 'A Dalit Feminist Standpoint' in Rao, *Gender and Caste* (n 105) 99.
[124] Sharmila Rege, '"Real Feminism" and Dalit Women: Scripts of Denial and Accusation' (2000) 35(6) Economic and Political Weekly 492, 493 (hereafter Rege, 'Real Feminism').

recognized this in proclaiming that 'Dalit women experience[d] patriarchal oppressions in unique as well as in shared ways'.[125] These contradictions of sameness and difference led Dalit women to articulate their distinct position of disadvantage defined not simply in reference to caste, gender, or class alone, but in terms of the intersection of casteism, patriarchy, and poverty at the same time. But, secondly, the purpose was not simply to articulate these similarities and differences but to articulate, in Rege's terms, 'the hierarchical, multiple, changing structural power relations' or, so to say, the patterns of group disadvantage. The Dalit feminist standpoint was thus an analysis of relationships of power which rendered Dalit women, 'Dalits among Dalits' or 'downdrotten amongst downdrotten', being 'thrice alienated' on the basis of caste, class, and gender.

Thirdly, such a 'multiple, heterogeneous and even contradictory' exposition of the Dalit women's position rendered all Dalit women's experiences, and indeed all Dalit and female experiences, as non-normative and hence inclusive. Rege argued against privileging any standpoint as limiting the emancipatory potential of that movement and indeed of their epistemological standpoint.[126] She thus opened the doors of Dalit feminism to a broader struggle for emancipation of all dispossessed individuals and groups. She emphasized the transformative goal of movements to look outwards, to reinvent rather than reject modes of engaging with identity politics. Finally, the Dalit feminist standpoint, as Rege describes, was one marked by both theory and praxis—both in touch with one another and flourishing in tandem. Dalit feminism, like Black feminism, was thus not merely, not even predominantly, a scholarly space. It was, and has continued to be, an activist space inhabited by Dalit women's organizations and advocates, leading the social movement against Dalit women's oppression. The work of the National Federation of Dalit Women formed in 1995 bears testimony to the strong coexistence and mutual reinforcement of theory and praxis.[127]

The similarities between intersectionality developed by Black feminists and the intersectional thinking of Dalit feminists may be apparent in the common language and explanations of both the discourses. What conclusions can we draw from this coincidence? Where does this leave us in terms of using intersectionality as a framework developed in one context, as a frame of reference for another? What does an example of a thick account of intersectional disadvantage, as in the case of Dalit women, show anyway? And how does this feed into the aim of using intersectionality for defining and redressing the category of intersectional discrimination in discrimination law? The next section reflects upon this.

[125] Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree 2003) 88 (hereafter Chakravarti, *Gendering Caste*).

[126] Rege, 'Dalit Women Talk Differently' (n 121) 44.

[127] Kalpana Kannabiran, 'A Cartography of Resistance: The National Federation of Dalit Women' in Nira Yuval-Davis, Kalpana Kannabiran, and Ulrike Vieten (eds), *The Situated Politics of Belonging* (Sage 2006) 54–71 (hereafter Kannabiran, 'A Cartography of Resistance).

3.2 Dalit Feminism, Black Feminism, and Intersectionality

The roots of Dalit feminist intersectional thinking are indigenous and self-made. Their struggles reflect their own circumstances, and consequently the theorizations borne out of the Dalit feminist movement are informed by that praxis rather than universal theories of any kind. In fact, like Black feminism, Dalit feminism is inspired by its longstanding genealogy of thought; including, as the previous section highlighted, the politics of engaging with multiple identities that can be traced as far back as the early twentieth century. There is, as Subramaniam notes, 'no single point in time or place [that] marked "start" for the contemporary *dalit* women's movement'.[128] Given that the surge in both Dalit feminism and Black feminism coincided in time, from the 1980s onwards, there was no possibility initially of borrowing from one another. The locution of intersectionality and transcontinental dialogue thus remained absent in the formative moments of Dalit feminism.

This has of course changed now. Cross-referencing and conversations between Dalit feminists and Black feminists are mutual, if not equal. Indian feminists have used Black feminist literature on intersectionality as a theory and a methodological tool for illuminating or clarifying their own intersectional subjectivities.[129] For example, Rege cites '[f]eminists of colour [who] developed the powerful resource of "intersectionality" of structures of domination', including hooks, Collins, and Anzaldua, in her work.[130] In a recent exchange between Nivedita Menon and Mary E John on the usefulness of intersectionality theory in India, John ruminates: 'Dalit feminists have also frequently found inspiration in the history of black women, which makes me wonder whether some dimension of the intersectionality problem might speak to them. It would surely be odd to reject this out of hand.'[131] In fact, out of hand rejections of intersectionality have been rare.[132] The locution and the theory have found their way into spaces, often beyond Dalit feminism, which benefit from them.[133] For example, in her work *Tools of Justice*, Kalpana Kannabiran presents a contextualized account of intersectionality in Indian

[128] Mangala Subramaniam, *The Power of Women's Organizing: Gender, Caste and Class in India* (Lexington Books 2006) 59 (emphasis in original).

[129] Dalit feminism and indeed feminism in India has explored intersectionality and Black feminism in far more detail in comparison. See the dedicated vol 48 issue 18 of Economic Political Weekly in 2013 on intersectionality; Purvi Mehta, 'Dalit Feminism at Home and in the World' in Barbara Molony and Jennifer Nelson (eds), *Women's Activism and 'Second Wave' Feminism: Transnational Histories* (Bloomsbury 2017).

[130] Rege, 'Real Feminism' (n 124) 495.

[131] Mary E John, 'Intersectionality Rejection or Critical Dialogue?' (2015) 33(1) Economic and Political Weekly 72, 76.

[132] The notable one being Menon, 'Is Feminism about 'Women'?' (n 110).

[133] See especially the proceedings of Jagori Conference, 'A Brief Report Intersectionality: Knowing and Doing' (17 August 2015) <http://www.jagori.org/sites/default/files/publication/panel%20discussion%20on%20intersectionalities%2017th%20august%202015%20-%20report.pdf> accessed 28 March 2019.

constitutional law in relation to caste, religion, disability, sexuality, and indigenous and tribal peoples.[134]

Similarly, Bilge and Collins acknowledge Black feminism's shared but independent trajectory of intersectionality with Dalit feminism. They refer to Kannabiran's powerful exposition of the Dalit women's political position 'shaped by multiple and interrelated systems of oppression: religiously sanctioned casteism, patriarchy, capitalism, state, and religion'.[135] They use Kannabiran's analysis and the example of Dalit feminism to show how intersectional thinking has pervaded identity-based resistance and struggles beyond the context of Black feminism in the US.

The invocation of the Dalit feminism-Black feminism analogy has been both measured and attentive. Neither discourse adopts the other wholesale, uncritically or out of context; and both engage with the other more than just as passing references. The engagement thus bears out several things. First and foremost, it shows the limited value of engaging with identity politics, social movements, and discourses along a single categorial axis alone. Secondly, it shows in great depth from the perspective of Black feminism and Dalit feminism why intersectional thinking along multiple axes matters—to capture the qualitatively distinct nature of disadvantage associated with multiple identity categories. Thirdly, it shows the conceptual convergences in thinking about intersectional disadvantage and discrimination across diverse contexts. It is these convergences that reveal the value in applying the intersectional framework to different subjects and sites. It is useful to collate them here.

Both Dalit and Black feminists broke away from their respective mainstream feminist movements upon realizing that an unqualified category of women or Blacks or Dalits did not adequately explain and address the position of those women who were also Black or Dalit. In fact, their mutual discord with caste and race movements on the one hand, and Brahminical and white feminisms on the other, is captured in their comparable slogans: 'All Men are Black, All Women are White' and 'All Dalits are male and all women savarna [upper-caste]'. They then developed this with the central insight that women's subordination cannot exclusively be explained in reference to gender, and that other identities like race and caste create both shared and unique experiences amongst women. Their common demand was for reconceptualizing identity theory, social movements, and interventions, including law, from the standpoint of the most disadvantaged, namely those who suffered intersectional discrimination. Thus, like Black feminists, Dalit feminists demanded an epistemological shift across disciplines and an ontological space

[134] Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012).

[135] Collins and Bilge, *Intersectionality* (n 60) 130 (citing Kannabiran, 'A Cartography of Resistance (n 127)).

to reassert their multiple but whole identities and experiences. Their demands coincide, in that feminists and Dalit (or race) scholars are asked not to speak *as* or *for* Dalit (or Black) women but to 'reinvent themselves as dalit feminists'[136] or to bring Black women from 'margin to centre'.[137]

In this sense, both Dalit and Black feminist intersectional positions are transformative at heart; they are not about the aggregate of individuals or certain groups, and explicating their subjective positions, but about the eventual 'contingent transformation of collective subject positions', an emancipated standpoint which was 'not a given but one to be achieved'.[138] Dalit feminists share with Black feminists their larger goal of creating a paradigm for fighting oppression on behalf of every oppressed group and demanding Dalit women's emancipation for the 'emancipation of entire womanhood'.[139] As Vidyut Bhagwat writes:

> The core of dalit consciousness is made of protest against exploitation and oppression. In short, the term dalit stands for change and revolution. *By using the term Dalit women we are trying to say that if women from dalit castes and of dalit consciousness create a space for themselves for fearless expression i.e. if they become subjects or agents or self, they will provide a new leadership to Indian society, in general and to feminist and dalit movements in particular*.[140]

Even when, as Bhagwat characterizes, Dalit feminism adopts a caste and gender framing, it is but a shorthand for a structured analysis of intersections beyond caste and gender, and including sexualities, religion, disability, and especially class and poverty. It is important to underscore that just as Dalit feminism arose as a response to the exclusions of mainstream feminist and Dalit movements, it was equally a response to the thriving Marxist and eco-feminist discourse, which had excluded caste and gender analyses. In this, both the anti-caste movement as well as Dalit feminists had criticized the Left's blindness to caste, seeing it merely as a 'superstructure' like religion and thus leaving it unexamined. In fact, the Left's standpoint was that once class relations were assailed, caste could automatically be surpassed.[141] The argument appeared as exclusive as those of feminist and Dalit movements for excluding caste and gender specific detailing respectively. Dalit feminists thus made class the cornerstone of their analysis going beyond Dalit women who constituted the educated elite working in universities and in white-collar jobs, and towards interrogating, for example, the 'material realities of the lives of the rural Dalit

[136] Rege, 'Dalit Women Talk Differently' (n 121) 45.
[137] hooks, *Feminist Theory* (n 36).
[138] Rege, 'Real Feminism' (n 123) 495.
[139] Surendra Jondhale, 'Theoretical Underpinnings of Emancipation of Dalit Women' in PG Jogdand (ed), *Dalit Women in India: Issues and Perspectives* (GPH 1995) 107.
[140] Bhagwat, 'Dalit Women in India' (n 107) 2 (emphasis in original).
[141] For a detailed explanation of this point, see Chhaya Datar, 'Non-Brahmin Renderings of Feminism in Maharashtra: Is it a More Emancipatory Force?' (1999) 34(1) Economic and Political Weekly 2964.

women'.[142] The material reality of women's disadvantage was thus as foundational to Dalit feminism as it was for Black feminism; perhaps in the same way that, often, its muted presence in the list of identity categories was reflective of its foundational salience in the analysis of power structures rather than its exclusion.

It is hard to consolidate and compare the entire discourses of Black feminism and Dalit feminism, or any other which has developed or applied intersectional thinking. But even their brief iterations show what work they perform in understanding the complexity of intersectional discrimination. The formative roots of intersectionality in Black feminism and intersectionality-like thinking in Dalit feminism show how intersectionality is pursued concretely and on the ground, in relation to the specific forms of disadvantage it seeks to uncover. This specificity provides epistemic depth to the intersectional framework which, as I argued, is about sameness and difference in patterns of group disadvantage considered simultaneously and as a whole and in their context for the purposes of transforming them.

The lesson from this illustration is also that intersectionality as a trope is unimportant so long as one appreciates the intersectional framework. The framework, of course, is a rather complex one composed of several interconnected strands. The lived realities of discrimination suffered by groups like Black women and Dalit women, which feed the framework, are even more complex. Dilemmas, exhaustion, and fatigue are inevitable in traversing intersectional frames. This chapter has tried to simplify the complexities, address some of the dilemmas, and provide an illustration for accessing intersectionality in a systematic way. So, this is how this chapter and intersectionality come to inform the project of successfully claiming intersectional discrimination: by appreciating the complexity of this category of discrimination via a crystallized framework. What Black feminism and Dalit feminism do is to enrich that framework with a thick account of what intersectional discrimination with respect to specific groups looks like. Thus, this chapter has provided a template for extending the framework of intersectionality to understand intersectional discrimination yielded by the patterns of group disadvantage associated with multiple identity categories like race, caste, nationality, language, religion, sex, gender, sexual orientation, disability, age etc., in disparate contexts and with respect to diverse groups, like fat Black men, Muslim men, Muslim women, disabled people identifying as LGBTQ etc.

Conclusion

One may ask whether this thick account of intersectionality—its defences and its presence/relevance in contexts like Dalit feminism—strays from the legal project

[142] Chakravarti, *Gendering Caste* (n 125) chs 1–2.

of this book, which is concerned, in the remaining part, with comparative discrimination law. The reason for this detailed account is perhaps exactly to render such a question meaningless: to show that it is in no other way that discrimination law can address the complexity of discrimination in reality than actually diving deep into understanding it. Intersectionality theory and praxis give us a firm grasp on the qualitative nature of disadvantage suffered by intersectional subjects. It is useful to sum up the main points made in the course of making this argument.

Intersectionality rejects the understanding of discrimination as a function of a single categorial axis and emphasizes the need to recognize discrimination resulting from the intersections of multiple axes of race, caste, religion, sex, gender, disability, age, sexual orientation etc. It seeks to reconceptualize the way we understand such intersectional discrimination to present a more accurate vision of the prevailing social inequalities that correspond with people's lived realities. By filling in this epistemological gap, intersectionality aims to transcend and ultimately transform these patterns of group disadvantage. This is the core of intersectionality, which hopes to be reflected in the category of intersectional discrimination and redressed in discrimination law. The full version of the claim appears thus: *intersectionality illuminates the dynamic of sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, and in their full and relevant context, with the purpose of redressing and transforming them*.

For each case of intersectionality, the explanation of what sameness and difference in patterns of group disadvantage looks like will be highly specific to the identities in question and the context in which they emerge. These explanations will be framed by supporting works of sociology, anthropology, psychology, political science, economics, law etc., which provide evidence of the qualitative nature of intersectional disadvantage. Intersectionality then fulfils a limited but significant role in providing the conceptual framework for distilling the explanations of group disadvantage experienced by persons with multiple identities or membership in disadvantaged groups. This contribution can be neither overemphasized nor understated. After all, intersectionality 'even in its theoretical voice [is] about the practical implications of its arguments'.[143] Thus, intersectionality, as Crenshaw herself stressed, is what it *does*, not what it *is*.[144] And that is all that matters. So, the question we must now ask is, how do we *do* intersectionality in discrimination law? The next two chapters turn to this.

[143] Hancock, *An Intellectual History* (n 24) 71.

[144] Kimberlé W Crenshaw, 'Postscript' in Lutz et al, *Framing Intersectionality* (n 100); Cho, Crenshaw, and McCall, 'Toward a Field of Intersectionality Studies' (n 13) 795.

3

The Concept

Understanding the Category of Intersectional Discrimination

Introduction

This chapter aims to explore the juridical conception of intersectional discrimination. It complements the last one by extending the theoretical discussion about intersectionality to discrimination law practice. The purpose is to understand how intersectionality, understood in the way described in the last chapter, has been understood qua discrimination law in courts. The analysis of relevant case law from a range of jurisdictions shows that there is no one way of responding to intersectional claims. Justices not only respond to them as intersectional discrimination but also in various other ways. Their responses can be traced along a continuum which spans the categories of single-axis and intersectional discrimination, and includes strictly single-axis, substantially single-axis, capacious single-axis, contextual single-axis, multiple, compound, combination, and embedded forms of discrimination. The category of intersectional discrimination is thus to be understood as qualitatively distinct from these other ways of conceptualizing discrimination in law.

Why is it important to understand the concept of intersectional discrimination in this way? If we recall, Crenshaw's greatest dismay with discrimination law, when she first wrote about intersectionality in 1989, was its single-axis framework. She showed how courts reduced intersectional claims based on the grounds of race and sex to either race or sex discrimination. Thirty years on, intersectional claimants still find it hard to succeed in courts, though it is no longer because of single-axis thinking alone but various other categories of thinking which are distant from intersectionality. The salience of intersectional discrimination lies in its contrast with these other categorial frames of conceiving discrimination.

This chapter picks through seminal case law to illuminate the continuum of judicial responses to intersectionality. Each case, at its heart, is a case of intersectional discrimination. By this I mean that the case is one properly understood in terms of the intersectional framework described in the previous chapter; that is, it represents the dynamic of sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, in their full and relevant context, and requiring transformative ways of redressing such disadvantage. While

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not all cases have been seen in this way and thus have been classified appropriately along the continuum, the discussion justifies why each case fits this framework in fact.

The case law is drawn from comparative jurisdictions including the US, Canada, UK, South Africa, and India; regional systems including the EU and European Convention on Human Rights (ECHR); and international law including the jurisprudence of the Human Rights Committee (HRC), and the Committees of the UN Convention on the Elimination of Discrimination Against Women (CEDAW) and UN Convention on the Rights of Persons with Disabilities (CRPD). While some categories of discrimination may be more common in one jurisdiction than another (say, capacious single-axis is peculiar to EU law), there is decidedly little consistency or coherence within each jurisdiction in how judges have responded to intersectional claims at different points in time. So, the purpose of comparative case law is to delineate the categories of thinking about discrimination, and not to map the differences in individual jurisdictional positions per se. The comparative references are thus not exhaustive and do not showcase all of the intersectionality-related case law from each jurisdiction. Cases are selected for their ability to clarify our conceptual understanding of intersectional discrimination as well as every other category of discrimination constructed as a response to it. The discussion is thus conceptual, the comparative references providing the foil for it.

It is important to stress that the conceptual grounding of intersectional discrimination is necessary but not sufficient for intersectional claims to succeed in discrimination law; much more is required. A more fine-grained comparative survey appears in chapter 4, which considers matters such as legislative texts, the meaning of grounds, the test for identifying analogous grounds, the difference between direct and indirect discrimination, the preferred touchstone for identifying discrimination harms (i.e. dignity, autonomy, fairness, prejudice, stereotyping, marginalization etc.), the standard of scrutiny, the burden of proof, justification analysis, and remedies; each of these affects how an intersectional claim is received in discrimination law and will be considered in turn. The focus of the present chapter is rather more macrocosmic; the interest is in understanding the conceptual framing of claims which are claims of intersectional discrimination properly so called.

A word about terminology will be useful here. The term 'intersectionality' is used to refer to the theoretical framework sketched in the last chapter while 'intersectional discrimination' is used to denote discrimination experienced because of multiple identities that corresponds to the framework. Intersectional discrimination is thus supposed to reflect the framework of intersectionality. To the extent that the judicial meanderings have been unable to do this, intersectional discrimination remains aspirational within the judicial discourse. This does not mean that intersectional discrimination does not itself exist. It only means that courts have been unable to translate intersectionality into a clear perspective on intersectional

discrimination. Likewise, the absence of the term intersectionality or intersectional discrimination does not necessarily mean an absence of appreciation of the framework. We need to look closely at the judicial text to gauge whether and how intersectionality has transpired in cases. Similarly, in relation to other categories on the continuum—strictly single-axis, substantially single-axis, capacious single-axis, contextual single-axis, multiple, compound, combination, and embedded discrimination—the terminology does not seek to match that adopted in a particular jurisdiction or even previous works on the subject. These labels are far from settled between different jurisdictions and commentators. It is thus helpful to pay attention to the conceptual explanation of each of the categories, rather than their labels. The labels try to match the accompanying conceptual explanation alone.

This chapter is divided into seven sections. Section 1 sets the scene by explaining why it is important to be diagnostically clear about what causes discrimination, especially intersectional discrimination. The rest of the chapter uses this as the key to distinguish between different conceptual categories of thinking about discrimination. Section 2 consolidates these categories along a continuum and the next five sections explain each of the categories, namely, single-axis discrimination (which includes strictly single-axis, substantially single-axis, capacious single-axis, and contextual single-axis discrimination); multiple discrimination; additive discrimination (which includes combination discrimination and compound discrimination); embedded discrimination; and, finally, intersectional discrimination.

1. Causation

At the outset, let us return to Lord Phillips' hypothetical scenario of a fat Black man being denied purchase.[1] When the shopkeeper says, 'I do not serve people like you', Lord Phillips applies the objective test to assess whether the criterion applied by the shopkeeper for making this distinction was discriminatory. The mental processes or motive (subjective test) were irrelevant in this assessment. According to Lord Phillips, if the criterion for refusal was weight, it was not discriminatory (since weight was not a prohibited ground); if it were the fact that the man was Black, then it was discriminatory, on the basis of race. Lord Phillips does not consider the possibility that both weight and race could have been the criteria of discrimination. Given that weight, as in obesity, can be considered a ground of discrimination under disability now,[2] would Lord Phillips reconsider his set of options for finding discrimination in this situation today? Would he consider that discrimination in this case could have been caused by two grounds?

[1] *R v JFS* [2009] UKSC 15 (hereafter *JFS*).

[2] Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening* [2014] ECLI:EU:C:2014:2463 (CJEU) (hereafter *Kaltoft*).

While Section 14 on combination discrimination under the Equality Act 2010 remains unenforced, there is little prompting Lord Phillips to expand his options, legally speaking. But our problem is not just legal, whether about the letter or the interpretation of the law; the problem is our normative frames of reference for thinking about causation in discrimination. Because causation is at the heart of the discrimination inquiry, for both direct and (in a modified way) indirect discrimination, we need to first address the fact that discrimination can in fact be caused by multiple identity categories or grounds.

What does this mean? Causation in legal parlance refers to the idea that a particular 'harm' complained of by the claimant was the 'consequence of' or 'caused by' or the 'effect of' a wrongful act.[3] In discrimination law, causation is revised such that the harm of discrimination is due to a wrongful act which is 'based on' (whether directly or indirectly) particular identities called grounds or personal characteristics. Thus, to prove discrimination it is not only necessary to show a causal link between the wrongful act and its discriminatory consequence but that the act and consequence flow from certain kinds of identities recognized as grounds or personal characteristics. Identities or grounds need to have played some role or should have been a factor which resulted in the discrimination being complained of.[4] For example, the shopkeeper may have denied purchase to the fat Black man because: (i) the man did not have enough money to make the purchase; or (ii) although he had enough money, he was not allowed to make the purchase in a white neighbourhood being a Black person; or (iii) according to a government policy, shopkeepers were entitled to refuse purchase of certain items to obese persons; or (iv) the shopkeeper did not wish to serve fat Blacks in his shop; or (v) the shopkeeper was following an official policy whereby those without jobs or on social assistance did not have access to regular shops but to a separate rationing system. While (i) may not necessarily devolve into a discrimination claim per se since the causal basis is not anchored in a ground (like race, caste, religion, disability, gender, etc.), (ii) and (iii) can be easily framed as single-axis claims based on race and weight respectively. In intersectional discrimination, we are particularly thinking of cases like (iv) and (v) where discrimination is either directly or indirectly a consequence of multiple grounds such that both race and weight are said to

[3] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, OUP 1985) 4.

[4] Given that the connection between grounds and discrimination is rather loose, some may avoid using the term 'causal' at all in describing intersectional discrimination. See *Peel Law Association and Melissa Firth v Selwyn Pieters and Brian Noble* 2013 ONCA 396 (Ontario Court of Appeal) [60] (Juriansz JA) ('I do not think it acceptable, however, to attach the modifier "causal" to "nexus". Doing so seems to me to elevate the test beyond what the law requires. The Divisional Court's requirement of a "causal nexus" or a "causal link" between the adverse treatment and a prohibited ground seems counter to the evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause'). I think we can retain the term 'causal' because it helps ground intersectional discrimination in patterns of group disadvantage and structures of power associated with people's identities. That said, the term and the connection it seeks to make must be interpreted liberally, as it is in human rights and discrimination law, as merely a correlative link.

influence the way the claimant was treated or impacted.[5] It is in this sense of diagnosing discrimination as being based on multiple grounds that we are concerned about causation in intersectional discrimination.

Traditionally, discrimination law has assumed that there is one, and only one, ground which causes discrimination in a particular instance. Tests for assessing whether discrimination has so occurred are designed in this way. For example, the 'but for' test for establishing causation and identifying grounds in the UK and the 'on grounds only of' language in the Indian Constitution show this thinking explicitly.[6] The failure of early intersectional cases like *DeGraffenreid v General Motors*[7] in the US which were argued on two grounds (race and sex) confirms this. What was being asked for in cases like *DeGraffenreid* was the recognition that discrimination could be based on two grounds in fact, namely that it was *caused* by two grounds together. Whether one applies the 'but for' test or the objective test from Lord Phillips in *JFS*,[8] the disparate treatment and disparate impact theories popular in the US,[9] the 'direct coincidence' test from the European Court of Human Rights (ECtHR),[10] or the impact analysis carried out by the South African and Canadian courts,[11] the causal point about intersectional discrimination is the same. None of these tests are fundamentally averse to modification to accommodate intersectional discrimination. Although their application has been confined to a single ground alone at a time, there is little to no justification for this. For example, they could be re-cast as 'but for' the grounds of race and sex, for a group such as Black women; or the objective criteria of distinction being based on both race and sex, such that it is targeting groups like Black women, Asian women, or Latinas; or the discriminator particularly choosing to discriminate because of the claimants' personal characteristics of being both Black and female; or that the disadvantaged group (say of Black women) and the group at a certain advantage (say of white men) are distinguished precisely by the personal characteristics of race and sex; or the impact test which shows that, ultimately, whatever the animus, criteria, or reason for distinction, it was Black women who in fact suffered a disadvantage. The

[5] Grounds, single or multiple, may not be the *sole* reason why discrimination occurred. So long as grounds are one of the reasons for which someone suffers discrimination, explicitly or in effect, the causation requirement may be satisfied. See *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [8]–[10]; *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48 [29]–[30]. See also Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 165–71.

[6] *James v Eastleigh Borough Council* [1990] 2 AC 751 (HL); Constitution of India 1950, art 15(1).

[7] *DeGraffenreid v General Motors* 413 F Supp 142 (1976) (United States District Court, Eastern District of Missouri) (hereafter *DeGraffenreid*).

[8] *JFS* (n 1) [20] (Lord Phillips); also adopted by Lady Hale [55] [65]–[66], Lord Mance [78], Lord Clarke [129]; *Preddy v Bull* [2013] UKSC 73 [61].

[9] *McDonnell Douglas Corporation v Green* 411 US 792 (1973); *Wards Cove Packing Co v Atonio* 490 US 642 (1989).

[10] Opinion of Advocate General Sharpston in Case C-73/08 *Bressol v Gouvernement de la Communaut Francaise* [2010] ECR I-2735 [56].

[11] *Harksen v Lane NO* 1998 (1) SA 300 (SACC) [50] (hereafter *Harksen*); *R v Kapp* [2008] 2 SCR 483 (SCC) [16] [37] [40].

causal implications of all these tests is to find for two bases of discrimination at the same time, in both race and sex for Black women. This chapter asks the reader to keep an open mind about the possibility of discrimination due to a certain act or omission (measure, policy, provision, criterion, or practice) to be either directly based on two or more grounds (direct intersectional discrimination) or indirectly leading to an effect or impact which is suffered on two or more grounds (indirect intersectional discrimination). The forthcoming analysis will explain exactly how this can be appreciated within the different causal frameworks or tests that jurisdictions apply to find for discrimination. The ultimate aim is to define causality on multiple grounds in terms of the qualitative nature of intersectional discrimination, as defined by the framework of intersectionality outlined in the last chapter. This means that the ultimate causality we are after is not just an appreciation of the fact that discrimination is *multi-causal* (where that is the case), but also that its *explanation* resides in similar and different patterns of group disadvantage considered as a whole and in light of its context. It is this intersectional understanding of causation that will be sought in this chapter.

Three things must be noted before we proceed further. First, not every case is a case of intersectional discrimination. This must be obvious. In our example above, for the same claimant who is a fat Black man, not every case of discrimination involving him will be a case like (iv) and (v)—cases where both fatness and Blackness make a difference causally to the experience of discrimination directly or indirectly. Claims like (i), (ii), and (iii) are not intersectional and need not be considered as such even where they involve a claimant like the fat Black man. Intersectionality makes a difference to discrimination law when used to explain causation which is not one-dimensional. Where causation is actually one-dimensional, intersectionality need not be invoked.

Secondly, even though the idea of intersectionality is one which explains the nature of discrimination which is multi-causal, not all its strands are causally relevant or useful in explaining intersectionality qua discrimination law. At least, the final limb of transformation has more to do with how one responds to intersectional discrimination rather than how one appreciates it. On the other hand, the first four strands seem bound together in illuminating the complexity of causality in intersectionality that produces similar and different patterns of group disadvantage, which can only be appreciated by treating the claimant as a whole and in her full and relevant context.

Finally, it is useful to note that we are not delimited here in looking for causation based on recognized lists of traditional grounds alone. As shown in chapter 2, there is no difficulty in intersectionality accounting for patterns of group disadvantage based on identities like class or socio-economic status, even though it was developed primarily with the grounds of race and sex in relation to Black women. Crenshaw's initial response was framed this way because she was responding to discrimination law's inability to address claims of Black women based on race and

sex, both of which were recognized grounds under Title VII of the Civil Rights Act 1964. Which intersectional identities should be recognized as grounds will be considered in the next chapter. In this chapter it is useful to keep in mind a broad range which includes not only some obvious grounds like race, sex, gender, sexuality, religion, disability, age etc. but also socio-economic status, place of residence, employment status, physical appearance etc. which may cause discrimination just the same in an intersectional way.

2. Continuum

The twofold purpose of this chapter is to, first, pore over comparative doctrine to understand how actual or potential intersectional claims have been categorized in discrimination law, and, secondly, test how different categories of discrimination fare against the framework of intersectionality. The chapter illustrates a range of categorial responses to discrimination based on two or more grounds. These responses can be consolidated by imagining a progressive continuum with single-axis discrimination on the one hand and intersectional discrimination on the other. A variety of responses lie between the two. It is useful to summarize the continuum here before elaborating on each of the categories.

Intersectional discrimination characterizes the realization of the framework of intersectionality and thus represents the most accurate conceptualization of multi-causal claims based on two or more grounds. The category furthest from intersectional discrimination is that of single-axis discrimination. Crenshaw's original critique of *DeGraffenreid* was one which can be described as a critique of strictly single-axis discrimination where discrimination is delimited by a single ground, to the exclusion of every other identity. Single-axis discrimination, though, has evolved into at least three other categories. Substantially single-axis acknowledges that discrimination may be based on other identities but can be substantially understood as based on a single ground. Capacious single-axis is based on a single ground again, but interpreted capaciously so as to include patterns of group disadvantage associated with other grounds as part of that single ground itself. Contextual single-axis, while based on a single ground, accounts for other grounds as the context of the discrimination claim. Further along from these categories of single-axis discrimination is multiple discrimination which admits multiple grounds of discrimination but considers them as causing discrimination independently. Multiple discrimination is thus nothing but multiple claims of single-axis discrimination. Single-axis and multiple discrimination quantitatively limit the possibility of multi-causal discrimination and hence do not quite consider the qualitative implications of intersectionality in the way discrimination occurs. Additive discrimination differs from single-axis and multiple discrimination in two fundamental ways—first, it admits that discrimination can be based on more

than one ground; and secondly, that such discrimination is based on the interaction of multiple grounds. Additive, as in combination or compound forms of discrimination, thus reflects judicial thinking far more advanced than Crenshaw's bane of 'the dominant conception' of single-axis discrimination. And yet, additive discrimination does not quite comport with the idea of intersectional discrimination since the interaction between grounds is not conceptualized squarely as a matter of intersectionality. Finally, embedded discrimination, which is closest to the category of intersectional discrimination, considers two or more grounds as coming together to form a separate ground of discrimination. The new amalgamated ground is seen as representing the complex character of multi-ground discrimination better than grounds taken alone or in some combination.

These categories are very much a product of the individual circumstances of the claims which dictated judicial thinking. While some cases represent categories which are reflective of intersectionality in some measure, others miss it by a long shot. In order to understand the category of intersectional discrimination, it is thus important to understand the variety of categories which have been invoked as a response to it and to distinguish it from those. The real difference between each of the categories is in the way each appreciates the various strands of the framework of intersectionality. The emphasis of each category of thinking about discrimination on each of these strands is unequal and dispersed. In fact, cases representative of a particular category may place different levels of emphases on each strand. The effort is not simply to map each case or category's engagement with each strand of intersectionality in a clinical fashion. Instead, the idea is to unravel judicial frames of thinking about discrimination on their own terms and in reference to intersectionality. In the final analysis, this dialectic engagement should lead the reader to appreciate the salience of intersectional discrimination.

3. Single-axis Discrimination

The approach of the Missouri District Court in *DeGraffenreid* was to splinter the claim of Black women into individual claims of race and sex discrimination and ask which was the case in fact. As we have already seen, this is an incorrect characterization of the claim because it fails to reckon with the nature of intersectional disadvantage suffered by Black women. But this is only one version of single-axis thinking, which can be called 'strictly' single-axis discrimination. There are at least three more variants which have developed in comparative jurisprudence: the South African Constitutional Court's earliest characterization of intersectional claims as based 'substantially' on a single ground; the interpretation of a few of the successful cases in EU discrimination law as 'capacious' enough despite being based on a single ground; and some of the seminal minority decisions in the South African and Canadian jurisprudence using contextual factors alongside a single

ground. These are but forms of single-axis discrimination and this section takes each in turn. It confirms how single-axis thinking is ingrained in discrimination law as strategically convenient and cognitively accessible.

3.1 Strictly Single-axis Discrimination

Despite Crenshaw's early intervention in *DeGraffenreid*-type thinking, strictly single-axis discrimination remains a typical response to intersectional claims. While much of the US discrimination jurisprudence on the grounds of race and sex has progressed to other categories like multiple or additive discrimination, most of the Indian discrimination jurisprudence and some rather significant decisions of the Canadian Supreme Court and the South African Constitutional Court are characteristic of strictly single-axis thinking. It is useful to consider, then, what strictly single-axis thinking involves across these jurisdictions.

The jurisprudence on Article 15(1) of the Indian Constitution has been mainly strictly single-axis since the constitutional non-discrimination guarantee came into force in 1950. The immediate reason for this appears to be the language used in the provision which states that: 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'.[12] The phrase 'on grounds only of' has been consistently interpreted as prohibiting discrimination that occurs solely on the basis of a single ground.[13] The 1982 Supreme Court decision in *Air India v Nergesh Meerza*[14] confirmed this interpretation. *Air India* concerned a challenge to the constitutional validity of the Air India Employees Service Regulations (Service Regulations) which provided that an air hostess were to retire from service upon one of the following occurring: (i) on attaining the age of thirty-five years (extendable at the discretion of managing director to forty-five years); (ii) on first pregnancy; or (iii) on marriage if it took place within four years of the service. Air hostesses challenged the Service Regulations under Article 15(1) of the Constitution as discriminating on the basis of sex or disabilities arising there from. Air India argued that there was no discrimination in this case *on the grounds only of sex*, and the discrimination, if there were any, was based not only on sex but on a host of other considerations, including the difference between the class of air hostesses and assistant flight pursuers (who were male) based on job functions, the mode of recruitment, qualifications, promotional avenues, and the circumstances

[12] Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 337, 460.

[13] *Mahadeb v BB Sen* AIR 1951 Cal 563 (Calcutta High Court) [28]; *Anjali Roy v State of West Bengal* AIR 1952 Cal 825 (Calcutta High Court) 839; *Dattatraya Motiram More v State of Bombay* AIR 1953 Bom 311 (Bombay High Court) [7]; *Yusuf Abdul Aziz v Bombay* 1954 SCR 930 (Supreme Court of India) 932; *Government of Andhra Pradesh v PB Vijaykumar* AIR 1995 SC 1648 (Supreme Court of India) [14]; *Vijay Lakshmi v Punjab University* AIR 2003 SC 3331 (Supreme Court of India) [10].

[14] 1982 SCR (1) 438.

of retirement. The Court agreed with Air India for the reason that: 'what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations.'[15] Based on this, while the first two conditions (relating to age and pregnancy) were declared unconstitutional, the third condition (relating to termination upon marriage within four years of service) was upheld since it was seen as based not only on sex but other considerations including family planning, improving health and maturity of the employee, and hence ensuring the success of her marriage, as well as the economic costs of training the crew. The Supreme Court thus justified sex discrimination based on the fact that it was linked to justifications associated with marital status which were not prohibited from consideration under Article 15(1). Consideration of marital status was deemed unproblematic given its absence from the list of prohibited grounds of discrimination in Article 15(1). Sex was thus isolated from the social, political, and material reality of gender, as well as its interaction with other systems of disadvantage including marriage. Such an isolated reading of sex not only circumscribed the possibility of claiming for gender discrimination as a matter of sex discrimination,[16] but also the possibility of claiming intersectional discrimination based on sex coupled with other grounds.[17] There has been some progress in addressing gendered aspects of sex discrimination since *Air India*[18] and reading in analogous grounds under Article 15(1).[19] In September 2018, a sole judge in the landmark decision decriminalizing sodomy in India gave a friendly nod to intersectionality questioning the single-axis reasoning in *Air India*.[20] According to Chandrachud J:

> This formalistic interpretation of Article 15 [in *Air India*] would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15... This fails to take into account

[15] Ibid [70].

[16] See Indira Jaising, 'Gender Justice and the Supreme Court' in BN Kirpal et al (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2001); Martha Nussbaum, 'India: Implementing Sex Equality Through Law' (2001) 2 Chicago Journal of International Law 49; Martha Nussbaum, 'India, Sex Equality, and Constitutional Law' in Beverley Baines and Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (CUP 2005); Catharine MacKinnon, 'Problems, Prospects, and "Personal Laws" ' (2006) 4 International Journal of Constitutional Law 181.

[17] Cf Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) ch 1.

[18] See esp *Anuj Garg vs Hotel Association of India* (2008) 3 SCC 1 (Supreme Court of India) (lifting the ban on employment of women in places serving alcohol) and *State of Maharashtra v Indian Hotels and Restaurants Association* AIR 2013 SC 2582 (Supreme Court of India) (lifting the ban on the performance of 'bar dancers' in hotels and restaurants below three stars).

[19] *Naz Foundation v Government of NCT* (2009) 160 DLT 277 (High Court of Delhi) (reading sexual orientation as a ground analogous to sex under art 15(1)); *National Legal Services Authority vs Union of India* (2014) 5 Supreme Court Cases 438 (Supreme Court of India) (reading trans-status as third gender and analogous to sex under art 15(1)).

[20] *Navtej Singh Johar v Union of India* (Writ Petition (Criminal) No 76 of 2016) (decided on 6 September 2018) (Supreme Court of India).

> the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.[21]

While the *Air India* reasoning may finally be in peril, the Supreme Court is yet to consider intersectional discrimination in any substantive way. India is also the only jurisdiction of those considered in this book, whose jurisprudence can be largely attributed to one category of thinking about discrimination as strictly single-axis. Chandrachud J's remark, made as obiter in a case which was not squarely about intersectionality, will thus have to be tested to unleash its true potential.

Other jurisdictions have rejected a multi-causal understanding of discrimination in a more considered and substantial way than the Indian Supreme Court. The decision of the Canadian Supreme Court in *Mossop v Canada (Attorney General)*[22] serves as a good starting point. The claimant in the case was denied bereavement leave for attending the funeral of his partner's father. The leave was restricted to immediate family or spouses. The claimant was excluded on the basis that he was in a same-sex relationship with his partner which neither qualified as familial nor spousal for the purposes of the bereavement leave. He challenged this as discrimination on the grounds of family status under the Canadian Human Rights Act (CHRA). The matter came up before the Canadian Supreme Court in 1992. Lamer CJ, writing for the majority, observed that the matter could have been decided on the ground of sexual orientation if it were pleaded as such and, in particular, if it were interpreted as an analogous ground under the CHRA. Since the claimant did not take this approach but proceeded under the ground of family status instead, he followed the claimant's lead. This proved fatal because according to Lamer CJ it was not actually family status, but rather sexual orientation, which had led to discrimination in this case:

> It is sexual orientation which has led the complainant to enter [into] a "familial relationship" [with his same-sex partner] and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and that man's father. So in final analysis, sexual orientation is *really the ground of discrimination* involved.[23]

Lamer CJ was strict about finding *the* ground of discrimination in *Mossop*. For him, only one ground, either family status or sexual orientation, could have caused

[21] Ibid [36].
[22] [1993] 1 SCR 554 (SCC) (hereafter *Mossop*).
[23] Ibid [33] (emphasis supplied).

discrimination. Since he found that discrimination was actually caused by sexual orientation, which was not a recognized ground under the CHRA, there was no discrimination in this case. The obstinate effort in affixing only one ground as causing discrimination is characteristic of strict single-axis discrimination.[24]

This, though, misunderstands the causal basis of discrimination in *Mossop*. Even if sexual orientation discrimination had been recognized as a ground of discrimination and the claimant had pleaded his case based on it, there is no guarantee that he would have succeeded. The reason the claimant was denied bereavement leave was not only because of his sexual orientation or because his partner was the same sex as him, but because his same-sex relationship with his partner was not included in the kind of relationships recognized as 'familial' or 'spousal' in law. Sexual orientation simpliciter would have regulated discrimination where one was denied a benefit because of his own sexuality but would not necessarily have affected how his sexuality determined other statuses like marital or family status.[25] It was the intersection of homosexuality and relationship status which caused the particular disadvantage, in this case, of being denied bereavement leave. While both gay and single men and women suffered from disadvantages associated with their sexuality and marital status, including homophobia and social marginalization, neither suffered from this particular disadvantage. The disadvantage suffered by those like Mr Mossop was thus similar to and different from that based on individual grounds of discrimination. It was about being denied equal benefit of the law as compared to similar long-term heterosexual relationships which had the possibility of being recognized as de jure or de facto marriages for the purposes of the impugned law. A strict focus on Mr Mossop's sexual orientation alone would not have uncovered this basis of discrimination, which was intersectional in fact.

The result in *Egan v Canada*[26] confirms this. In *Egan*, the Supreme Court of Canada considered a challenge to the Old Age Security Act 1985 which provided an allowance to spouses of pensioners, when they turned sixty and until they became pensioners themselves at sixty-five, if their income fell below a stipulated amount. Mr Egan maintained that this provision was discriminatory under Section 15 of the Canadian Charter because it applied only to legally married or common

[24] Note that according to Lamer CJ, 'if Parliament had decided to include sexual orientation in the list of prohibited grounds of discrimination, [the] interpretation of the phrase "family status" might have been entirely different [such that] Mr. Mossop's situation included both his sexual orientation and his "family status"'. This reasoning appears at odds with what he had just determined about Mr Mossop's case in fact—that it was *not* one that was causally based on family status at all but on sexual orientation as such. It is curious why he then considered that the inclusion of sexual orientation as a ground under the CHRA could have changed the character of discrimination as such—from being sexual orientation discrimination to sexual orientation *and* family status discrimination at the same time. Ibid [35].

[25] Of course, one could argue that sexual orientation should in fact include all kinds of discrimination whether alone or based on other grounds associated with it. It could then be a matter of capacious or contextual single-axis discrimination and, as I argue below, may still be reductionist in its appreciation of intersectionality.

[26] [1995] 2 SCR 513 (SCC) (hereafter *Egan*).

law spouses and excluded those in same-sex relationships. The Canadian Supreme Court for the first time in 1995 admitted sexual orientation as a ground of discrimination under Section 15 of the Charter. Yet, the majority Court refused to see this as a case of discrimination based on sexual orientation. La Forest LJ, writing for the majority, considered the case in light of the content of the law, its purpose, and its impact upon those to whom it applied.[27] He concluded that the purpose of the law was to support aged and elderly married couples whose relationships were defined by the special legal status of the institution of marriage. This institution was 'by nature heterosexual' in that it was 'firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship'.[28] Conceived this way, marriage had little do with the ground of sexual orientation but was about procreation and child-rearing. Thus, neither the heterosexual nature of marriage nor the exclusion of people like Mr Egan from benefits associated with marriage were considered discriminatory by the Court. Sexual orientation alone seemed to have been inadequate in convincing the Court of discrimination under Section 15, given that the majority focussed its entire analysis on another ground (marital status). In fact, what was at stake was neither what gay people suffered on account of their sexual orientation nor the contours of marriage per se, but how sexual orientation determined other identities like marital status and how identities and the disadvantages associated with them were co-constituted. The impact of excluding gay people from an institution like marriage lay at the heart of discrimination in this case, which can properly be described as intersectional based on both sexual orientation and marital status. But the strict focus on sexual orientation seems to have obfuscated this.

Cases like *Mossop* and *Egan* may be relatively straightforward if considered within the intersectional framework. The claimants and the Court could conceive of these cases as being based on the two grounds of sexual orientation and family or marital status, and trace the patterns of disadvantage suffered by those at the intersection of the grounds. They could then possibly uncover the distinct nature of structural disadvantage suffered by gay people not simply as gay people but also as those structurally excluded from other groups defined by family or spousal status. While such disadvantage may be similar to the disadvantage suffered by others who are excluded from these structures, such as heterosexual and gay single persons and unmarried couples, there is a difference between suffering disadvantage as a gay person or as someone outside of the familial or marital relationship, on the one hand, *and* as both of them at the same time, on the other. It is the whole of the claimant's identity which yields the qualitative nature of similar and different

[27] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (SCC) [149] (McIntyre J).
[28] *Egan* (n 26) [21].

patterns of group disadvantage which may have to do with prejudice, stigma, stereotyping, denial of dignity, and loss of socio-economic forms of security and wellbeing. A transformative approach is required to be able to see and overturn these patterns. A strict focus on a single ground, though, does none of this.

Other cases may be tougher still. Intersectional discrimination may involve more than two grounds, in a much more complex socio-political and economic context, and with polycentric considerations. Such discrimination may also be far more insidious for all these reasons and a strictly single-axis focus may obscure such discrimination further. The Canadian Supreme Court's decision in *Gosselin v Quebec* exemplifies this dilemma.[29]

Louise Gosselin was young, female, poor, unemployed, and battling with mental health issues. She challenged the Quebec government's social assistance scheme where the base amount payable to welfare recipients under thirty was a third of the amount payable to those thirty and over. To receive a comparable amount, recipients under thirty had to participate in a designated work activity or educational programme. She argued that this scheme violated Section 15(1) of the Canadian Charter on the ground of age. McLachlin CJ, writing for the majority, found that 'unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege'.[30] According to her, 'as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued'.[31] She thus dismissed the claim that the legislative criterion perpetuated stereotypes or reinforced prejudice on the basis of age and thereby violated Section 15(1) of the Charter.

The gap, for our purposes, lies in the majority's analysis which focusses solely on the legislative criterion of age rather than the basis of discrimination suffered by Louise Gosselin in fact. The claimant in this case was a young woman who had relied on social assistance much of her adult life, being unable to keep a job for long. She had also been economically dependent on her mother, with whom she shared a difficult relationship but to whom she had nevertheless had to turn for a safe place to stay. She eventually moved out but was unable to pay her own rent and, on occasions, was forced into rough sleeping, leaving her vulnerable to sexual harassment. Her situation was aggravated by substance abuse and her delicate mental health, which made her opt out of vocational and educational training that could have increased her social assistance. Instead, she was stuck in a vicious cycle of receiving lower social assistance because she was under thirty, and slipping into mental distress, malnutrition, physical precarity, and sexual vulnerability, all of which in turn made her unable to participate in programmes which could have upgraded her amount of social assistance.

[29] [2002] 4 SCR 429 (SCC) (hereafter *Gosselin*).
[30] Ibid [31].
[31] Ibid [34].

Age was thus only part of Louise Gosselin's problem. Another claimant who was not a woman and was not exposed to the gendered nature of poverty, or who did not battle with mental health and could participate in the social assistance programmes uninterrupted, or who was in fact thirty or older and could benefit from full social assistance may not have found themselves in her situation. While they may still have suffered discrimination in their own way if they were also disabled, younger, and reliant on social assistance like Louise Gosselin, they would not have suffered the unique combination of discrimination suffered on the basis of all of these characteristics at the same time. But it was this similar and different nature of group disadvantage due to these characteristics that defined Louise Gosselin's experience with the social assistance scheme.

This understanding appears nowhere in *Gosselin*. The majority is concerned only with the legislative distinction based on age, taking it to be the ground, that is the *basis* or *reason*, on which discrimination may have occurred. Considerations beyond age are dismissed as Louise Gosselin's own 'personal problems', because of which she '[fell] through the cracks' of the legislative scheme.[32] But a legislative distinction may not perforce be the ground of discrimination even if it coincides with a ground like age. Structural discrimination can be far more discreet, based directly on one ground and indirectly causing discrimination on other grounds. If we are to ferret out such discrimination, we need to begin by thinking about discrimination conceptually in ways which go beyond strictly single-axis thinking.

Of course, this will only be a foot in the door. Conceptual categorization of discrimination alone will not ferret out invidious forms of discrimination, including intersectional discrimination. *Gosselin* is a prime example of this—its failure being a multi-faceted one, and not one of strictly single-axis thinking alone.[33] But conceptual clarity over how discrimination transpires is key to resolving other issues of doctrine. The clarity lies in being clear over the rudimentary matter of the causal link of grounds with discrimination.

The Canadian Supreme Court's discrimination jurisprudence is not the only one to have obfuscated this link in potential cases of intersectional discrimination. The South African Constitutional Court shows comparable signs in inopportune cases. In fact, the Constitutional Court's decision in *S v Jordan*[34] shows uncannily similar single-axis reasoning to *Gosselin*. The case involved a constitutional challenge to

[32] Ibid [48] [55].

[33] For example, Sheila McIntyre has critiqued the application of a very low and deferential standard of review in 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 Queen's Law Journal 731; Gwen Brodsky has criticised the Court's justification analysis under s 1 of the Canadian Charter in 'Gosselin v Quebec (Attorney General): Autonomy with a Vengeance' (2003) 15 Canadian Journal of Women and the Law 194; Jennifer Koshan and Jonnette Watson Hamilton have criticised the acontextual discrimination analysis of the Court in 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 University of New Brunswick Law Journal 19. These issues are considered in the next chapter.

[34] 2002 (6) SA 642 (SACC) (hereafter *Jordan*).

Section 20(1)(aA) of the Sexual Offences Act for unfairly discriminating against women. The state contended that the provision targeted both the prostitutes (as primary offender) and the customers (as accomplice) indulging in commercial sex and hence was not discriminatory. The appellants and the amici contended that it only targeted prostitutes (in principle, as the primary offender, as well as in practice, since only prostitutes were prosecuted), who were most often women, and hence discriminated on the basis of gender. The majority, led by Ngcobo J, upheld the neutral and formalistic construction of the provision to find that there was neither direct discrimination against women nor any indirect discrimination when a provision employed 'a common distinction' between a merchant and a customer for outlawing commercial sex.[35] The majority did not look beyond the pale of gender neutrality to recognize the reality that it was mainly women in the role of the 'merchant' who were penalized, and that the male customers were never prosecuted. The fact that those found in violation of the criminal provision were women was dismissed as being a result not of law, but of social attitudes.[36]

Jordan is rightly criticized for brushing aside indirect discrimination.[37] But there is something more basic than the difference between direct and indirect discrimination which the majority missed in this case. It is that whether it is direct or indirect discrimination (i.e. an explicit distinction or a neutral one), either one has to seem to cause discrimination based on certain ground(s) relevant to the claimant. *Jordan* was the case of a gender-neutral criminal provision under which only women were prosecuted in fact. The reason they were deemed criminal was not simply because of their gender or for being women per se, but that their gender, poverty, and employment status as prostitutes combined to produce patterns of group disadvantage for women who were economically worse off and hence had to take to prostitution which in turn was uniquely denigrative, and defined by physical, mental, and economic exploitation, social ostracization, and stereotypes and prejudices associated with it. Gender, strictly-speaking, could not explain this causal basis all on its own.

So when the majority assumed that '[t]he stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in',[38] it was important to ask how this 'conduct' (flowing from the employment status that was dictated by gender and poverty) could be weighted into the discrimination analysis for having actually caused the discrimination being complained of. If only the Court were inclined to consider this, a range of possibilities would have opened up—reading-in class (socio-economic status or poverty) and

[35] Ibid [9] [10].
[36] Ibid [16]–[19].
[37] See Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 South African Journal on Human Rights 248 (hereafter Albertyn and Goldblatt, 'Facing the Challenge').
[38] *Jordan* (n 34) [16].

employment status or prostitution as aspects of the ground of gender; or treating them as possible analogous grounds; or taking them as part of the full context of discrimination; or treating gender–prostitution, gender–employment status, or gender–poverty–prostitution as embedded grounds of discrimination. As we will see when we proceed through the categories of discrimination in this chapter, these are all possibilities which give some acknowledgement to the causal basis of discrimination as being based on more than one identity, to open up ways that lead eventually to intersectional discrimination. None of these were explored in *Jordan* with the Court's strict focus on gender.

What is clear is that sex or gender alone cannot explain *all* forms of discrimination against women. Women's multiple identities, when they have a role to play in the discrimination being complained of, cannot simply be discarded as irrelevant if we care for discrimination as occurring *on the basis of* or *because of* certain characteristics, identities, or grounds.

A final example of the discrimination women face in respect of marriage should suffice. Consider the decisions of the South African Constitutional Court in *Volks v Robinson*[39] and the Canadian Supreme Court in *Quebec v A*.[40] The controversy in *Volks* revolved around the exclusion of partners in permanent opposite-sex relationships from claiming maintenance from the estates of their deceased partners if they were unable to support themselves. Similarly, *Quebec v A* concerned the exclusion of de facto spouses from matrimonial property. The majority in both cases held that the relevant statutory provisions did not discriminate on the basis of marital status. For them, the issue of unfair discrimination under Section 9(3) of the South African Constitution and substantive inequality under Section 15(1) of the Canadian Charter was to be determined not only in reference to the actual disadvantage of being unable to inherit a deceased partner's property, but also as an impairment of fundamental human dignity[41] or objectionable stereotypes and prejudices.[42] The latter was absent in the opinion of the majorities. This was because exclusion from the benefits associated with the marital status of being married was accompanied by a freedom of self-determination and personal autonomy which included the choice not to marry and to dispose of property as one pleased.[43] Imposing a duty of maintenance after the death of a partner when none arose during their lifetime would have disrespected the deceased's choice not to marry and his freedom of testation.[44] According to the majority in both cases, there was thus no case of unfair discrimination or substantive inequality to be made in respect of surviving partners.

[39] 2005 (5) BCLR 446 (SACC) (hereafter *Volks*).
[40] [2013] 1 SCR 61 (SCC) (hereafter *Quebec v A*).
[41] *Volks* (n 39) [79].
[42] *Quebec v A* (n 40) [178].
[43] *Volks* (n 39) [60] [81] [82] [85] [87] [94].
[44] Ibid [17] [60] [62].

The problem with this line of reasoning lies in its exclusive focus on marital status couched as a matter of self-determination rather than fundamentally determined by gender and income inequality. The claimants before the two courts were women who, at all times, were prepared to marry. The fact that *their* wish to marry was not respected was a matter of unequal power relations between men and women, including women's financial dependence on their male partners. The Constitutional Court in *Volks* had before it the evidence presented by the amicus curie which showed the vulnerability of women in cohabitation relationships.[45] According to the Court, the evidence was based on qualitative research from 'only eight poor communities'[46] relating primarily to 'African' and 'Coloured' women.[47] Contrasted with 'statistical or scientific evidence capable of easy verification', the evidence brought by the amicus curie was seen as 'non-representative', 'controversial', and not relating to the 'direct case before the court'.[48] Similarly, the Supreme Court in *Quebec v A* had heard intervenors who had contended that relationships which were spousal in nature were marked by gender inequality.[49] Skweyiya J, writing for the majority in *Volks*, expressed in passing his 'sympathy' and 'genuine concern' for female surviving partners whose deceased male partners had refused to marry them and found that the 'conduct of the male partner is unconscionable in these cases'.[50] But, like the court in *Jordan*, he concluded that gender inequality in this case was a product of social reality not law.[51] Similarly, McLachlin J in *Quebec v A*, recognized the 'unfortunate dilemma' of women like the claimant but found that it was ultimately proportionate to the benefits of choice and autonomy guaranteed by the scheme.[52] But neither court was inclined to consider the actual impact of the exclusion on those in marriage-like relationships, particularly women who were financially dependent on and subservient to the choices of their male partners. The actual impact was one which was defined not only by marital status but also by marital status, gender, class, and even race, considered together.

These cases are paradigmatic of single-axis discrimination because of their blinkered view of the causality of discrimination as based on one, and only one, ground alone, when the situation in each of the cases warranted a more complex view. There are a whole host of things the courts consequently get wrong—the criteria for admitting analogous grounds, the difference between direct and indirect discrimination, the substantive test of wrongful discrimination, the standard of review etc. We want to pick through each of these when we come to it in the next chapter. But what is key to getting other aspects of a discrimination inquiry right

[45] Ibid [30] [31].
[46] Ibid [34].
[47] Ibid [33].
[48] Ibid [31]–[35].
[49] *Quebec v A* (n 40) [49].
[50] *Volks* (n 39) [59] [68].
[51] Ibid [66].
[52] *Quebec v A* (n 40) [449] (concurring in result with the majority).

is a prior matter of conceiving discrimination as *based on* more than one ground at all. If we conceive of it as quantitatively limited to one ground, we tend to miss discrimination which is multi-causal and ultimately qualitatively intersectional in nature.

3.2 Substantially Single-axis Discrimination

Another way of understanding an intersectional claim is to think of it as not strictly but substantially based on a single-axis. The difference lies in acknowledging that there may be other axes relevant to the claim, but ultimately construing the claim as running along a single central axis. The result is similar to strict single-axis in that the construction misses the causal basis and hence the qualitative nature of discrimination just the same, albeit with an admission that the claim may have been substantiated on another ground too.

The decision of the South African Constitutional Court in *Brink v Kitshoff NO*,[53] which was the first case brought under the non-discrimination guarantee of the interim constitution, exemplifies this approach.[54] O'Regan J's discussion on the normative foundations of equality and non-discrimination, especially acknowledging the possibility of discrimination to be based on multiple grounds, was a remarkable feat for a new court.

The question before the court was whether a provision under the Insurance Act 1943 discriminated against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies made in their favour by their husbands. O'Regan J introduced the claim as one based on two grounds of discrimination, namely, sex and marital status. The fact that one of them (marital status) was not an enumerated ground did not affect the nature of protection since the constitution explicitly recognized the possibility of discrimination being based on 'one or more' grounds. She thus reaffirmed that the enumerated list of grounds 'should not be used to derogate from the generality of the prohibition on discrimination'.[55] Despite this, according to her, even when discrimination was apparently based on two grounds, it was not necessary to construe it as such and it was 'sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds'.[56] O'Regan J was cognizant of the relative effort in reading-in the analogous ground of marital status to be able to eventually find for

[53] 1996 (4) SA 197 (SACC) (hereafter *Brink*).

[54] Section 8 on 'Equality' under the Interim Constitution of South Africa 1993 provided in part: '(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'.

[55] *Brink* (n 53) [43].

[56] Ibid.

discrimination on both the grounds. From the claimant's perspective, it was also sensible to resort to a listed ground rather than an analogous one since the constitution offered a presumption of unfairness when discrimination was based on one or more of the listed grounds. No doubt she considered it pragmatic to simply find for discrimination on the basis of sex alone.

But the expediency of finding discrimination to be 'substantially' based on a single ground fails to reach the heart of discrimination—that something is discriminatory *because of* the wrongful conduct or effects being *based on* certain identities or grounds. The approach may thus be 'accused of failing to perceive an applicant's "true" experience of disadvantage'.[57] As such, although *Brink* itself succeeded, its approach can still be critiqued within the framework of intersectionality which has a particular interest in respecting the claimant's identity and treating her as a whole person in tracing similar and different patterns of group disadvantage. The specific claim in *Brink* was against 'married women'.[58] The impugned provision concerned 'spouses married in community of property and protect[ed] life insurance policies owned by a wife from attachment in certain circumstances'.[59] Characterizing this as mainly or substantially a claim of sex discrimination runs the danger of essentializing the disadvantage associated with an individual ground like sex, thus undermining the causal link of sex discrimination with marital status and the specific disadvantage women face in marriage.

Gumede v President[60] and *Moseneke v The Master of High Court*[61] also tow this line. *Gumede* concerned issues of ownership, including access to and control of family property that affected women during and upon dissolution of customary marriages. It was identified as 'a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law'.[62] Yet, the discrimination analysis focussed on gender inequality in marriages, making only sporadic references to gender inequality in customary marriages. The thrust of the analysis became the 'self-evident discrimination on at least one listed ground: gender'.[63] The decision thus glossed over the specific situation of women in customary marriages which is comparable but in no way coincides with women in civil marriages generally. On the other hand, in *Moseneke*, the claimant had argued that it was discriminatory in intestate succession that white people's estates were administered by the Master of the High Court, while Black people's were administered by a Magistrate. The case was argued as a matter of race discrimination but the amicus had aptly pointed out that in the case of intestate estates of deceased

[57] Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage' (2008) 24 South African Journal on Human Rights 397, 407.
[58] *Brink* (n 53) [19] [43] [47] [50] (O'Regan J).
[59] Ibid [21].
[60] 2009 (3) SA 152 (SACC) [1] (hereafter *Gumede*).
[61] 2001 (2) SA 18 (SACC) (hereafter *Moseneke*).
[62] *Gumede* (n 60) [1].
[63] Ibid [34].

Africans, race, gender, and culture interacted in a way which discriminated directly and indirectly against African widows.[64] Yet, the Court's analysis did not explore the qualitative distinction of discrimination based on both race and gender. Racism consumed the impact of discrimination on Black women, no matter their gender.

Obviating grounds by actively and substantially focussing on a single ground is not just a trend in South African jurisprudence alone, even if it were most characteristically laid down in *Brink*.[65] In her minority opinion in *Mossop*, L'Heureux Dubé J also preferred this approach even when she recognized that: 'The situation of individuals who confront multiple grounds of disadvantage is particularly complex . . . Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.' Be that as it may, the ultimate treatment of the issue was determined thus: 'On a practical level, where both forms of discrimination [viz. on race and gender] are prohibited, one can ignore the complexity of the interaction, and characterise the discrimination as of one type or the other. The person is protected from discrimination in either event.'[66]

In 2010, the Second Circuit Court of Appeal in the United States adopted this approach in *Gorzynski v JetBlue Airways Corp*.[67] The claimant in *Gorzynski* was a 54 year-old woman who was employed with the customer services department of an airline. She was subjected to several sexually coloured and ageist remarks, negative performance evaluations, and disparate training standards in comparison with other women and other male employees. One of her arguments was that 'she was treated differently because of her status as an older woman, rather than because of age or gender acting as independent factors'.[68] The Court readily acknowledged that 'where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components'.[69] However, it went on to find that '[h]aving determined that Gorzynski has provided sufficient evidence of age discrimination to reach a jury, there is no need for us to create an age-plus-sex claim independent from Gorzynski's viable [age discrimination] claim'.[70] The holding is uncannily similar to *Brink*, which likewise acknowledged the possibility of multi-causal basis of discrimination but ultimately found it sufficient to deal with the claim as based on a single ground. The acknowledgement basically portrays that single-axis discrimination and intersectional discrimination on two or more grounds may be the same, such that even when, per *Gorzynski*, 'grounds cannot be neatly reduced to

[64] *Moseneke* (n 61) [17].
[65] See the decision of the Human Rights Tribunal of Ontario in *Arias v Desai* 2003 HRTO 1.
[66] *Mossop* (n 22) 106.
[67] 596 F 3d 93 (2d Cir 2010) (USCA).
[68] Ibid 109.
[69] Ibid.
[70] Ibid 110.

distinct components', claimants can somehow provide 'sufficient evidence' of discrimination based on one ground alone. Causally speaking, it can only be one or the other. And if these cases *were* admittedly multi-dimensional, then it should neither have been possible nor preferable to have them proven on a single ground. Substantial single-axis discrimination thus reproduces the weaknesses of single-axis discrimination in appreciating the complexion of causality when discrimination is said to be based on more than one ground.

3.3 Capacious Single-axis Discrimination

As substantial single-axis thinking shows, strict single-axis is not the only way of limiting intersectional claims to a single ground. It is even possible to limit discrimination to a single ground and yet interpret it capaciously.[71] The result is qualitatively different from strict and substantial forms of single-axis thinking. EU discrimination jurisprudence shows this strikingly.

Consider the landmark case of *Marshall* decided by the Court of Justice of the European Union (CJEU) in 1986.[72] The facts involved a claimant who was dismissed from employment because she had reached the retirement age. The Social Security Act 1975 (UK) set a qualifying retirement age of sixty years for women and sixty-five years for men to access their state pension, but imposed no obligation to retire at the said age. The claimant challenged her dismissal as discrimination on the ground of sex under Article 5(1) of Council Directive 76/207/EEC on the equal treatment between men and women in employment.[73] The Court held that the dismissal of a woman 'solely because she has attained or passed the qualifying age for a State pension, which age is different under national legislation for men and for women' constituted discrimination on the ground of sex under the Directive.[74] The Court's terse reasoning hints at its capacious reading of the ground of sex which involves other aspects of discrimination against women, including age. According to the Court, when the 'sole' reason for dismissal of a woman is her age, the dismissal is a matter of discrimination on the basis of sex after all. Unlike the strict approach, the Court does not jostle with age and sex to determine which one of them caused discrimination; and unlike the substantial approach the Court

[71] A concept first explained by Sandra Fredman in her EU Commission Report for the European network of legal experts in gender equality and non-discrimination, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (2016) <https://publications.europa.eu/en/publication-detail/-/publication/d73a9221-b7c3-40f6-8414-8a48a2157a2f> accessed 30 March 2019.

[72] Case 152/84 *Marshall v Southampton and South West Area Health Authority* [1986] ECR 723 (CJEU) (hereafter *Marshall*).

[73] Article 5(1) provided that: 'the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.

[74] *Marshall* (n 72) [38].

also does not say that one of the two grounds of age or sex could have substantially captured the discrimination at play. Instead, the Court reads sex discrimination capaciously to include aspects of age which disadvantage women. In effect the Court finds for discrimination against the claimant as an older woman, by acknowledging that both age and sex played a part in causing the discrimination which neither younger women nor older men would have suffered, whereas both younger women and older men would have suffered from general sexism and ageism. The result of dismissal from service could be explained fully in reference to both similarities as well as differences in patterns of group disadvantage based on sex and age. Looking for only or substantially one or the other would not have uncovered the nature of discrimination suffered.

The capacious approach flows perhaps from the language of EU law itself in that it recognizes that discrimination on the basis of a particular ground includes discrimination in reference to other grounds as well. For example, one of the earliest EU Directives (76/207 of 1976) had provided that 'the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.[75] Similarly, Directive 79/7 of 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security provided that the Directive applied to statutory schemes which provided protection against: sickness, invalidity, old age, accidents at work and occupational diseases, and employment.[76] Intersections of these other disadvantages with sex thus became a matter of sex discrimination construed capaciously. The CJEU's typically concise opinions simply adopt this capacious approach flowing from the legislation without more. *P v S*[77] is the locus classicus in this regard. According to the CJEU, 'the scope of the [sex equality] Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex . . . the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned'.[78] It thus held that dismissal from employment due to a person's gender reassignment 'is based, essentially if not exclusively on the sex of the person concerned'.[79] Since gender reassignment is not itself a ground recognized under EU law, a capacious reading of sex allowed for the protection from discrimination to be extended to gender reassignment.

In fact, some rather hard cases which would have otherwise fallen through the cracks of single-axis discrimination fare successfully under the capacious view:

[75] Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40. See also Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/1, arts 2(1) and 4(1).

[76] Council Directive 79/7, ibid, art 3(1).

[77] Case C-13/94 *P v S and Cornwall County Council* [1996] IRLR 347 (CJEU) (hereafter *P v S*).

[78] Ibid [20]

[79] Ibid [21].

Helga Kutz-Bauer v Freie und Hansestadt Hamburg,[80] *Steinicke v Bundesanstalt für Arbeit*,[81] and *Brachner v Pensionsversicherungsanstalt*,[82] to name a few.[83] In *Kutz-Bauer*, the CJEU held that a part-time scheme for older employees was discriminatory when it impacted those between the age of fifty-five and sixty-five years differently on the ground of sex. The scheme operated in such a way that 'the great majority' of workers who could actually take advantage of the five-year flexible work arrangement were men because their retirement age was sixty-five as compared to women whose retirement age was set at 60.[84] In finding that such a difference was discrimination on the ground of sex, the Court was not inhibited by the fact that the criterion of differentiation and its impact were grounded in both age and sex at the same time. Similarly, in *Steineke*, the Court found another part-time scheme for older employees to be discriminating on the basis of sex, when the scheme required employees to have been working full-time for at least three out five years before applying. Since 'the group of persons who have chiefly worked part-time during the period referred to by the provision at issue and who are thereby excluded from that scheme consists mainly of women',[85] the Court concluded that the scheme 'results as a matter of fact in discrimination against female workers by comparison with male workers'.[86] The disadvantage suffered at the intersection of part-time work, age, and sex was deemed to be a matter of sex discrimination. In *Brachner*, the Court again found for indirect sex discrimination against the intersectional group of older women. The case concerned a statutory provision which reserved an exceptional increase in pensions to those receiving pensions above EUR 746.99 per month. The percentage of men receiving this amount was found to be approximately 2.3 times higher than the percentage of women.[87] Thus, the category of retired persons suffering disadvantage consisted of a significantly greater number of older women than older men. The statistics in favour of the intersectional group of older women defined by their age and sex became a basis of finding for sex discrimination.

There are examples from other jurisdictions as well. For example, in the South African Constitutional Court's decision in *Volks*, the dissenting opinion of

[80] Case C-187/00 *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-02741 (CJEU) (hereafter *Kutz-Bauer*).

[81] Case C-77/02 *Steinicke v Bundesanstalt für Arbeit* [2003] ECR I-09027 (CJEU) (hereafter *Steinicke*).

[82] Case C-123/10 *Brachner v Pensionsversicherungsanstalt* [2011] ECR I-000 (CJEU) (hereafter *Brachner*).

[83] See also Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 2743 (CJEU) [12]; Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation v Lewark* [1996] ECR I-243 (CJEU) [31]; Case C-243/95 *Hill and Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-03739 (CJEU) [34]; Case C-226/98 *Jørgensen v Foreningen af Speciallæger and Syge- sikringens Forhandlingsudvalg* [2000] ECR I-2447 (CJEU) [29].

[84] *Kutz-Bauer* (n 80) [45]

[85] *Steinicke* (n 81) [56].

[86] Ibid [57].

[87] *Brachner* (n 82) [29].

Mokgoro and O'Regan JJ proceeded on the single ground of marital status but ended up finding for unfair discrimination against survivors of permanent and intimate life partnerships which were 'socially and functionally' similar to marriage. Their primary thrust was on clarifying the purpose of the prohibition of discrimination based on marital status and why Mrs Robinson's case was a central case of marital status discrimination in fact. Within this, they considered how 'rules of marriage [were] discriminatory on the grounds of gender and sex'.[88] They were thus able to appreciate how gender inequalities associated with marriage were reproduced in marriage-like relationships. Mokgoro and O'Regan JJ seem to have adopted a capacious view of a single-axis, like marital status, to conceive of structural disadvantages associated with gender within it.[89]

The capacious single-axis approach is further ahead than strictly and substantially single-axis discrimination because it not only admits two or more grounds into the discrimination analysis but also ensures that such multi-causal basis helps appreciate the qualitative nature of discrimination at play. The approach is closer to intersectional discrimination even if it is ultimately defined as discrimination based on a single ground. This is because, in spite of its formal characterization of being based on one ground, the substantive reasoning is multi-causal and appreciates that discrimination is actually a result of interaction of several identities. This approach works for claimants who are already seen, generally or on the basis of statistical evidence, to be part of a distinct disadvantaged subgroup. Thus, in the cases brought by older women under EU law, the considerable sympathy towards older women as a subgroup and the incontrovertible evidence of their relative disadvantage made it easy to argue for discrimination associated with age for women and hence for older women per se.[90] In a similar vein, obese persons have been included within the protection from discrimination on the grounds of disability under EU law.[91] The capacious approach has also worked equally well in cases of sexual orientation discrimination for unmarried gay couples. In *Maruko* and *Romer*, a capacious view of sexual orientation discrimination was taken under Directive 2000/78 to include the denial of a survivor's benefits under the occupational pension scheme of a deceased same-sex life partner when such benefits were confined to partners within opposite-sex relationships or marriage previously.[92] Discrimination against gay men and women in same-sex life partnerships was considered a matter of sexual orientation discrimination when national laws had abolished marital-status distinctions between married and unmarried life

[88] *Volks* (n 39) [109] (Mokgoro and O'Regan JJ).
[89] Ibid [108]–[118].
[90] See esp Case C-4/02 *Hilde Schönheit v Stadt Frankfurt am Main* and Case C-5/02 *Silvia Becker v Land Hessen* [2003] ECR I-12575 (CJEU) [35].
[91] *Kaltoft* (n 2) [64].
[92] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757 (CJEU); Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3591 (CJEU).

partnerships. Marital status was thus subsumed within sexual orientation and considered an aspect of sexual orientation itself.

But the approach does not work so well in cases where a subgroup is not socially salient or there is little statistical evidence relating to the subgroup in particular. For example, the CJEU in 1998 was reluctant to admit sexual orientation discrimination against a lesbian claimant as part of sex discrimination because such an interpretation 'does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights, [and it] cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty'.[93] This was two years after the Court had found that discrimination against trans persons was part of sex discrimination.[94] Similarly, unlike *Maruko* and *Romer*, the result in *Parris v Trinity College Dublin*[95] confirms that the lack of a socio-legal consensus on the equivalence of marriage and life partnerships between same-sex individuals debars the capacious view of sexual orientation discrimination to include intersections with marital status and age discrimination. Social consensus on who was considered protected within sex discrimination explains the difference in extending the capacious single-axis discrimination to some cases but not others.

This approach is thus highly contingent and suits only a limited number of cases. One may argue that, principally, this need not be so. Thus, for example, disability, race, and gender must each be capacious enough to include all forms of disability, race, and gender discrimination such that discrimination based on one of them can be described as another just the same. That is, discrimination against a fat Black man can then be described as capacious disability discrimination, capacious race discrimination, or capacious sex discrimination. Such an approach suffers from solipsism. It is important to understand why.

We are interested in explaining intersectional discrimination as a category of discrimination such that it is based on structures of disadvantage which are not, after all, singular or unidimensional. This matters because we want to be diagnostically clear about how patterns of group disadvantage interact and create similar and different patterns of intersectional group disadvantage. So, we are interested in reckoning with intersectionality as a category of discrimination, such that these patterns, even if multi-dimensional, are said to be based on multiple grounds, because that is what makes discrimination *discrimination*. The capacious approach runs the danger of explaining away this diagnostic link as insignificant. Discrimination under this approach could be based on one *or* another

[93] C-249/96 *Grant v South West-Trains* [1998] ECR I-00621 (CJEU).
[94] *P v S* (n 77).
[95] Case C-443/15 *Parris v Trinity College Dublin* [2017] ICR 313 (CJEU) (hereafter *Parris*). See discussion on *Parris* in section 4 on multiple discrimination.

ground because each ground is considered capable of explaining discrimination so far as it intersects with another. Capacious single-axis discrimination may thus turn out to be too self-referential rather than intersectional for the purposes of discrimination law.

3.4 Contextual Single-axis Discrimination

Focussing on a single ground strictly or substantially, or on groups included capaciously within a ground, are not the only ways of conceptualizing single-axis discrimination. One can also look at single-axis discrimination contextually and consider other identities or grounds as the context shaping the experience of discrimination. What does this entail?

The South African Constitutional Court has explained the contextual approach to discrimination as:

> Discrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts.[96]
>
> 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, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.[97]

According to Albertyn and Goldblatt, there are four aspects of the contextual approach: (i) analysis of the socio-economic situation of the claimant; (ii) impact on the claimant as flowing from systemic patterns of group disadvantage; (iii) relevance of examining complex forms of discrimination yielded by multiple identities in an intersectional way; and finally (iv) an appreciation of the historical context of the claim.[98] Similarly, in the Canadian context, Iacobucci J in *Law* enlisted four non-cumulative and non-exhaustive 'contextual' factors as: (i) pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group; (ii) relationship between grounds and the claimant's characteristics or

[96] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (SACC) [35].

[97] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (SACC) [113].

[98] Albertyn and Goldblatt, 'Facing the Challenge' (n 37) 260–61.

circumstances; (iii) ameliorative purposes or effects; and (iv) nature of the interest affected.[99]

What constitutes 'context' is thus framed very broadly such that a whole host of factors can be considered relevant to a discrimination claim. Context can be taken to reflect all such identities, conditions, and circumstances which are relevant to the experience of discrimination. Here, we are primarily concerned with the understanding of context as identities which form the basis of discrimination. Construed this way, identities which are not captured as grounds have the potential to be factored into the discrimination analysis via context. The possibility seems intuitively attractive. It is then useful to examine those cases where context as identities has been used to explicate the nature of discrimination, especially that which is intersectional. The most interesting and relevant cases are of indirect discrimination—where the criteria of discrimination do not themselves invoke multiple identities but the impact is suffered by those who belong to multiple disadvantaged groups at once. The minority opinions in *Volks* and *Gosselin* are telling examples, and I take them each in turn.

In *Volks*, the dissenting opinion of Sachs J reckoned with gender as the context of the claim based on the ground of marital status. He distinguished this approach from the strictly single-axis view of the majority and the capacious view of Mokgoro and O'Regan JJ in these terms:

> The source of the complexity appears to lie elsewhere. In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue before us is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.[100]

Sachs J's characterization of the issue as being multi-layered, and more complex and elusive, is accurate. According to him, a strictly formal view of the claim may camouflage the complexity of discrimination.[101] While he too described the 'legal issue' as discrimination based on the ground of marital status,[102] the issue, for him, was situated within a 'framework of reference that goes beyond the classificatory landscape established by the impugned measure itself'[103] and defined by its 'socio-legal context: patriarchy and poverty'.[104] In light of this, he noted that:

[99] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) (hereafter *Law v Canada*) [59] [87].
[100] *Volks* (n 39) [149].
[101] Ibid [147]–[148].
[102] Ibid [189]–[190].
[103] Ibid [191].
[104] Ibid [163].

> it is women rather than men who suffered disadvantage because of their status of being married or unmarried. Any investigation of unfairness resulting from marital status would accordingly have to take into account the manner in which patriarchy dictated the advantage or disadvantage associated with the status of being married or not being married.[105]

This contextual framing led him to find the exclusion of unmarried partners from inheritance to be unfair discrimination.[106] He particularized his analysis to the context of female cohabiting partners who survived their male partners, and identified both the specific vulnerability of women as well as broader patterns of disadvantage associated with marital status, including socio-economic vulnerability and poverty.

The minority opinions in *Gosselin* had followed a similar approach. L'Heureux-Dubé J warned against abstract generalizations and categorizations based on grounds and insisted on evaluating the effects of the impugned distinction based on age.[107] She went beyond the government's stated purpose and criterion of discrimination and focussed specifically on the claimant and the impact upon her. She thus found a whole set of surrounding circumstances to be accentuating Louise Gosselin's position including: the 'imminent and severe threat of poverty' arising from the disparate operation of the training programmes; vulnerability to malnutrition and to prostitution in order to make ends meet; and the wholesale exclusion from participation in Canadian society.[108] Although L'Heureux-Dubé J went on to find discrimination to be the 'sole consequence' of the claimant's age, her reliance on the context of Louise Gosselin's gender, poverty, and disability changed her view of the impact of the age-based criterion for accessing social assistance.[109] Not only did the contextual approach help reveal the disadvantage in the case of Louise Gosselin in particular, but it also, according to Bastarache J's dissenting opinion, showed how Louise Gosselin's situation was illustrative of the manner in which the social assistance scheme violated the basic human dignity of those below the age of thirty, such that there was 'no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30'.[110] He treated Louise Gosselin as representative of those in her position, who were not suffering just because they were under thirty, but who, because of their own context and circumstances, were suffering the structural disadvantage inflicted by an arbitrary criterion like age.

A contextual approach to single-axis discrimination is especially helpful when a claimant may have chosen to argue a potential intersectional claim on

[105] Ibid [199].
[106] Ibid [219]–[220].
[107] *Gosselin* (n 29) [110]–[111].
[108] Ibid [132].
[109] Ibid.
[110] Ibid [255].

a single ground. Once the claim is argued as such, it may be inapt for the court to read-in another ground to the discrimination claim. For claims challenging general legislative provisions, it may also be the case that the provision (criterion) is directly discriminating on a single ground but ends up adversely affecting the claimants on multiple grounds. In such cases, 'context' becomes relevant as a device for recognizing causality which is explained in reference to multiple identities, circumstances etc., beyond a single ground. Thus, a provision excluding survivors of cohabitation relationships can be found discriminatory on the basis of marital status but, in the case of a female claimant, it may be apposite for the court to note her intersectional disadvantage accruing not just on the basis of marital status but also gender via context (*Volks*). The approach seems particularly appropriate in challenging legislative provisions and policy decisions rather than individual cases of discrimination, where those situated differently may face discrimination based on that difference in context (*Volks* and *Gosselin*). It helps respond directly to the impugned provision based on a single ground (marital status or age) but contextualizes it enough to relate to broader patterns of group disadvantage. At the same time, the approach focusses on the situation of the actual claimant in fact and allows us to extrapolate, from her experience, the experience of those similarly situated. Thus, both Bastrache and L'Heureux Dubé JJ in *Gosselin* focussed on the particular claimant and her experience of the law rather than the exclusive viewpoint of the legislature. The contextual approach satisfies the claimant's interest in integrity in that it helps appreciate, what Duclos calls, the *whole* picture of discrimination, which goes beyond the exclusive focus on a particular characteristic and includes 'not only individual complainant and respondent, and all their attributes, but others (co-workers, tenants, customers), their various relationships, and the environment in which the situation arose'.[111]

For all this, the contextual approach is a step in the right direction in realizing intersectionality. If the eventual explanation of disadvantage suffered is described in intersectional terms—appreciating similar and different patterns of group disadvantage suffered by the claimant as a whole in the full and relevant context, like in the dissenting opinions of Sachs J in *Volks* and L'Heureux Dubé and Bastrache JJ in *Gosselin*, there is a real possibility of addressing intersectional discrimination without reference to multiple grounds of discrimination. If identities can be reckoned with as context, and context is deemed causally significant, one can overcome the single-axis thinking as based on a single ground alone.

Yet, for the purposes of intersectionality, it may be legitimate to argue for the use of contextual analysis in respect of multiple grounds rather than a single ground. The framework of intersectionality outlined in the last chapter argued for

[111] Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 Canadian Journal of Women and the Law 25, 50.

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this—to see multiple identities as grounds, within their full and relevant context—for charting patterns of group disadvantage. This characterization rests on a vital distinction between identities as grounds, and their context. I think the distinction is a useful one to retain in discrimination law. I will explore the nature of grounds in the next chapter to clarify this distinction, but it may suffice to clarify the relationship between grounds and context here.

This chapter has been concerned with the categorization of discrimination in a causal (correlative) way. The purpose is to understand how certain structures of disadvantage associated with people's identities or personal characteristics interact in yielding intersectional discrimination. Context enables this understanding by revealing the background conditions which facilitate these structures of disadvantage. Thus, for example, amongst other things, the war on drugs, incarceration laws, gun control, and police impunity make up the context in which race discrimination transpires in twenty-first-century United States. It contributes to why race operates as a ground of discrimination, by segregating people into social groups with massive differences in socio-economic, political, and cultural power. Similarly, South African and Indian discrimination law continue to be defined by, and at the same time to fight against, the racist and casteist ideologies which manifest in housing arrangements, quality of education, level of employment, access to justice, and so on. These contextual framings thus make up both the grounds of discrimination in a general sense and the individual instances of discrimination based on these grounds in specific ways. But, in the general sense, context is too broad to causally explain the link between specific instances of discrimination and grounds. Contextual single-axis discrimination, like other categories of single-axis thinking, runs the risk of obscuring this link by calling everything relevant to discrimination a matter of context, while facially operating on a single ground. It is the opposite of the capacious approach which deems every causal connection, however strong or weak, as capable of being explained within a single ground in question. While it is obviously much more appreciative of intersectionality than strict and substantial single-axis discrimination, which ignore multi-causal explanations of discrimination either completely or substantially, it is less appreciative of the distinction that intersectionality maintains between identities and context in terms of the distinctive roles they play in explaining the nature of intersectional discrimination.

So much for single-axis forms of conceptualizing discrimination in law. What happens when we open up the causal basis of discrimination to actually include multiple grounds? Does it help in appreciating the nature of discrimination in intersectional claims? The next four sections explain the different ways in which multiple grounds have been accounted for in discrimination cases and the categories of discrimination they yield, namely, multiple, additive, embedded, and intersectional.

4. Multiple Discrimination

Courts may move beyond single-axis thinking and admit that discrimination can be based on more than one ground. One way they do so is by treating discrimination as devolving on multiple grounds individually. The UK Court of Appeal's reasoning in *Bahl v Law Society*[112] is typical of what may be characterized as multiple discrimination where multiple grounds are treated discreetly and in isolation from one another.[113] *Bahl* largely mirrors the single-axis reasoning in *DeGraffenreid* in that the claim based on the grounds of race and sex was split into independent claims to be proven separately. The difference between the two is that while the *DeGraffenreid* Court insisted that the claimant could only show either race or sex discrimination, the *Bahl* Court agreed that discrimination could be based on both of the grounds, provided they were argued and proven separately.

The case concerned Dr Kamlesh Bahl, a Black woman, who had served as the Vice President of the Law Society in the UK. She argued that she had been discriminated against by its members, especially its President and Secretary General, in the determination of staff complaints against her behaviour. In analysing the copious evidence presented before the courts below, Peter Gibson LJ found that the Employment Tribunal had omitted to 'identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination' and that it would have been 'surprising if the evidence for each form of discrimination was the same'.[114] He insisted that for a claim of race and sex discrimination to succeed, the claimant should prove both sex and race discrimination separately such that discrimination was based on 'either race or sex' at a time.[115] This way of conceptualizing a claim based on multiple grounds may have resulted from the atomized nature of UK discrimination law before the Equality Act 2010, when sex was a protected ground under the Sex Discrimination Act 1975 and racial discrimination was prohibited separately under the Race Relations Act 1976. But this conceptualization led the Court to imagine the grounds of race and sex as mutually exclusive, as if the disadvantage associated with being Black and female were disembodied. The multiplicity of grounds basically multiplied and disintegrated the identity of the claimant as a Black person and as a woman. This in turn delimited the possibility of seeing how patterns of discrimination based on race and sex co-existed and co-constituted one another, denying any recognition of

[112] [2004] EWCA Civ 1070 (UK Court of Appeal) (hereafter *Bahl*).

[113] 'Multiple discrimination' is often used as a generic term, especially in EU law, to denote all forms of multi-ground discrimination, including additive, combination, compound, embedded, overlapping, and intersectional discrimination. Here, multiple discrimination is used in a particular sense to denote the category of thinking about intersectional claims which treats intersectional discrimination as 'multiple' single-axis claims.

[114] *Bahl* (n 112) [137].

[115] Ibid [115]–[137].

similar and different patterns of group disadvantage suffered by Dr Bahl as a Black woman.[116]

Section 14 of the Equality Act 2010 breaks away from *Bahl* and multiple discrimination. Under Section 14, it is not necessary to show that the treatment complained of was direct discrimination 'because of each of the characteristics in the combination (taken separately)'. If Section 14 were brought into effect, the *Bahl* approach would lose ground.[117] But while Section 14 remains unenforced, the current position under the Equality Act 2010 appears to be the same as in *Bahl*, with the claimant having to prove each ground separately under Section 13 on direct discrimination or Section 19 on indirect discrimination. There are signs that the UK courts may in fact have fortuitously overcome the *Bahl* reasoning despite an unenforced Section 14.[118] Yet, *Bahl* remains the highest and only detailed consideration of a claim actually argued on two grounds and marks a missed opportunity for the Court of Appeal.

Similarly, although much of the US jurisprudence has progressed from strictly single-axis discrimination in *DeGraffenreid* to additive discrimination, intersectional claims continue to be characterized as multiple discrimination as well. Cases at the intersection of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 are particularly prone to this. For example, in *Lowe v Angelo's Italian Foods*,[119] the complainant had alleged discrimination under both the statutes. She was referred to as 'girl' or 'girlie' by the employer and had overheard a line cook remark 'no skirts in the kitchen'. She was consistently told what to wear at work while other (male) waiters were left to choose for themselves. When Lowe presented a letter from her doctor stating that she could not stoop, bend, lift weight, or climb stairs because of her medical condition (Multiple Sclerosis), she was immediately dismissed. The Court allowed only her disability discrimination claim to proceed. According to the Court, the complainant had failed to establish that she was treated less favourably than male employees in respect of the dress code, since she could not show that the male employees were 'similarly situated'. Similarly, the Court found that the complainant's evidence did not reveal a case of 'hostile work environment' since the evidence of sexual or

[116] This is not to say that such discrimination in fact existed in *Bahl*. It is the conceptual denial of the Court which is being critiqued here. In fact, as James Hand notes, it was 'the non-existence of credible evidence and the absence of justification for inferences that caused the claim to fail'. See 'Combined Discrimination—Section 14 of the Equality Act 2010: A Partial and Redundant Provision?' [2011] Public Law 482.

[117] This need not necessarily be the case; Iyiola Solanke finds it 'questionable whether the new provision corrects the eclipse highlighted by the theory of intersectional discrimination'. *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart 2016) 149.

[118] See *Hewage v Grampian Health Board* [2012] UKSC 37 [26], which does not explicitly deal with intersectional discrimination, but the Supreme Court gives a nod to claims based on the grounds of race and sex and using a single comparator group like white males to prove discrimination based on both grounds.

[119] 87 F 3d 1170 (10th Cir 1996) (USCA).

gendered remarks, regrettable as they were, did not permeate the work environment 'with discriminatory intimidation, ridicule, and insult'.[120] In the opinion of the Court, evidence from a former employee indicating that the employer had used racial epithets against waitresses could not be used to establish sex discrimination.[121] Contrast the result in *Lowe* with that of *Joseph v HDMJ Restaurant, Inc*,[122] where another Court let a complainant's Title VII but not her disability claim proceed. The complainant was a Black woman of Haitian origin employed as a waitress by the defendant. The complainant was frequently abused by the defendants and propositioned with lewd remarks, gestures, and violent threats.[123] The complainant had also suffered a knee injury in a car accident which kept her out of work. Upon her return, she was pulled down a flight of stairs and yelled at when she complained that she was not given any tables to serve in order to be able to receive tips. According to the employer, 'white girls were supposed to make more money than foreign Blacks'.[124] The complainant was dismissed after this incident. She complained of race, colour, national origin, sex, and disability discrimination under the ADA and Title VII. While the Court found the defendant's conduct individually and collectively to be sufficiently severe and pervasive so as to create a hostile work environment for women on the basis of sex, it did not find for any other ground despite direct evidence of treatment meted out because of race and disability.[125]

A slew of cases involving the ADA and Title VII has been addressed in this way.[126] What is characteristic of the courts' approach in these cases is the preoccupation with isolating discrimination as based on each ground separately. There is not even a superficial or passing acknowledgement that grounds could potentially interact, let alone of the possibility that such an interaction could create intersectional patterns of group disadvantage for those like disabled Black women, who belong to multiple disadvantaged groups at a time. Instead, the claimant is treated as a separate entity in respect of each ground, as Black, as a woman, as a disabled person etc. This isolated treatment of grounds in multiple discrimination fails to respect the integrity of such claimants and appreciate the nature of discrimination they suffer, not in discrete packets relating to their race, sex, and disability individually, but in a discursive yet composite way *as* disabled Black women. Without this detailing, such as described in the last chapter for Black women and Dalit

[120] Ibid 1175.
[121] Ibid 1176.
[122] 685 F Supp 2d 312 (2009) (United States District Court, Eastern District of New York).
[123] Ibid 139.
[124] Ibid 139–40.
[125] Ibid 148.
[126] See *Herx v Diocese of Fort Wayne-South Bend, Inc* (2014) 48 F Supp 3d 1168 (United States District Court, Northern District of Indiana), where the Court let the disability claim go forward but dismissed the sex discrimination claim; *Querry v Messar* 14 F Supp 2d 437 (1998) (United States District Court, Southern District of New York), where the Court allowed the Title VII but not the ADA claim.

women, there is little to aid the recognition and redress of the experience of intersectional discrimination.

Yet, multiple discrimination remains a popular way of conceptualizing discrimination based on multiple grounds. Most recently, in 2016, the CJEU adopted it unequivocally in its first ever decision which considered discrimination based on two grounds explicitly.[127] In *Parris v Trinity College Dublin*,[128] the Court considered a pre-emptive challenge to the exclusion of same-sex surviving partners from claiming the pensions of their deceased partners. The claimant, David Parris, had been in a same-sex partnership for over thirty years. His partnership was legally recognized in 2011 when Ireland passed the Civil Partnership Act. He was sixty-four years old then. Under his occupational pension scheme, his partner would have been excluded from succeeding him since they had not married or entered into a civil partnership before he turned sixty. But there was no legal provision for same-sex individuals to marry or enter into civil partnership in 2007, before David Parris turned sixty. He challenged the exclusion of his same-sex partner as discriminating on the grounds of sexual orientation and age under EU Council Directive 2000/78.[129] When the Labour Court (Ireland) came to frame its reference questions for the CJEU to consider, it asked whether there was discrimination on the grounds of sexual orientation, discrimination on the basis of age, or, instead, discrimination based on the 'combined effect' of age and sexual orientation. The CJEU rejected the independent claims of sexual orientation and age discrimination, and further rejected the 'combined' basis of discrimination when no discrimination was found on the basis of each of the grounds considered independently.[130] In its words:

> while discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.[131]

Thus, according to the Court, when the pension scheme did not discriminate on the basis of sexual orientation and age taken separately, it could not discriminate on the basis of both taken together.[132] The refusal to see the claim as based on sexual orientation and age together cost the Court the ability to uncover the causal

[127] Cf Advocate General Sharpston's opinion in Case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union* [2007] ECR I-6767 (CJEU), which specifically dealt with the discrimination claim on the grounds of both age and sex. The CJEU did not, however, address the claim as such.

[128] *Parris* (n 95).

[129] Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[130] *Parris* (n 95) [80] [81].

[131] Ibid [80].

[132] Ibid [81].

basis of discrimination explained by similar and different patterns of group disadvantage associated with being gay and old at the same time. The claimant (and his partner) was disadvantaged not only as someone who was gay and suffered everyday homophobia and systematic exclusion from mainstream institutions like marriage, or as someone who was old and faced economic and social marginalization, but as someone who was both gay and aged and faced both these disadvantages simultaneously. This meant that their disadvantage, while similar to other gay and old people, was also distinct from them in that younger gay men and women would not have been excluded like them since they had the option to have their partnerships legally recognized before turning sixty to avail themselves of the pension scheme benefit, while straight pensioners were legitimately excluded because their partnerships were not on par with long-term stable relationships. They were excluded *as older gay people* considered as a whole, suffering from these similar and distinct patterns of group disadvantage associated with sexual orientation and age, in the context of the historical, socio-economic, and legal landscape of Ireland. Seeing their position as a matter of sexual orientation or age, one at a time, would have revealed little of this.

Multiple discrimination is thus no more sophisticated than strict single-axis discrimination, other than the fact that it is based on more than one ground. Yet, it is a mischaracterization of the causal basis of multi-ground discrimination which cannot be so neatly segregated into multiple single-axis claims.

5. Additive Discrimination

When multiple grounds are considered not in an isolated manner but in a way which reflects some interaction between the grounds resulting in discrimination, the category of discrimination may be described as additive discrimination. The term 'addition', though, is too simplistic, implying that the grounds somehow add up mathematically to yield a quantitatively different form of discrimination. There is simply no way to quantify discrimination, based on a single ground or on multiple grounds.[133] Additive discrimination thus needs to be stripped of this quantitative understanding to reveal what it signifies. This section argues that the interaction between multiple grounds, within what has been seen as the category of additive discrimination, can be explained in terms of either 'combination' or 'compound' discrimination. While combination discrimination appreciates the unique forms of discrimination suffered by intersectional claimants, compound discrimination engages with the similarities between discrimination suffered by intersectional claimants and other disadvantaged groups such

[133] Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65, 68–72.

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that discrimination is seen to be made worse or aggravated because of multiple grounds. While both go a long way in appreciating aspects of intersectionality, neither seems to appreciate the totality of patterns of group disadvantage to reflect intersectionality fully.

5.1 Combination Discrimination

In 1980, four years after *DeGraffenreid*, the Fifth Circuit Court of Appeal in *Jefferies v Harris County*[134] considered another claim of race and sex discrimination by a Black woman. The claimant had argued that she was passed over for promotion in favour of Black men and white women. The Court below had ignored her claim of 'discrimination based on a combination of race and sex' and had rather bifurcated it into separate claims of race and sex discrimination.[135] The Fifth Circuit Court, in a first, held that the District Court had erred in failing to address her 'claim of discrimination on the basis of both race and sex'.[136] According to the Court: 'Title VII provides a remedy against employment discrimination on the basis of an employee's "race, color, religion, sex, or national origin". The use of the word "or" evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics.'[137] Acknowledging that discrimination could in fact be based on more than one ground at a time, the Court held that such discrimination, based on both race and sex, could only be identified and remedied with the '[r]ecognition of Black females as a distinct protected subgroup'.[138] This meant that discrimination against Black women could be proven in the absence of discrimination against Black men and white women.

Jefferies made a breakthrough in US discrimination law. It not only opened up the possibility of claiming discrimination based on multiple grounds but also admitted that such discrimination was truly distinctive and not merely a matter of single-axis discrimination considered strictly on its own, substantially, capaciously, contextually, or taken in turn multiply. It was followed by *Judge v Marsh* in 1986, where the District Court of Columbia also affirmed that the subgroup of Black women was protected from discrimination since both their personal characteristics (race and sex) were listed under Title VII.[139] Though *Judge v Marsh*

[134] 615 F 2d 1025 (5th Cir 1980) (USCA).
[135] Ibid [22].
[136] Ibid [23].
[137] Ibid [24].
[138] Ibid [34]
[139] 649 F Supp 770 (1986) (United States District Court, District of Columbia) (hereafter *Judge v Marsh*).

confirmed the *Jefferies* rationale, it found it to be too broad and injudicious, and limited it thus:

> The difficulty with [*Jefferies'*] position is that it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII's prohibition. Following the Jeffries rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion . . . For this reason, the Jefferies analysis is appropriately limited to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic . . . The benefits of Title VII thus will not be splintered beyond use and recognition; nor will they be constricted and unable to reach discrimination based on the existing unlawful criteria.[140]

The result is that US courts which have followed the *Jefferies* rationale have limited what they see as 'combination' discrimination to two grounds only per *Judge v Marsh*. Further, such discrimination has been understood to be suffered particularly by a distinctive subgroup composed of those who belong to two disadvantaged groups protected under enumerated grounds. Finally, combination discrimination, say against Black women, is established not only in contrast with the position of white men, but also Black men and white women. This means that it is mainly the evidence of lack of discrimination against Black men and white women which is seen as causally relevant in establishing discrimination against Black women.

Lam v University of Hawaii[141] confirms this interpretation. In *Lam*, a woman of Vietnamese descent alleged that the University of Hawaii's Richardson School of Law had discriminated against her on the basis of race, sex, and national origin when she applied for the position of Director of the Law School's Pacific Asian Legal Studies Program. In examining the evidence, the Ninth Circuit Court characterized the claim as one of combination discrimination against Asian women and found that:

> where two bases for discrimination exist, they cannot be neatly reduced to distinct components . . . Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences . . . Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination "even in the absence of discrimination against [Asian] men or white women". . . . Accordingly, we agree with the Jefferies court that, when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that

[140] Ibid 780.
[141] 40 F 3d 1551 (9th Cir 1994) (USCA).

> *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.[142]

Lam added a new dimension to *Jefferies* and *Judge v Marsh*. It was no longer enough to prove that subgroups like Black women suffered disadvantage when Black men and white women did *not*; but it was also not sufficient to show that Black men and white women *were* disadvantaged in order to prove combination discrimination against Black women. Realistically, Black women, or Asian women for that matter, had only the reference point of white men for proving that they were discriminated against uniquely.[143] The fact that men belonging to their racial or ethnic group or other white and non-white women were treated worse or better contributed nothing to proving combination discrimination. Its proof rested on showing combined patterns of group disadvantage which were different from, and not similar to, patterns of groups disadvantage associated with each disadvantaged group. Thus, in the case of *Daniels v Church's Chicken*[144] the District Court of Alabama interpreted a Black woman's claim based on 'her sex or race and a combination of both' as centred around the proof of a special class defined by 'membership in the separate and distinct protected class of Black females'.[145] The reason was that '[n]o substantive case was ever made that Church's discriminate[d] against females or blacks in general'.[146] In the absence of discrimination against white women and Black men, the claim could only be characterized as combined discrimination against the subgroup of Black women alone. This, however, the claimant failed to show. The Court was fastidious in looking for discrimination against the claimant which was defined in terms of both her race and sex in a unique way such that it was only her race and sex combined which appeared in the discriminator's reasoning. Construed this way, the causality of multiple grounds was hard to prove.

Pitting the combination of groups as highly distinctive defies the relational basis of intersectional discrimination between groups and undermines the sameness in patterns of group disadvantage. It is as if Black women and the disadvantage they suffer have nothing to do with others, especially other non-Black women and Black men. But without reference to these other groups, Black women's claims seem solipsistic and liable to fail. Take, for example, the case of *Jeffers v Thompson* where the claimant complained of discrimination in promotion 'because of her race, her gender, her race-and-gender combined, and her age'.[147] The United States District Court of Maryland interpreted this as a claim against the 'composite class' of Black

[142] Ibid 1562 (emphasis in original).
[143] See *Goodwin v Board of Trustees of University of Illinois* 442 F 3d 611 (7th Cir 2006) (USCA).
[144] 942 F Supp 533 (1996) (United States District Court, Southern Division of Alabama).
[145] Ibid 538.
[146] Ibid.
[147] 264 F Supp 2d 314 (2003) (United States District Court, Maryland).

women. The claimant had brought evidence of her difficult relationship with her supervisor and the statistical evidence of promotion of white men and white women. The Court found that such 'sparse statistical evidence discloses no special bias against African-American women':

> Some characteristics, such as race, color, and national origin, often fuse inextricably. Made flesh in a person, they indivisibly intermingle. The meaning of the statute is plain and unambiguous. Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination . . . Discrimination against African-American women necessarily combines (even if it cannot be dichotomized into) discrimination against African-Americans and discrimination against women—neither of which Title VII permits.[148]

The analytical gap in this framing should now be apparent. This was the gap Crenshaw had highlighted when discussing *Payne v Trevanol*[149] and *Moore v Hughes,*[150] which had rejected Black women's discrimination as having to do with discrimination against Black men and white women respectively.[151] From thereon, the category of combination discrimination in the US has solidified into a highly unique form of discrimination levelled against a subgroup which has little to do with discrimination suffered by others.[152] In reality, such a heightened construction of uniqueness of an intersectional claim is in fact unreal given that discrimination based on multiple grounds cannot be wholly distinguished from the multiple grounds that yield it. In particular, while such a construction appreciates the difference in patterns of group disadvantage between different (sub)groups, it overstates that difference as obscuring all similarities between them. That intersectional discrimination is defined by both sameness and difference simultaneously seems to be lost in this. So even if the US jurisprudence describes this category as intersectional discrimination,[153] it is clear that it is not one which embraces intersectionality due to its failure to correspond with one of the key strands of intersectionality theory,

[148] Ibid 326.

[149] 673 F 2d 798 (5th Cir 1982) (USCA).

[150] 708 F 2d 475 (9th Cir 1983) (USCA).

[151] Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139 (hereafter Crenshaw, 'Demarginalizing'). See chapter 2, section 1.1 for a discussion of the dynamic of sameness and difference based on these cases.

[152] See also *Kimble v Wisconsin Department of Workforce Dev* 690 F Supp 2d 765 (United States District Court, Eastern Division of Wisconsin 2010); *Shazor v Professional Transit Management Ltd* 744 F 3d 948 (6th Cir 2014) (USCA).

[153] Equal Employment Opportunity Commission in the US characterises this type of discrimination as 'intersectional discrimination': 'Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them "even in the absence of discrimination against Asian American men or White women" '. See Compliance Manual, ch 15 <https://www.eeoc.gov/policy/docs/race-color.html> accessed 11 March 2019.

which appreciates the relationships between groups or, as we describe it, the dynamic of sameness and difference together.

5.2 Compound Discrimination

A slightly different idea of additive discrimination exists in other jurisdictions that do not view it as a matter of highly unique combined patterns of group disadvantage associated with a distinct subgroup but actually a matter of shared disadvantage suffered by several groups. For them, additive discrimination is the opposite of the US conception—too similar to rather than too different from discrimination based on individual grounds. We may refer to this as 'compound' discrimination, where similar patterns of disadvantage associated with different groups are compounded with patterns of disadvantage associated with other groups based on different grounds. Unlike multiple discrimination, such discrimination is not necessarily proven in isolation but in a fluid and flexible way. The problem, though, from an intersectional perspective is that, despite its flexibility, it may still fail to be diagnostically precise about tracing sameness and difference in patterns of group disadvantage simultaneously and in treating the claimant's identities as a whole.

The UK courts' most advanced thinking on discrimination based on multiple grounds is representative of compound discrimination. The decisions of the Employment Appeal Tribunal (EAT) in *Tilern de Bique v Ministry of Defence*[154] and the Employment Tribunal (ET) in *O'Reilly v BBC*[155] are useful examples. *Tilern* concerned the case of a female solider, from St Vincent and the Grenadines, serving in the British army, who was also a single mother to a young daughter. As a solider, she was meant to be available for work twenty-four hours a day, seven days a week ('24/7 condition'). But, as a foreign national, she could not have a family member stay with her for an extended period to help her with childcare ('immigration condition'). The immigration condition made it impossible for her to meet the 24/7 condition. She argued that the conditions indirectly discriminated against her on the basis of sex and race. The ET found that the conditions were not shown to be a proportionate means of achieving a legitimate aim and upheld her claim. The Ministry of Defence challenged this ruling. In dismissing the appeal, Cox J of the EAT rejected the argument that the two conditions had to be shown as discriminating under 'the separate and distinct grounds of sex and race' such that '[e]ither one or the other, or both independently' were indirectly discriminatory.[156] Such a characterization misconceived the nature of discrimination at play, which was instead found to be a case of 'double disadvantage':

[154] [2009] UKEAT/0075/11/SM (hereafter *Tilern*).
[155] [2010] UKET/2200423/2010 (hereafter *O'Reilly*).
[156] *Tilern* (n 154) [162] [165].

> The Claimant in this case considered that the particular disadvantage to which she was subject arose both because she was a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted. The Tribunal recognised that this, double disadvantage reflected the factual reality of her situation.[157]

To understand what Cox J meant by double disadvantage, it is useful to see how she went about proving it. According to her, the 24/7 condition had to be tested for sex discrimination by comparing 'men and women soldiers in the British Army whose potential child carers were foreign nationals'.[158] Seen this way, the particular disadvantage suffered by women, especially single mothers, in comparison with men, was amply clear since 'the women soldiers . . . were more likely than the men to be single parents requiring assistance with childcare'.[159] Cox J clarified that '[t]his is what we understand this Tribunal to mean, in referring to the combined effect of the 24/7 and the immigration [conditions] when considering the claim of indirect sex discrimination'.[160] Similarly, the combined effect of the two conditions was tested for race discrimination by comparing those of 'Vincentian national origin and of British national origin in the Army who are or may become single parents', which reflected 'the particular disadvantage caused to women of Vincentian origin in the British Army who were single parents'.[161] The so-called combined effect then was a matter of considering how Vincentian female soldiers who were single mothers suffered disadvantaged which was similar to female soldiers who required childcare and Vincentians who were single parents. The similarities between the claimant's position and these groups compounded the discrimination suffered by the claimant on the basis of both sex and race at the same time.

The problem lies in the way the comparator groups were selected and discrimination proven on the basis of each ground separately and then compounded together to reflect the combined effect. The choice of the comparator groups will be analysed in the next chapter. At this point, what is critical is that the category of compound discrimination reflected in *Tilern* ended up ignoring the unique patterns of group disadvantage in addition to the shared disadvantage of the claimant (and those in her position) with women of different racial groups and people of the same race who were single parents. For this reason, compound discrimination does not achieve full compliance with the key ingredient of the framework of intersectionality—of appreciating similar and different patterns of group disadvantage simultaneously. For an intersectional claimant like a female soldier and single mother from St Vincent, it means that she faced the disadvantages

[157] Ibid [165].
[158] Ibid [167].
[159] Ibid.
[160] Ibid [168].
[161] Ibid [169] [170].

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associated with single motherhood on the basis of sex and immigrant status on the basis of race, just as other women and non-British persons, and also faced some unique disadvantages attached to single mothers who were non-British soldiers. The simultaneity of similar and different patterns of group disadvantage was thus lost in the framing of disadvantage as 'doubled' when based on two grounds at the same time.

O'Reilly also falls in this trap. In deciding a claim of age and sex discrimination in respect of the underrepresentation of older women at the BBC, the ET admitted that the claim could be based on two grounds. However, it rejected that the claim could be characterized as 'combined discrimination', defined in terms of the unique discrimination suffered by women above forty, when men above forty and women below forty could apply for the same position.[162] According to the ET, this was flawed because:

> the prescribed reason [ground] need not be the sole reason, or even the principal reason, why a person suffers detrimental treatment. Part of the reason that a woman over 40 is precluded from applying for the job, in the above example, is the fact that she is a woman. Another part of the reason is that she is over 40. Both of them are significant elements of the reason that she suffers the detriment. In such circumstances, we consider it is clear that the woman is subject to both sex and age discrimination.[163]

The ET's approach to discrimination based on two grounds in *O'Reilly* is similar to the EAT's approach in *Tilern*. Both are looking for similar patterns of discrimination between members of the larger social groups (women, foreign nationals, single parents, older people) and the subgroup to which intersectional claimants belong (single mothers who are foreign nationals/older women). While multiple discrimination stops at showing these individual patterns of disadvantage based on each characteristic, compound discrimination presents the result as 'compounded' in the form of double or worse-off discrimination.

This characterization is most conspicuous in the Canadian context.[164] Take, for example, the case of *Radek v Henderson Development*.[165] The British Columbia Human Rights Tribunal in that case found for discrimination based on multiple grounds, in that the presence of each ground was seen as compounding the experience of discrimination suffered. This is evident in the Court's approach: 'While the primary focus of Ms. Radek's individual complaint is her race, colour and ancestry, the analysis of those grounds must not ignore her disability, and the possibility of

[162] *O'Reilly* (n 155) [244].
[163] Ibid [245].
[164] *Morrison v Motsewetsho* (2003) HRTO 21 (Ontario Human Rights Commission) was the earliest case in this regard.
[165] (2005) BCHRT 302 (British Columbia Human Rights Tribunal).

the compound discrimination which may have occurred.'[166] Thus, using evidence to trace patterns of stereotyping based on race, colour, and ancestry the Tribunal held that discrimination was 'particularly clear with respect to discrimination on the grounds of race, colour and ancestry' and even 'disability was a factor in the adverse treatment she received, as . . . her gait was an element in the way she was treated'.[167] Disability thus compounded the discrimination suffered by the claimant on the basis of race, colour, and ancestry.

Radek had relied on *Comeau v Cote*,[168] where the British Columbia Human Rights Tribunal had interpreted multi-ground discrimination in this way. In *Comeau*, the case of dismissal of a worker was deemed discriminatory on the basis of his disability and age when separate evidence could be deduced for each ground to prove discriminatory treatment. But since the treatment was suffered by the claimant as one person,[169] the treatment had a 'combined effect' because of the claimant's disability and age, such that the treatment based on disability or the perceived heart condition of the claimant was 'amplified' by his age.[170]

Isolating similar and different patterns of group disadvantage, and then adding them to yield compound and combination discrimination respectively, is thus a common way of conceptualizing multi-ground claims. US courts do this too when they 'aggregate' evidence of different forms of discrimination.[171] Even at the ECtHR, De Albuquerque J's separate opinion in *Kostantin Markin v Russia*[172] followed this approach. *Markin* concerned a challenge to the denial of parental leave to men enrolled in the military service while servicewomen were entitled to the leave. While the majority had found for discrimination under Article 14 on the basis of sex, according to De Albuquerque J it was 'important, for both practical and theoretical reasons, to analyse separately the double nature of the discrimination suffered by the applicant as a serviceman: in relation to servicewomen (the sexual-discrimination issue) and in relation to civilian men (the professional-discrimination issue)'.[173] He thus held that:

> the denial of parental leave to the applicant was based on a combination of two different discriminatory grounds: military status and sex. The impugned discrimination has a twofold legal nature: there is not only sex discrimination between servicemen and servicewomen, since servicewomen are treated better than servicemen, but also

[166] Ibid [465].
[167] Ibid [586].
[168] (2003) BCHRT 32. See also *Dartmouth Halifax (County) Regional Housing Authority v Sparks* (1993) 119 NSR (2d) 91 (Nova Scotia Court of Appeal).
[169] Ibid [86] [87].
[170] Ibid [88].
[171] See esp *Hicks v Gates Rubber Co* 833 F 2d 1406 (10th Cir 1987) (USCA) 1416 ('in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility. We conclude that such aggregation is permissible').
[172] [2010] ECHR 1435.
[173] Ibid (De Albuquerque J).

> discrimination based on professional status, since civilian men are treated better than servicemen.[174]

The approach seems to divide grounds for the purposes of proving discrimination and then compound the different results to explain the nature of disadvantage. A final illustration of the decision of the South African Constitutional Court in *Bhe v Magistrate, Khayelitsha*[175] should make clear why this approach falls short of intersectionality.

Bhe concerned a constitutional challenge to the rule of male primogeniture, according to which only males related to the deceased qualified for intestate succession under customary law. The rule was found to be discriminatory because it excluded: (a) widows from inheriting from their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents; and (d) extra-marital children from inheriting from their fathers. In the specific case brought by Nontupheko Maretha Bhe, which sought relief for the exclusion of all female heirs, Langa DCJ, writing for the majority, held that:

> The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.[176]
>
> The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.[177]

His reasoning shows an appreciation of the particular forms of exclusion suffered by women governed by customary law, in addition to patriarchal domination suffered by women generally. There is, though, little analysis of racism per se, even when the rule of primogeniture applied only to Black women (as opposed to women of other races) and thus carried relics of the racist past of South Africa.[178] The fact that their exclusion from inheritance may not mirror white women's experiences of inheritance and thus was not simply a matter of 'gender' discrimination is left unexamined. Race did not define the discrimination causally, but merely added or compounded the sex discrimination suffered. The approach of the Court can be interpreted as considering the rule of male primogeniture as reproducing patterns of sexism, made worse by the racist

[174] Ibid.
[175] 2005 (1) SA 580 (SACC).
[176] Ibid [78].
[177] Ibid [91].
[178] Ibid [78] [89]–[92].

implications of a separate regime of succession. The result is that the analysis reflects some composition of racism and sexism against African women's rights of inheritance but there is no analytic precision in explaining what this relationship is. It is not that the Constitutional Court is unaware of the interaction between race and sex in Bhe's claim, only that the nature of such interaction is left undistinguished.

Furthermore, wholly absent from consideration is the claimant's situation of extreme poverty and destitution in *Bhe*. The fact that the claimant and her daughters lived in poverty and that severance from the contentious property would have rendered them homeless does not factor in the Court's reasoning, even though it was initially set out as the background of the claim.[179] Again, the loss is causal in that the Court failed to see how multiple identities of the claimant yielded the patterns of group disadvantage considered as a whole and in the necessary context. As Albertyn and Fredman write: 'a proper consideration of the multiple dimensions of equality and their impact on Black women [in *Bhe*] might have been a better legal approach and would have better reflected the nature of inequality on the ground'.[180]

But the Court did find for the claimants and declared that the rule constituted unfair discrimination under Section 9(3) which could not be justified under Section 36 of the Constitution. *Bhe* shows that the South African Constitutional Court is generally good at spotting multi-ground discrimination and, eventually, finding for the claimant. However, this does not automatically translate into linking the claimant's multiple identities to the particularity of disadvantage suffered based on those. Thus, even when the Court reaches a favourable outcome, the reasoning leaves something to be desired in how it treats a claim involving multiple identities of the claimant.

To sum up, the shortcoming of both forms of additive discrimination, described either as a combination of or as compounded by multiple grounds of discrimination, is that they do not truly capture the causality of multi-ground discrimination in terms of appreciating *both* the sameness and difference in patterns of group disadvantage at the same time. It takes a lopsided view of discrimination by focussing on either sameness or difference, thereby compromising on treating the claimant as a whole and/or considering discrimination in its full and relevant context including that of poverty or class. Despite its superior sense of interaction between multiple grounds as compared to all other categories of discrimination preceding it, additive discrimination may thus still evade intersectionality.

[179] Ibid [14]–[19].

[180] Catherine Albertyn and Sandra Fredman, 'Equality Beyond Dignity: Multi-dimensional Equality and Justice Langa's Judgments' (2015) Acta Juridica 430, 446–47.

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6. Embedded Discrimination

This is a rare category of conceptualizing discrimination but is a useful one to map on the continuum for an important reason. Since multi-ground claims have raised fears of creating a 'special sub-category', 'special class', 'new "super remedy"',[181] or 'many headed Hydra'—protecting 'subgroups . . . for every possible combination of race, color, sex, national origin and religion', giving rise to a 'volley of discrimination charges', and splintering discrimination law 'beyond use and recognition'[182]—it is useful to consider what happens when courts amalgamate multiple grounds into an independent ground of discrimination itself. Conceptually, it does not seem misconceived to do that because, after all, can we not express patterns of group disadvantage associated with multiple grounds as inhering in a composite ground rather than multiple grounds? The Canadian Supreme Court's decision in *Corbiere v Canada (Minister of Indian and Northern Affairs)* seems to do just that and gives us a ready example of what it called discrimination based on ' "embedded" analogous grounds'.[183]

The facts in *Corbiere* concerned the exclusion of off-reserve Indian band members from voting in band elections as violating Section 15(1) of the Canadian Charter. The Court found that the exclusion was based on a new analogous ground of 'aboriginal residence' or 'off reserve status' of band members. Such a distinction was discriminatory because it undermined the cultural identity of off-reserve band members in a stereotypical way. It denied voting privileges to off-reserve band members and perpetuated the message that they were uninterested in and undeserving of participating in band governance.[184] The Court held that the disenfranchisement was thus discriminatory and could not be justified under the Charter.[185]

The first step of reading-in aboriginal residence as an analogous ground in Section 15(1) of the Canadian Charter was the key to this holding. As L'Heureux-Dubé J explained in her concurring opinion, '[t]he differential treatment in this case is based on the status of holding membership in an Indian Act band, but living off that band's reserve. This combination of traits does not fall under one of the enumerated or already recognized analogous grounds.'[186] While race is an enumerated ground under Section 15(1), residence was not recognized as a standalone analogous ground. Yet, for off-reserve band members, the combination of the two status identities of race (aboriginal status) and residence (off-reserve residence) reflected

[181] *DeGraffenreid* (n 7) 143.
[182] *Judge v Marsh* (n 139) 780.
[183] [1999] 2 SCR 203 (SCC) [14].
[184] Ibid [18] (McLachlin and Bastarache JJ).
[185] As the majority judgment by McLachlin and Bastarache JJ describes, the two points of departure with the minority were: '(1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground'. Ibid [6].
[186] Ibid [58] (L'Heureux-Dubé J).

a position of immutability or fundamental choice—identified by the Court as the underlying logic of grounds under the Canadian Charter.[187] Aboriginal residence was considered a personal characteristic which was unchangeable or changeable at a very high personal cost. It had discriminatory potential because those defined by the characteristic lacked political power, were historically disadvantaged, and were potentially vulnerable to becoming disadvantaged or having their interests overlooked.[188] The fact that aboriginal residence related only to a 'sub-set' of Indian band members in fact, namely those who lived off-reserve, was no impediment to recognizing it as an analogous ground. In fact, it was found that '[i]ts demographic limitation is no different from, for example, pregnancy, which was a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intragroup discrimination.'[189] Thus the claim in *Corbiere* was seen as one based on aboriginal residence which was an analogous ground embedded in the enumerated ground of aboriginality under Section 15(1) and concerned a subset of Indian band members, that is those living off-reserve. This characterization helped the Court appreciate the disadvantage at the crossroads of aboriginality and off-reserve residence. The disadvantage was one which perpetuated the historic exclusion of off-reserve band members from democratic participation in the band governance. They were thus deemed less worthy than those band members who lived on reserves. This in turn undermined their cultural identity as Indian band members, which was central to the aboriginal population, living on- or off-reserve alike. In fact, the Court was quick to point out that '[a]boriginals living on reserves are subject to the same discrimination' in that they too constituted an underprivileged group and were forced to flee, return, and disrupt their lives through government policies.[190] The disadvantage suffered by the intersectional group in question, of off-reserve band members, was thus characterized by patterns of similar and different group disadvantage based on aboriginality and residence or aboriginal residence. Similarities did not undermine the unique claim of discrimination and nor did differences appear unrelatable such that the claimants had nothing in common with other groups.

The discrimination inquiry in *Corbiere* was conducted from the perspective of the claimants, namely off-reserve band members considered as a whole, and not simply either Indian band members or those living in the cities and removed from their cultural context. Race and culture were seen as embodied in one identity of off-reserve residence as band members. Furthermore, the inquiry was firmly grounded in the Canadian context, which had historically, through legislation and

[187] Ibid [13].
[188] Ibid [60].
[189] Ibid [15].
[190] Ibid [19].

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government policies, contributed to exactly the sort of exclusion and marginalization being complained of. As L'Heureux-Dubé J correctly reminded the Court, the Canadian cultural context included the cultural context of aboriginal people, such that:

> [the] contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.[191]

All this and more was ultimately geared towards furthering the purpose of Section 15(1) of the Canadian Charter which was recognized as being:

> [T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[192]

The transformative purpose of Section 15(1) is apparent in this construction. In the final analysis, the impact of the exclusion was gauged from this perspective and whether the exclusion undermined this vision of the society. If it did, it was liable to be outlawed in order that the law, especially discrimination law qua Section 15(1), actually subverted disadvantage, stereotyping, and prejudice, and promoted equal dignity of all. The Court's reasoning and ultimate finding did this fittingly.

Corbiere is a unique example of how the characterization of a claim as based on an embedded ground like aboriginal residence which brings together two identities—aboriginal status and off-reserve residential status—can ultimately realize intersectionality in a meaningful way, appreciating all its key strands in the discrimination analysis. The result is far from that of single-axis discrimination, in its treatment of the nature of discrimination as actually causally defined by multiple systems of disadvantage. Unlike multiple discrimination, these systems are studied interactively, appreciating their synergy rather than treating them in isolation. Finally, unlike additive discrimination, the causal connections are drawn clearly, without undermining the complexity of their interaction and overemphasizing either sameness or difference as the key to intersectionality.

But it is important to note that not every case will yield itself to this category of discrimination based on an embedded analogous ground. For example, Lord Phillips' hypothetical scenario of the fat Black man may not immediately appear to be a case based on a distinctive ground of race–weight, unless the socio-cultural,

[191] Ibid [54].
[192] Ibid [58] (quoting *Law v Canada* (n 99) [51]).

historical, and legal context of the claim allows for such a ground to pass the test of grounds, such as one based on immutability, fundamental choice, lack of political power etc. This—to show a compound ground as embedded within an enumerated ground—is often not easy in discrimination law other than for obvious cases. For example, as the Court in *Corbiere* acknowledged, pregnancy is considered a separate embedded ground both related to sex or gender and, in particular, related to the condition of pregnancy, which does not affect all women but can only affect women in fact. Another example may be the case of discrimination against sex workers in *Jordan*, which can be imagined as a matter of both sex/gender and employment status as a prostitute which predominantly affects women. The approach may also be helpful in arguing poverty as embedded in grounds like age combined with reliance on social assistance which protects unemployed youth from discrimination as in *Gosselin*.[193] But in all other cases, where the 'embeddedness' of an unrecognized ground (residence, weight, employment status, or poverty) within another, recognized ground (race or sex) is moot, it will be difficult to create a composite ground like aboriginality–residence to find for discrimination. One may have to look for another strategy for making intersectionality real in discrimination law. It is finally time, then, to turn to the category which promises to do so, of what may be called intersectional discrimination proper.

7. Intersectional Discrimination

The effort in the last five sections has been to explain eight different conceptual categories of framing discrimination which occurs on multiple grounds. All of them relate to intersectionality in different ways—some reflecting the strands of intersectionality in a much more considered and profound way (like capacious and contextual single-axis discrimination, and embedded discrimination), and others (like strict and substantial single-axis discrimination, and multiple discrimination) failing to do so. Additive discrimination lies somewhere in between these successful and failed efforts in terms of appreciating intersectionality. In contrast with all is the category which embraces intersectionality fully—intersectional discrimination.

We already have a sense of what this category may look like. Indeed, given that we know what the real or potential shortcomings of the rest of the categories are, we can imagine what overcoming them means. But what we are after is not simply finding for each strand of intersectionality in the judicial conceptualization of

[193] This was the preferred approach of the feminist judgment of *Gosselin* written by the Women's Court of Canada: Gwen Brodsky, Rachel Cox, Shelagh Day, and Kate Stephenson, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 Canadian Journal of Women and the Law 193.

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multi-ground discrimination but, ultimately, how that aids in explicating a comprehensive and clear understanding of what such multi-causal discrimination looks like. A few good examples in comparative case law reflect this diagnostic clarity befittingly. In particular, the approach of the South African Constitutional Court in *Hassam v Jacobs*[194] serves as a model for this category.

Hassam involved a challenge to certain legislative provisions which excluded widows of Muslim polygynous marriages from intestate succession. The claimant had been married to the deceased under Muslim rites. She argued that her exclusion from inheriting the property of her deceased husband constituted unfair discrimination on the grounds of religion, marital status, and gender.[195] The failure to include spouses of polygynous Muslim marriages was argued as indirect discrimination against women on the basis of gender generally, and Muslim widows in polygynous marriages specifically, given 'the reality that women constitute a particularly vulnerable segment of the population' and that the impugned Act 'operates to the detriment of Muslim women but not Muslim men because only Muslim men may have multiple spouses under Islamic Law'.[196] Similarly, she argued that the discrimination was one based on marital status because it excluded certain kind of relationships from protection, but in particular it was problematic because it withheld protections from Muslim widows in polygynous marriages.[197] Finally, the religious aspect of discrimination was argued as entrenching the historical subordination of Muslims, in particular that the 'non-recognition prejudices widows of polygynous Muslim marriages in that it fails to have regard to their lived reality and to accommodate diversity within a heterogeneous society'.[198] The scheme of arguments mirrors the framework of intersectionality. Each of the claimants' arguments mapped similar and different patterns of group disadvantage based on multiple grounds (religion, marital status, and gender), noting not only the uniqueness of disadvantage suffered as a Muslim woman in a polygynous marriage, but also connecting it to broader patterns of group disadvantage shared with women, Muslims, and those in non-traditional marriages, and, also, intersectional groups like Muslim women, and women in non-traditional forms of marriages, while acknowledging stark differences, viz. with Muslim men who were not similarly affected.

Before embarking on the discrimination analysis under Section 9(3) of the South African Constitution, the Court set out the interpretive approach to be used in making the determination. Noting the shift in the constitutional landscape and ethos at the end of the apartheid era, the Court held that 'the content of public policy must now be determined with reference to the founding values underlying

[194] 2009 (5) SA 572 (hereafter *Hassam*).
[195] Ibid [9].
[196] Ibid [11].
[197] Ibid [11].
[198] Ibid [14].

our constitutional democracy, including human dignity and equality'.[199] This was important in light of the rich history and diversity of the South African society, including the social reality of prejudice directed towards the Muslim community in South Africa.[200] The values of equality, dignity, and diversity thus framed the constitutional interpretation with the specific purpose of 'the achievement of the progressive realisation of our "transformative constitutionalism" '.[201] The jurisprudence of transformative constitutionalism reckons with the transformative strand of intersectionality perfectly in its emphasis on transcending the past, transitioning from the status quo and transforming into 'a truly equal society'.[202]

Following this interpretive approach with the goal of transformation in mind, the Court applied the three-part *Harksen* test for unfair discrimination.[203] It first considered whether the differentiation was on grounds listed under Section 9(3). According to Nkabinde J, this question had to be answered 'contextually and in the light of our history'.[204] The South African context and history included the past when 'Muslim marriages, whether polygynous or not, were deprived of legal recognition'.[205] However, under the current law, it was Muslim women, not Muslim men, who were excluded from intestate succession because only Muslim men would have multiple spouses. But it was not that Muslim women per se were being discriminated against. It was particularly Muslim widows of polygynous marriages and not widows married in terms of the regular Marriage Act or those in monogamous Muslim marriages or even widows in polygynous customary marriages, all of whose marriages were recognized.[206] According to the Court, the complexity of this difference meant that discrimination in this case could be understood as overlapping on the grounds of religion, marital status, and gender.[207]

Having determined that the differentiation amounted to discrimination based on the 'overlapping' grounds of religion, marital status, and gender, Nkabinde J considered whether such discrimination amounted to 'unfair discrimination'. This inquiry focussed on the impact on the claimant and those in her position.

[199] Ibid [26].
[200] Ibid [25] [27].
[201] Ibid [26].
[202] Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351, 353. See *S v Makwanyane* 1995 3 SA 391 (SACC) [262] ('What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future'); *Du Plessis v De Klerk* 1996 3 SA 850 (SACC) [157] ('[The Constitution] is a document that seeks to transform the status quo ante into a new order'); *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (SACC) [100] ('Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity').
[203] *Harksen* (n 11) [54].
[204] *Hassam* (n 194) [33].
[205] Ibid.
[206] Ibid [31].
[207] Ibid [34].

1958

Considering the claimant as a whole, that is a Muslim widow of a polygynous marriage, the Court traced the patterns of group disadvantage as follows:

> women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.[208]
>
> By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve.[209]
>
> The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion.[210]

What these passages do is recognize the interrelationship between patterns of group disadvantage based on marital status, gender, and religion respectively, such that a claimant like a woman in a polygynous Muslim marriage is seen as suffering disadvantage not only as someone uniquely in this position vis-à-vis the disadvantaged groups of women, Muslims, and those in polygynous marriages; but also as someone who shared her disadvantage with these groups. The appreciation of the dynamic of sameness and difference in patterns of group disadvantage based on religion, marital status, and gender, by considering the claimant as a whole (i.e. a Muslim woman in a polygynous marriage, within the South African context, history, and contemporary society) against the transformative ideals of the South African Constitution, allowed the Court to appreciate the reality and totality of the discrimination at play. The exclusion of Muslim widows in polygynous marriages from intestate succession was thus recognized as causing 'significant and material disadvantage' and harm of 'non-recognition' by enforcing 'patterns of stereotyping and patriarchal practices' as if the claimant and those in her position were 'unworthy of protection'.[211] The reality and the totality of this disadvantage could only be appreciated because of the Court's careful discrimination analysis which is characteristic of intersectionality. Each strand of the framework found its way, succinctly but sufficiently, into the Court's reasoning, making a difference to the understanding of the nature of discrimination in this particular case. *Hassam* is a case in point of breaking through the complexity of intersectional discrimination,

[208] Ibid [36].
[209] Ibid [37].
[210] Ibid [38].
[211] Ibid [34] [36] [37].

in being able to diagnose and explain it *as it is* rather than transmogrifying it into a proxy category.[212]

In fact, as *Hassam* demonstrates, breaking through the complexity of intersectional discrimination does not require complicated tact. As other cases also show, intersectionality can be appreciated rather straightforwardly—with different strands feeding into one another dialectally not sequentially. The decision of the Human Rights Tribunal of Ontario in *Baylis-Flannery v DeWilde*[213] is an apt example. The facts involved the claimant who worked as a receptionist at the respondent's physiotherapy clinic. She complained of discrimination 'in a way that was both racialized and sexualized'.[214] Her allegation was that she was treated badly because she was Black, and that this behaviour was coupled with unwelcome sexual advances and sexually coloured remarks and solicitations. In the Tribunal's opinion:

> reliance on a single axis analysis where multiple grounds of discrimination are found, tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred.[215]

The Tribunal thus treated the claim as based on both race and sex, such that the discrimination in question was 'intersectional'.[216] It found that the claimant's right to equal treatment with respect to employment without discrimination had been infringed based on race and sex because the respondent:

> sexually solicited her, sexually harassed her, racially harassed her, engaged in discriminatory treatment toward her within her employment, and poisoned her workplace with pornography that mirrored both her race and gender. He did so because she is an attractive, young Black woman, and all the evidence heard about his views about Blacks and Africans, his comments about dating, his visits to strip clubs in Detroit, about his fixation with Malina, about the Black female escort he found attractive on the internet, and about his hiring practices indicate that he has a stereotypical view of attractive, young, Black women over whom he can assert economic power and control.[217]

In the final analysis, the intersectional nature of discrimination was found to have caused 'wilfully and recklessly [injury to] her dignity and worth' as well as 'damage

[212] See also *Daniels v Campbell No* 2004 (5) SA 331 (SACC), which carries out a similar analysis of discrimination based on marital status, religion, and culture regarding the exclusion of surviving spouses, married under Muslim rites, from statutory intestate succession.
[213] 2003 HRTO 28 (hereafter *Baylis-Flannery*). See also *Flamand v DGN Investments* 2005 HRTO 10.
[214] Ibid [3].
[215] Ibid [144].
[216] Ibid [143]–[149].
[217] Ibid [146].

to her physical and emotional well-being'.[218] The impact of intersectional discrimination was considered to have exacerbated the mental anguish of the claimant,[219] such that it was 'greater' than would have been experienced if the matter were based on a single ground.[220]

It is important to note that, unlike the US courts and even the employment tribunals in the UK, the Tribunal in *Baylis-Flannery* resisted the classification of these instances of treatment as examples of either racism or sexism. Thus, the defendant's enquiries about the claimant's relationship status, comments about his preference for 'young black girls', descriptions of women's bodies, and references to Black women's physical characteristics[221] were all considered inappropriate and discriminatory 'based on both race and sex'.[222] The Tribunal was quick to explain that although the findings of the case were:

> of sufficient gravity that Ms Baylis-Flannery could succeed on either enumerated ground of race or sex, or on both grounds, one set following the other, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman. The danger in adopting a single ground approach to the analysis of this case is that it could be characterized as a sexual harassment matter that involved a Black complainant, thus negating the importance of the racial discrimination that she suffered as a Black woman. In terms of the impact on her psyche, the whole is more than the sum of the parts: the impact of these highly discriminatory acts on her personhood is serious.[223]

The reason for not treating the claim as a case of single-axis, multiple, or additive discrimination is apparent in this reasoning. According to the Tribunal, respecting the integrity of the claimant *as a whole person* meant that it could not bifurcate the evidence before it as race or sex based. Importantly, the acknowledgement of the claimant's integrity was not simply an expressive matter but one which was causally important, lest it would have led to a mischaracterization of the nature of harassment and discrimination suffered *as a Black woman*. The Tribunal appears to be clear in its understanding that the nature of sexual harassment changes its character fundamentally when directed against a Black woman and that racial discrimination is causally significant in determining the experience of sexual harassment. The reasoning appears to treat strands of intersectional thinking as inseparable in that similar and different patterns of group disadvantage suffered on the basis of race and sex could only be appreciated when the claimant was considered as a whole person. This inquiry was guided, in turn, by the immediate context of her

[218] Ibid [145].
[219] Ibid [143].
[220] Ibid [149].
[221] Ibid [123] [124].
[222] Ibid [125].
[223] Ibid [145].

discrimination as defined by the power dynamics of the workplace where her employer was in a position of power and control over her socio-economic status and stability, as well as the broad and purposive dignity jurisprudence of the Canadian Supreme Court, which is committed to affirming equal moral worth of all despite such power structures.[224] While it is contestable how transformative the dignity jurisprudence has actually been, there is no doubt that the contours of dignity in Canada have at least been defined in as transformative terms as possible.[225] The decision in *Baylis-Flannery* reflects this in its final holding, governed by a sense of minimizing the harm to human dignity when individuals and groups are 'marginalized, ignored or devalued', and enhances it by recognizing 'the full place of all individuals and groups within society'.[226]

Recently, the ECtHR too has shown signs of embracing intersectional discrimination in the case of *BS v Spain*.[227] The case concerned a migrant woman from Nigeria who was self-employed as a sex worker in Spain. She was approached by the police at several points during the course of her employment, who had asked her to present her identity documents, demanded her to leave the premises with lewd remarks, and had even struck her on several occasions.[228] She complained of verbal and physical abuse by the police and mishandling of her case by the Spanish judiciary. Before the ECtHR, she alleged that her rights under Article 3 (right against torture) and Article 14 (right to equality) had been violated on the basis of her race, gender, and employment status as a sex worker. She argued that 'her position as a Black woman working as a prostitute made her particularly vulnerable to discriminatory attacks and that those factors could not be considered separately but should be taken into account in their entirety, their interaction being essential for an examination of the facts of the case'.[229] The repeated inspections, insults, and injuries inflicted by the police and the failure of the Spanish courts to investigate and redress these allegations were thus a result of the claimant's specific vulnerability as a Black female sex worker in Spain. Further, she argued that her case was not a stray incident but one symptomatic of 'structural problems discrimination' in the Spanish judicial system.[230]

Third party intervenors presented intersectionality literature and 'invited the Court to recognise the phenomenon of intersectional discrimination'.[231] In light of the evidence submitted before it, the Court concluded that the Spanish courts had 'failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute' and 'to take all possible steps to ascertain

[224] Ibid [147] [148] (quoting from *Law v Canada* (n 99) [53] and *Egan* (n 26) (L'Heureux-Dubé J).
[225] See, for an account of this transformative potential, Denise G Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 1.
[226] *Baylis-Flannery* (n 213) [147].
[227] (2012) Application No 47159/08 (ECtHR).
[228] Ibid [8] [9].
[229] Ibid [52].
[230] Ibid [55].
[231] Ibid [56]–[57].

whether or not a discriminatory attitude might have played a role in the events.'[232] Similarly, the failure to investigate the 'causal link' between alleged racist attitudes and the violence perpetrated by the police was considered discriminatory under Article 14 of the ECHR.[233] The ECtHR thus cast the responsibility on the Spanish state to trace and address the structural forms of discrimination suffered by the claimant as a Nigerian sex worker and those similarly situated. A full-blown intersectional analysis does not appear in *BS v Spain*, but the ECtHR heard evidence on intersectional discrimination and found that a failure to investigate and address the case as such was a failure on the part of Spain which constituted a violation of Article 14 of the ECHR. The judgment is sparse in detail but poignant in its assertion that claims of intersectional discrimination should be investigated and redressed as such.

The case is significant when we remind ourselves that Article 14 of the ECHR is a parasitic right and is invoked only when the matter is within the ambit of another Convention right. As the next chapter shows, the Court does not often respond to Article 14 claims, single-axis or otherwise, especially when it has already found for a violation of another right. Roma women's cases of sterilization are typical of this.[234] In other cases where the Court does not find a violation at all, equality claims fail anyway. Muslim women's headscarf cases are typical of this.[235] Given this record, the ECtHR in *BS v Spain* need not necessarily have made a determination under Article 14, but, in doing so, it made a strong statement for national courts to embrace intersectionality in potential cases.[236]

In international human rights law, the CEDAW Committee has an extensive record of intersectionality in deciding individual communications under the Optional Protocol. The first substantive consideration of intersectionality appeared in *Alyne v Brazil*.[237] The author had challenged the poor quality of emergency obstetric care which led to the death of her daughter, Ms. Alyne da Silva Pimentel Teixeira, as violative of Articles 2 and 12, in conjunction with Article 1, of CEDAW. She alleged that the state party had not provided appropriate medical treatment in connection with pregnancy and had failed to ensure that timely emergency obstetric care was made available to all women, and, in particular, to women who were from particularly vulnerable areas and belonged to minority groups. The Committee recognized the sameness and difference in patterns of group disadvantage suffered by the author's daughter as one shared with women in general and in comparison with men, and

[232] Ibid [62].
[233] Ibid [60]
[234] *VC v Slovakia* (2012) Application No 18968/07 (ECtHR); *NB v Slovakia* (2010) Application No 29518/10 (ECtHR); *IG v Slovakia* (2013) Application No 15966/04 (ECtHR).
[235] *Dahlab v Switzerland* [2001] ECHR 449; *Şahin v Turkey* [2005] ECHR 819; *SAS v France* [2014] ECHR 695.
[236] Keina Yoshida, 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain' (2013) 21 Feminist Legal Studies 195.
[237] *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008 (views adopted on 25 July 2011).

uniquely as women from a disadvantaged and vulnerable background, including on the basis of their race and class.[238] Even though the Committee ended up calling such discrimination 'compounded' or 'multiple discrimination',[239] its thinking differed from the line of reasoning described in the previous sections as compound or multiple discrimination. The Committee was particular in causally linking grounds of race and sex to the experience of discrimination such that: 'the convergence or association of the different elements described by the author may have contributed to the failure to provide necessary and emergency care to her daughter, resulting in her death'.[240] It thus concluded that Ms Alyne was discriminated against 'not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background'.[241]

The term 'intersectional discrimination' appeared later in the Committee's decision in *Kell v Canada*,[242] where the Committee found discrimination against an aboriginal woman as a result of domestic violence which impaired the exercise of her property rights. It developed this analysis further in the context of intersectional gender violence in *RPB v Philippines*[243] where the Committee found for discrimination based on sex, age, and disability against a young deaf girl who was subjected to prejudices, stereotypes, and unfair practices during a rape trial. In particular, the Committee acknowledged the shared patterns of gender violence suffered by women generally,[244] and with women with disabilities,[245] in addition to the distinct disadvantages suffered by the claimant as a young deaf-mute girl.[246]

The CRPD Committee—although it has dealt with intersectionality ably in its General Comments, especially the latest General Comment no. 6 on the right to equality and non-discrimination—has not had the opportunity to decide an actual or potential case of intersectional discrimination. In contrast, the Human Rights Committee, in deciding over two hundred individual communications under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), has had numerous opportunities to deal with intersectional discrimination.[247] However, only its 2011 decision in *LNP v Argentina*[248] bears substantive resemblance to intersectionality. In *LNP*, the author of the communication

[238] Ibid [3.2] [5.9].
[239] Ibid [5.10] [7.7].
[240] Ibid [7.7].
[241] Ibid.
[242] CEDAW Committee, Communication No 19/2008, UN Doc CEDAW/C/51/D/19/2008 (views adopted on 28 February 2012).
[243] CEDAW Committee, Communication No 34/2011, UN Doc CEDAW/C/57/D/34/2011 (views adopted on 21 February 2014). See also *MS v Denmark*, CEDAW Committee, Communication No 40/2012, UN Doc CEDAW/C/55/D/40/2012 (views adopted on 22 July 2013) [5.8].
[244] Ibid [8.9] [8.10].
[245] Ibid [8.3] [8.6] [8.7].
[246] Ibid [8.5] [8.8].
[247] See, for an extended analysis of this, Shreya Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in ICCPR' (2017) 35(3) Nordic Journal of Human Rights 220.
[248] HRC, Communication No 1610/2007, UN Doc CCPR/C/102/D/1610/2007 (2011).

complained of discrimination based on her sex and ethnicity in the way that her rape complaint was handled and decided by the police and judicial system in Argentina. She showed specific instances of having been targeted as a minor indigenous girl, including inordinate delay in responding to her complaint; lapses in investigation and unfair trial of her case as compared to rapes reported by women of the dominant community; the re-victimization of the author by perpetrating negative stereotypes about her character and morals during the trial; and the use of Spanish throughout the process despite the protests of the author and her family that they did not understand Spanish as indigenous people. According to her, these instances showed a pattern of systemic disadvantage suffered by indigenous women such that:

> . . . her case is by no means exceptional, since Qom girls and women are frequently exposed to sexual assault in the area, while the pattern of impunity that exists in regard to such cases is promoted by the prevalence of racist attitudes. The author adds that, in the opposite case, when a Creole woman says that she has been raped by a Qom, he is immediately arrested and sentenced.[249]

The Committee agreed with the author's careful detailing of her experience of specific, as well as shared, forms of discrimination and found that the state had violated Article 26 of the ICCPR based on the author's gender and ethnicity. The appreciation of this dynamic by considering the claimant as a whole—as a young Qom girl, in the context of existing patterns of discrimination suffered by Qom women in comparison to Creole women in Argentina—is the only real instance of the HRC adopting an intersectional framework with the purpose of transformation.

It is useful to note that decisions of treaty bodies are not binding in law, given that the committee members do not sit as a court and are, in fact, not all lawyers. They are not written in the manner of typical legal opinions and are kept characteristically terse. It is arguable that this non-legalistic nature of determination in international law may lend itself to greater consideration of intersectionality. However, this has not especially been the case, substantively speaking. In comparison with *Hassam* and *Baylis-Flannery*, the key strands of intersectionality are not appreciated in comprehensive detail by any of the human rights treaty bodies.[250]

[249] Ibid [2.7].

[250] See, for example, the latest decisions of the Human Rights Committee which found that the French ban on wearing a full-face veil discriminated against Muslim women [*Sonia Yaker v France*, Communication No 2747/2016, UN Doc CCPR/C/123/D/2747/2016 (2018); *Miriana Hebbadj v France*, Communication No 2807/2016, UN Doc CCPR/C/123/D/2807/2016 (2018), both decided on 17 July 2018]. Although the Committee finds for 'intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant', the analysis is too sparse to explain in what way was it a case of intersectional discrimination in fact. It may be argued that cases like these are too obviously intersectional to bother with this explanation. However, obvious or not, a clear and comprehensive, even if pithy, explanation of intersectionality may be important for appreciating what is wrong about

This matters because, ultimately, intersectionality must make a diagnostic difference to the way we conceive of cases of intersectional discrimination—in determining the multiple grounds on which they are based and how these interact and lead to the disadvantage which is sought to be addressed through the body of discrimination law. The appreciation of the dynamic of sameness and difference in patterns of group disadvantage, which can only be accomplished by considering the claimant's identity as a whole and in its context, serves exactly this diagnostic purpose in discrimination law. The first four strands of the framework of intersectionality are thus intertwined such that they can only transpire together—it is not possible to appreciate the dynamic of sameness and difference of patterns of group disadvantage without appreciating the claimant's integrity or out of the relevant context of discrimination. The final strand of transformation, however, is more dispersed. While intersectionality is committed to its transformative aims of upturning the structures of disadvantage associated with identities and envisioning a world without such disadvantage, not all of discrimination law is couched in this way. South Africa is unique in its commitment to transformative constitutionalism, which includes its commitment to the transformative aims of discrimination law. It is thus unsurprising that the *Hassam* Court did not just draw on the core of intersectionality, as in sameness and difference in patterns of group disadvantage considered as a whole and in their context, but did so with the purpose of subverting such patterns of disadvantage, so as to achieve transformation of a diverse yet divided post-apartheid South African society. The result reflects the category of discrimination which comprehensively touches upon all aspects of intersectionality, and hence represents intersectional discrimination. *Baylis-Flannery* is not too far behind in its elaboration of the nature of intersectional discrimination in light of intersectionality, including a keen appreciation of the particular context of workplace harassment and discrimination claims, as well as the overall purpose of the Canadian jurisprudence to affirm the dignity of all. Other examples of intersectional discrimination in international law, including the ECtHR and human rights treaty bodies, are more light-touch in contrast. But their causal understanding of intersectional discrimination is not amiss and shows genuine signs of appreciating causality through the dynamic of sameness and difference in patterns of group disadvantage.

In sum, examples of intersectional discrimination in case law may not be rife but there are sure-fire signs of success in the few and relevant examples considered above. Intersectionality does not receive a uniform treatment in how much each of its strands is appreciated in each case. But it is clear that each case which does bear on multiple grounds of discrimination can be appreciated faithfully as an

it as a case of discrimination (even where intuitive). It may also matter for other external reasons, including for transparency in (non)judicial reasoning and as guidance for future claimants and domestic judges.

intersectional case when the strands are appreciated at all. Most important amongst these turns out to be the strand which explains the causality of an intersectional claim transpiring on multiple grounds, as in the dynamic of sameness and difference. This emerges only when claimants are treated as whole persons, composed of their many identities as members of disadvantaged groups, and considered in their relevant context. Taken together, these reveal the patterns of group disadvantage which help appreciate intersectional discrimination as discrimination from which people must be protected. Once this is appreciated, intersectionality points to transformative ways of addressing such disadvantage and at least some judges have been able to draw on this aim appropriately in redressing intersectional discrimination.

Conclusion

This chapter canvassed the dissonance with the 'dominant ways of thinking about discrimination law'[251] in responding to intersectionality. Crenshaw's initial dissonance was with the dominance of single-axis discrimination. Thirty years later, there may be dissonance over more than just strictly single-axis discrimination. Ways of thinking about discrimination have multiplied, especially in response to multi-ground claims. Some of them relate to intersectionality more than others. Thus, categories like contextual and capacious single-axis discrimination have been constructed in jurisdictions ingrained in single-axis thinking to be able to accommodate claims of a more diverse kind. Similarly, multiple, additive, and embedded discrimination each allow more than one ground to be accounted for in the discrimination inquiry. However, multiple discrimination only accounts for multiple grounds in the scheme of single-axis discrimination such that each ground is seen to contribute to discrimination independently. In contrast, additive discrimination goes further and accounts for some complex ways in which grounds interact as a combination or compound of different patterns of discrimination. Either way, it overemphasizes or undermines the dynamic of sameness and difference rather than considering it as transpiring simultaneously. Embedded discrimination conceptualizes multi-ground discrimination as being based on a hybrid ground, which represents the complexity of discrimination at work. Embedded discrimination seems to be able to speak to the intersectionality of subgroups or grounds considered to be 'embedded' in individual grounds, and seems well conceived in appreciating intersectionality. Yet, for all other general cases of multi-ground discrimination, it may only be the category of intersectional discrimination proper which may account for the nature of discrimination based on multiple grounds. So,

[251] Crenshaw, 'Demarginalizing' (n 151) 150.

in order to make normative space for intersectionality, we need to think in terms of the category of intersectional discrimination which embodies the key strands of intersectionality outlined in chapter 2. This means two things. First, going beyond single-axis thinking and reimagining discrimination as something which can be causally based on multiple identities. It requires identifying accurately the multiple grounds which may have caused discrimination in a claim. This relates to not just how (through which act or policies) discrimination came about but also how it comes about 'on the basis of' or 'because of' or 'on grounds of' certain kinds of identities. The fact that the harm of discrimination flows as a (loose) consequence of certain kinds of identities (recognized as grounds of discrimination) represents the distinctive understanding of causation in discrimination law. While single-axis discrimination implicates only one identity in the discrimination inquiry, intersectional discrimination would involve two or more. The framework of intersectionality helps understand what it means for discrimination to be based on more than one ground. Thus, secondly, intersectionality posits what the nature of such discrimination is, namely same and different patterns of group disadvantage associated with multiple identities considered as a whole and in their relevant context. Intersectionality also dictates that the purpose of appreciating this is ultimately to transform these patterns and indeed dismantle them as structures of disadvantage and systems of power.

4
The Practice
Establishing an Intersectional Claim

Introduction

The focus of this book has been on identifying and responding to the gap between intersectionality theory and discrimination law. The gap, as we determined in chapter 1, is theoretical, categorial, and doctrinal in nature, in that it requires efforts in all these dimensions to make discrimination law respond to intersectionality. Chapter 2 addressed the normative gap by distilling the key strands of a framework of intersectionality theory for the purposes of discrimination law. Chapter 3 addressed the categorial gap in discrimination law for conceptualizing the category of intersectional discrimination which corresponded with the framework of intersectionality. The doctrinal task of actually proving a claim of intersectional discrimination so called remains to be fulfilled.

The task is presumably mammoth. A substantive restatement of discrimination law doctrine from the standpoint of intersectionality is required, to conceive of intersectional discrimination in a comprehensive way. From rethinking the legal and moral foundations of discrimination to settling practical matters (like recognizing grounds, classifying direct and indirect discrimination, using the comparator test, restating the burden of proof, choosing an appropriate standard of review, applying the justification defences, and imagining a suitable remedy), a complete account of intersectional discrimination will have to be wide-ranging.

This final chapter looks into these doctrinal recalibrations needed to respond to the category of intersectional discrimination. Section 1 weighs up the different legislative and constitutional texts which make intersectional discrimination viable in discrimination law. It concludes that it is not so much the drafting of the text as its interpretation which makes non-discrimination provisions intersectionality-friendly. Section 2 considers the nature of grounds in discrimination law and the criteria for identifying analogous grounds. It defends the position that we need to retain the diagnostic purpose that grounds serve in discrimination law but it also suggests that we need to expand the breadth of grounds to reflect the vast spectrum of disadvantage suffered by people because of their identities. Section 3 analyses what direct and indirect forms of intersectional discrimination look like and problematizes the notion of maintaining a strict distinction between the two.

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This is because intersectional discrimination defies such a binary approach and is often, in practice, a mix of both. Section 4 explores the substantive meaning of discrimination in terms of the touchstone or the test used for examining whether discrimination is actually wrongful in a case. The conclusion is that most substantive tests for discrimination are capable of capturing the wrong of intersectional discrimination, so long as we are attentive to the causal basis of it connected to multiple identities and the qualitative nature of the harm being produced by them in terms of intersecting patterns of group disadvantage. Section 5 argues that a holistic and contextual approach to comparison can be employed for this purpose—to determine multiple grounds of discrimination, as well as the wrongfulness of discrimination. Section 6 considers the standard of review and type of justification analysis that works for intersectional discrimination, discussing in particular the inexplicable inconsistencies in the application of both of these to single-axis versus intersectional claims. Section 7, on the burden of proof, critiques the inordinate burden placed on claimants in intersectional claims and posits a justification for levelling the burden of proof no matter the number of grounds or type of claim. Finally, section 8 canvasses the kind of remedies available for intersectional claims. It argues that remedies which make a difference are those which are specific and transformative in redressing intersectional discrimination. Higher or aggravated damages or any other quantitatively superior remedy is just one, and certainly not the only, way to redress intersectional discrimination.

This chapter thus presents a granulated account of intersectional discrimination in comparative discrimination law. It uses much of the case law discussed in the previous chapter as its starting point to understand how individual aspects in discrimination law relate to intersectional discrimination at a micro level. The chapter should be read together with chapter 3, which provides a macro analysis of whether these cases were conceptually categorized as a matter of intersectional discrimination or otherwise. Given the resistance to appreciating these cases as intersectional discrimination, the case law relevant for the present purposes is not vast. The effort has thus been to identify those cases and examples in comparative doctrine which give some indication of the key issues involved in respect of each of the broad doctrinal features of discrimination enumerated above. The discussion should help develop a normative idea of the recalibrations necessary for realizing a claim of intersectional discrimination. Needless to say, none of these recalibrations would be sufficient by themselves. To refer back to the imagery used in chapter 1 to describe the project of this book—discrimination law has to be imagined as a giant wheel of interconnected cogwheels, where each cog needs to work independently and simultaneously towards processing a claim of intersectional discrimination. So, the normative positions arrived at in this chapter should be taken together with other such positions developed in the chapter and the rest of the book, to see the difference in discrimination law reimagined from the perspective of intersectionality.

1970

1. Text of Guarantees

The discussion in the previous chapter posited that the fundamental problem with realizing intersectionality in discrimination law is the lack of a category for thinking about discrimination which befits intersectionality theory. Not much was said of whether such a characterization should exist in the text of the non-discrimination guarantees. However, as we saw in chapter 1, the text does in fact matter. It matters at two levels—first, whether it allows discrimination to be based on more than one ground, and second, whether any such multi-ground discrimination can be interpreted as a matter of intersectional discrimination. Chapter 1 compared positions across international and comparative jurisdictions to gauge how different answers to these two questions have influenced the development of discrimination law in addressing intersectional discrimination. A constitutional provision like Section 9(3) of the South African Constitution, a statutory provision like Section 3.1 of the Canadian Human Rights Act, and a definition of intersectional discrimination like that in paragraph 19 of General Comment no. 6 of the UN Convention on the Rights of Persons with Disabilities (CRPD) Committee[1] give a resounding yes to both of the questions posed above. But as we saw in chapter 3, it is not necessary that these provisions actually be interpreted and enforced this way. South African jurisprudence is a case in point of the different ways in which an enabling non-discrimination guarantee like Section 9(3) of the Constitution can be applied—as a matter of strictly single-axis discrimination in *Volks v Robinson*[2] and *S v Jordan*;[3] as substantially single-axis discrimination in *Brink v Kitshoff NO*;[4] capacious single-axis discrimination in the minority opinions of *Volks* and *Jordan*; additive discrimination in *Bhe v Magistrate, Khayelitsha*;[5] and intersectional discrimination in *Hassam v Jacobs*.[6] In fact, as the last chapter showed, most jurisdictions exhibit this diversity in responding to actual or potential claims of intersectional discrimination, no matter the actual text of their non-discrimination guarantees.

All that remains to be said in respect of the text of the discrimination guarantees, then, is that, while favourably worded provisions provide a foot in the door for recognizing intersectional discrimination, they are themselves insufficient for guaranteeing the realization of intersectional discrimination. It is the conceptual framing of discrimination defining those guarantees which makes a difference. Thus, even provisions which do not explicitly state that discrimination could be based on more than one ground have successfully accommodated intersectional

[1] CRPD Committee, General Comment No 6 on equality and non-discrimination, UN Doc CRPD/C/GC/6 (2018).
[2] 2005 (5) BCLR 446 (SACC) (hereafter *Volks*).
[3] 2002 (6) SA 642 (SACC) (hereafter *Jordan*).
[4] 1996 (4) SA 197 (SACC) (hereafter *Brink*).
[5] 2005 (1) SA 580 (SACC) (hereafter *Bhe*).
[6] 2009 (5) SA 572 (hereafter *Hassam*).

claims when interpreted in such a way. EU discrimination law is typical of this, its capacious single-axis reasoning proving sufficiently capable of appreciating intersectionality for certain recognized subgroups.[7]

Yet, some non-discrimination provisions seem awfully averse to intersectionality in the way they are cast. The notorious phrase 'on grounds only of' in Article 15(1) of the Indian Constitution is a prime example. The phrase has been interpreted to mean that discrimination based on one and only one ground is prohibited.[8] Even benignly worded provisions, such as in Title VII of the US Civil Rights Act of 1964, required some interpretation to be understood as *not* barring claims based on multiple grounds and, even so, not all the interpretations of multi-ground claims have been on a par with intersectionality.[9] On the other hand, while Section 14 of the UK Equality Act 2010 prohibits 'combination discrimination', the provision remains unenforced. Furthermore, there is little clarity as to whether the combination—which is meant to be limited to direct discrimination based on two enumerated grounds alone—implies additive (as in combination or compound) discrimination, or is actually intersectional discrimination. In contrast, Article 14 of the European Convention on Human Rights (ECHR) throws up its own unique challenges in not being an independent, self-standing non-discrimination guarantee. It has thus not been too sought after even where intersectional discrimination was at issue, most prominently in cases involving Muslim women's dress.[10]

The key point is that language does matter, but it is not determinative. A non-discrimination guarantee worded in an intersectionality-friendly way (i.e. explicitly recognizing that discrimination can be based on more than one ground and/or that such discrimination need not be proven separately on the basis of each ground) is thus a helpful starting point. It reduces the need for arguing that, even where discrimination is said to be based on a single ground alone, there is no justification for artificially confining it in such a way, because that is simply not how discrimination transpires in reality.[11] However, a provision which explicitly acknowledges this is neither necessary nor sufficient by itself for ensuring that intersectionality succeeds within it. While such a provision could certainly support intersectionality, nearly any other discrimination guarantee could too, because intersectionality resides not in multiple grounds or in the trope of intersectionality or intersectional discrimination; it resides in the way in which we interpret what those multiple grounds *do* in intersectional discrimination and what such discrimination actually *is*. This has been explained in the foregoing chapters. Here,

[7] See chapter 3, section 1.3.

[8] See chapter 3, section 1.1, nn 14–21 ff.

[9] See chapter 3, which shows how the US jurisprudence spans multiple categories of discrimination including single-axis, multiple, and additive discrimination.

[10] *Dahlab v Switzerland* [2001] ECHR 449; *Şahin v Turkey* [2005] ECHR 819; *SAS v France* [2014] ECHR 695 (hereafter *SAS*).

[11] This is the argument I make below with respect to art 15(1) of the Constitution of India.

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I want to take the example of apparently the hardest possible legal language—that of Article 15(1) of the Indian Constitution—and show how even that could be interpreted broadly to include intersectional discrimination, provided we are clear about one thing: the causal basis of discrimination.

To recap, Indian courts have had an unfavourable disposition towards outlawing discrimination that is based, even incidentally, on factors beyond the strict confines of a single ground.[12] They take their cue from the text of the constitutional non-discrimination guarantee, interpreted as strictly limiting discrimination to one ground only. This, though, is not the only possible interpretation of the constitutional text. In fact, considered as a whole and in the light of its history and cannons of constitutional interpretation, this is not a viable interpretation of Article 15(1) at all.[13]

Article 15(1) of the Indian Constitution provides that 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'. Two things need to be appreciated. First, a complete reading of Article 15(1) confirms that the prohibition of discrimination is one that is not simply based on *only* the enumerated grounds but also, based on *any of them*. The use of the word 'or' connecting the list of grounds to the phrase 'any of them' makes clear that discrimination that is prohibited can be based on the listed grounds alone or any of them in combination. Without the latter, the phrase 'or any of them' would be rendered redundant.[14] This is perhaps the most straightforward explanation for Article 15(1) to be interpreted as prohibiting discrimination based on *any* of the grounds, including intersectional discrimination on multiple grounds. Furthermore, there is an argument that the word 'only', even if not limiting the number of grounds in a claim, does limit the grounds which can be considered as the basis of discrimination. According to this argument, Article 15(1) signifies an exhaustive 'closed' list of grounds, barring recognition of discrimination based on grounds not enumerated therein. However, this argument has been sufficiently debunked with sexual orientation and transgender or third-gender status now considered analogous to grounds listed in Article 15(1).[15] This does not perforce

[12] See Indira Jaising, 'Gender Justice and the Supreme Court' in BN Kirpal et al (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2001). Cf Chandrachud J in *Navtej Singh Johar v Union of India* (Writ Petition (Criminal) No 76 of 2016) (decided on 6 September 2018) (Supreme Court of India) [36], expressing an openness towards interpreting art 15(1) in a way which goes beyond strictly single-axis discrimination and embraces intersectional discrimination based on 'other identities', in addition to a recognized ground of discrimination (hereafter *Navtej Johar*).

[13] See the complete version of this argument made in Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 Equal Rights Review 160.

[14] Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) 460–61.

[15] *Naz Foundation v Government of NCT* (2009) 160 DLT 277 (High Court of Delhi); *National Legal Services Authority v Union of India* (2014) 5 Supreme Court Cases 438 (Supreme Court of India) (hereafter *NALSA*); *Navtej Johar* (n 12).

mean that 'only' must now refer to the number of grounds in a discrimination claim. In fact, nothing in the drafting history of the Constitution indicates either of these quantitative limitations. What it does indicate, though, is that the phrase 'on grounds only of' may have been intended to have a causative import—signifying that discrimination is only that which is based on grounds.[16] The discussion on Article 15(1) by the Constituent Assembly (the body which drafted independent India's Constitution between 1947 and 1950) attributes no quantitative meaning to the word 'only', other than, perhaps, a qualitative link between the prohibition on discrimination and the five listed categories—religion, race, caste, sex, and place of birth—which is a causative understanding. Based on this understanding, 'only' in the phrase 'on grounds only of' is an adverb limiting the list of grounds, which means discrimination that is 'and no [more] besides; solely' based on the enumerated grounds is prohibited.[17] This meaning signifies what is special about discrimination law, that causation is not simply about cause and effect but them being linked by or based on certain grounds. This interpretation mirrors the causal phrases used in other jurisdictions where discrimination is that which is *based on, for the reason of* or *because of* certain grounds.[18] Intersectional discrimination fits this frame, in that discrimination of its kind is one that is *based on, for the reason of* or *because of* multiple grounds. Intersectionality thus does not require a different phrasing to be understood in these broadly causal terms. What is important for intersectional discrimination is for the typical phrases to not be quantitatively limited to discrimination based on a single ground. Instead, they should be interpreted as referring to the qualitative basis of discrimination, connecting it to the discriminator's act or omission (law, rule, criterion, policy, practice, decision) which disadvantages the claimant adversely and which is based on (whether directly or indirectly) certain kinds of identities (recognized as grounds or personal characteristics in discrimination law). With this we activate the possibility of recognizing causality such that it captures the qualitative basis of intersectional discrimination conceptually. Chapter 3 has already explained what that meant in terms of capturing the sameness and difference in patterns of group disadvantage considered as a whole and in their full and relevant context for transformative purposes. This section only clarifies that the text of discrimination guarantees, when interpreted as reflecting a broad causal understanding of discrimination to be linked to grounds, are well capable of supporting the conceptual framework of

[16] For example, one member even suggested replacing the provision with '[t]hat the State shall not make nor permit any discrimination against any citizen, on mere grounds of religion, race, caste or sex'; explaining that, '[t]he idea is if you put it like that, that would cover all cases.' This was not put to vote. Constituent Assembly of India Debates, Vol III, 29 April 1947.

[17] 'Only', Oxford English Dictionary <https://en.oxforddictionaries.com/definition/only> accessed 29 March 2019.

[18] US Civil Rights Act 1964, s 703a; UK Sex Discrimination Act 1975, ss 1, 2; UK Race Relations Act 1976, s 1; UK Disability Discrimination Act 1995, s 5; UK Equality Act 2010, ss 13, 19; Canadian Charter of Rights and Freedoms 1982, s 15(1); and Constitution of South Africa 1997, s 9(3).

intersectionality. Non-discrimination guarantees require reinterpretation rather than redrafting so as to actually be able to do so.

2. Grounds

In chapter 3, we looked at real or potential cases of intersectional discrimination of three kinds: (i) those which were argued on multiple grounds; (ii) those which discussed other grounds but were decided on a single ground; and (iii) those which were decided on a single ground and in which, even though other grounds/identities were apparently relevant, other grounds were not examined. The key to identifying intersectional claims lay in the possibility of multiple identities having been part of the reason why discrimination occurred. We saw that multiple identities (like weight, employment status, reliance on social assistance, and poverty) frequently went beyond the traditional construct and list of grounds recognized in discrimination law.

However, intersectionality theory did not exclusively develop as a theory of discrimination law to be limited by grounds in the first place. As chapter 2 showed, intersectionality was developed by Black feminists in many contexts—literature, poetry, philosophy, sociology, anthropology, psychology, etc. With a background in identity politics, intersectionality referred to identities rather than grounds in explaining people's experiences of discrimination. Yet, since only certain types of identities counted as grounds in discrimination law, intersectional discrimination also referred to grounds within the field. Crenshaw's initial response was framed in this way; looking at how the grounds of race and sex were construed under US discrimination law. This does not mean that the grounds-based approach to intersectionality is automatically the correct one. It only means that because Crenshaw was critiquing how Black women's claims were handled in discrimination law, it was axiomatic to refer to race and sex, both of which were recognized grounds of discrimination in the US under Title VII. Black feminism maintained an equal emphasis on class or poverty, which was then (as now) not recognized as a ground in Title VII or in most other jurisdictions. Both Black feminism and intersectionality theory have thus continued to relate to people's identities beyond recognized grounds, such as gender, race, religion, disability, and age, to include class, poverty, socio-economic status, residence, employment status, physical appearance, and weight.

So far, so good, if only grounds in discrimination law could accommodate intersectionality's reliance on identities which is far broader than the construct of grounds. But this has not been the case. Amongst the most seething criticisms of discrimination law has been criticism of the inability of grounds to accommodate intersectionality in this way.[19] The critique is both normative and practical—that

[19] Excellent analyses on the nature of grounds and their categorial application appear in: Daphne Gilbert, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill Law Journal 627;

the very idea of grounds is too limiting, both in principle and in practice, to either identify new grounds of discrimination or explain the nature of intersectional discrimination based on them. It is useful to address both the critiques. The argument here is that while the normative boundaries of grounds are indeed limited, it is a necessary limitation for discrimination law to be hinged on grounds, including for the purposes of intersectional discrimination (section 2.1). However, the doctrinal application of grounds does need revision, especially expanding the terms of construction of grounds in three ways—what each ground represents, how grounds relate to one another, and the criteria for selection of new (analogous) grounds (section 2.2).

2.1 The Construct of Grounds

I have stated at several points that this book relies on and defends the normative construct of grounds in discrimination law. The continuum of judicial responses charted in the previous chapter worked centrally with grounds of discrimination, whether single or multiple, and with different conceptual frames of deploying them in the discrimination analysis. The continuum thus reflects the centrepiece around which discrimination law operates. Grounds, which define people's disadvantage associated with certain kinds of group identities, form the centrepiece of the framework of discrimination law.

I have also explained in chapter 3 that the causal basis of discrimination as linked to grounds is the key to understanding the legal wrong of discrimination, including intersectional discrimination. Without this link, discrimination is just a generic wrong, wherein people are distinguished or suffer some differential impact or detriment for reasons which are arbitrary or based on any other reason—animosity, favouritism, sympathy, etc.—and not necessarily because people possess certain personal characteristics for which they have historically suffered, and continue to suffer, specific and substantial forms of structural disadvantage. Without the latter, there is nothing special about discrimination law as we understand it.

It is thus important for intersectional discrimination to relate to grounds not as an unjustified inconvenience in recognizing intersectional discrimination as based on multiple grounds but as what intersectional discrimination must necessarily be based on. Intersectionality itself is not based on an unhinged idea of disadvantage, but is squarely based on disadvantage associated with certain kinds of identities.

Denise G Réaume, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 Osgoode Hall Law Journal 40; Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 Canadian Journal of Women and the Law 37 (hereafter Pothier, 'Connecting Grounds'); Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 Queen's Law Journal 179 (hereafter Iyer, 'Categorical Denials').

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Thus, intersectionality works with structural disadvantage explained in reference to people's identities, whether ascribed, self-defined, or perceived, which represent the disadvantage people bear as members of social groups (like women, Blacks, Asian people) defined by identity categories (like sex/gender/race). In Tarunabh Khaitan's words, the disadvantage people suffer as members of a socially salient group should be pervasive, abiding, and substantial.[20] Identities in intersectionality and grounds in discrimination law serve the common purpose—of linking the discriminatory treatment or impact to disadvantage defined along these lines. It is in this sense that identities or grounds serve as constant markers or reminders of why discrimination is prohibited.[21]

The problem, then, is not the broad purpose for which the construct of grounds exists; it is, instead, whether that construct can accommodate a broad range of disadvantages associated with people's identities. For example, socio-economic disadvantage, social class, poverty, residence, employment status, social origin, and weight remain at the margins of discrimination law, seldom recognized in the list of grounds by legislatures and readily rejected by courts as improperly constituting analogous grounds of discrimination. While intersectionality has no problem working with these identities to chart the sameness and difference in patterns of group disadvantage, discrimination law appears to oust these as causally significant *as* grounds of discrimination. This is because they do not easily fit the tests employed to identify grounds. We somehow need to align our working understanding of grounds with that of identity in intersectionality then. The next section does just this.

2.2 The Test for Grounds

The main problem with grounds, as Nitya Iyer's remarkable challenge shows, is that they are too 'narrowly defined' for the purposes of intersectionality.[22] This means several things.

First, that the definition of individual grounds is too narrow and does not reflect a wide range of disadvantages associated with them. Grounds defined narrowly become essentialist in what they represent and whom they protect. For example, the definition of the ground of sex once excluded protection from pregnancy discrimination,[23] and still excludes specific disadvantages associated with sex work

[20] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 35–38 (hereafter Khaitan, *A Theory of Discrimination Law*); Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) 43–45 (hereafter Young, *Justice and the Politics of Difference*).

[21] *Corbiere v Canada* [1999] 2 SCR 203 (SCC) [8] [11] (McLachlin and Bastarache JJ) (hereafter *Corbiere*); Pothier, 'Connecting Grounds' (n 19) 41.

[22] Iyer, 'Categorical Denials' (n 19).

[23] *Bliss v Attorney General of Canada* [1979] 1 SCR 183 (SCC).

despite it being a highly gendered form of labour.[24] There can be no hope for intersectional discrimination if grounds like sex are defined too narrowly to exclude attendant disadvantages of poverty, sex work, weight, physical appearance, etc. Secondly, even if grounds are defined broadly, there exists the problem of failing to see the interactions between them. This is the problem with an isolated reading of grounds, considering them as transpiring all on their own and individually rather than in relation to one another. Thirdly, grounds are criticized for being too few and exclusive, leaving out some very plausible categories from protection. This problem manifests in discrimination guarantees which operate with a 'list' of grounds.[25] These lists can be either 'closed' (enumerating a few grounds and not permitting the addition of new grounds) or 'open' (listing a few grounds non-exhaustively and permitting the addition of 'analogous' grounds). While closed lists throw a challenge by their very nature of being closed to expansion, open lists too may be narrowly interpreted in reference to a narrow criteria for selection of analogous grounds.

All of these problems often transpire together. The case of *Mossop v Canada (Attorney General)*,[26] discussed in the last chapter, exemplifies how the troubles with grounds become compounded. To recall, *Mossop* concerned the denial of bereavement leave to attend the funeral of a same-sex partner's parent. The denial was based on the interpretation of the word spouse in the collective agreement with the employer which limited bereavement leave to married heterosexual couples. It was argued as discriminatory on the basis of family status under the Canadian Human Rights Act (CHRA). The majority held that discrimination in this case could have been based on sexual orientation but for the fact that sexual orientation was not an enumerated ground under the CHRA. Since the claimant did not argue it as an analogous ground, and discrimination based on family status was considered justifiable, the Court held that there was no discrimination in this case.

The main problem with *Mossop* was the fact that sexual orientation was not an enumerated ground under the CHRA then, in 1993. The list of enumerated grounds, where meant to be exhaustive (as in the CHRA), posed a definite impediment to claiming discrimination based on an unenumerated ground. Thus, the claimant's strategy to proceed under family status instead of sexual orientation seems reasonable. But, given that the majority in *Mossop* thought that the claim was based on the ground of sexual orientation in fact, the strategy was liable to fail. Moreover, the enumerated ground of family status was understood in

[24] *Jordan* (n 3).

[25] The most prominent non-list provision is the Equal Protection Clause of the Fourteenth Amendment of the US Constitution which guarantees equal protection of laws to everyone within the jurisdiction. Even so, the US discrimination jurisprudence has developed with a sense of what protected characteristics or grounds under the Equal Protection Clause look like (viz. race) in order to attract higher levels of scrutiny. *United States v Carolene Products Company* 304 US 144 (1938) n 4.

[26] [1993] 1 SCR 554 (SCC) (hereafter *Mossop*).

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isolation to avoid the 'back-entry' of unenumerated grounds (like sexual orientation) through enumerated ones.[27] So, when sexual orientation was not itself recognized, its incidents and connections with family status were also not meant to be protected from discrimination. Thus, the claimants were inhibited in bringing a claim based not only on unenumerated grounds or the intersection of enumerated and unenumerated grounds but on the enumerated ground of family status itself.[28] The fact that a ground like family status was definitionally understood to exclude homosexual partnerships as familial relationships was simply the problem of defining the ground too narrowly for the purposes of what disadvantages it addressed and whom it protected. L'Heureux-Dubé J in her dissenting opinion in *Mossop* called this a 'narrow and exclusionary approach' at odds with the 'broad and purposive interpretation of human rights legislation'.[29]

Several things can be done about this—for example, first, reforming the narrow, exclusionary, categorial, and isolated application of grounds; and secondly, expanding the possibility of reading-in unenumerated grounds for protection from discrimination.

The first suggestion has been oft-repeated. In Iyer's words we need to 'open up the pockets and permit them to interact'.[30] Similarly, Crenshaw argues that '[i]dentity politics do not need to be abandoned because of their reliance on categories but rather need to recognize the multiplicity of identities and the ways categories intersect at specific sites'.[31] The suggestion is that pockets or identity categories and grounds need to be interpreted broadly and studied in light of their interrelationships. This view of categories essentially depends on how we use them in constructing frames of thinking about discrimination rather than what the categories themselves are. Thus, capacious and contextual single-axis discrimination, additive discrimination, embedded discrimination, and, of course, intersectional discrimination rely on grounds being considered broadly and in terms of their interactions. Readers can revisit this discussion in the previous chapter.

Here, I want to tackle the claim that grounds do indeed need opening up externally, so as to recognize more identity categories for protection from discrimination. I want to show that it is possible for both closed and open lists, when our criteria for recognition of grounds is wide enough, to reflect the diversity of disadvantage associated with identities. For that to be so, it is important for the criteria

[27] See also *Rutherford v Secretary for State and Industry* [2006] UKHL 19 [16] (Lord Scott) ('a difference in treatment of individuals that is based purely on age cannot be transformed by statistics from age discrimination, which it certainly is, to sex discrimination.').

[28] However, this may not always be the case. Cf *Fitzpatrick v Sterling Housing* [1999] 2 WLR 1113 (HL) (bringing homosexual relationships into the ambit of 'family' before sexual orientation was recognized as a ground) and *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (extending right of partners in a homosexual relationship for inheriting statutory tenancy).

[29] *Mossop* (n 26) 107 (L'Heureux-Dubé J).

[30] Iyer, 'Categorical Denials' (n 19) 204.

[31] Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1297–99.

to be based on a range of factors, none of which are necessary on their own but may independently or in combination be sufficient in underpinning the justification for both existing and analogous grounds.

The prospect of claiming discrimination on multiple grounds remains central to realizing intersectional discrimination. It is, in turn, enhanced by the prospect of claiming on not just enumerated but also unenumerated grounds. In jurisdictions like the UK and India, where the general non-discrimination guarantees operate with closed lists (under the Equality Act 2010 and Article 15(1) of the Constitution respectively), this may seem hard on the face of it. Though courts in both jurisdictions have made ambitious interpretive strides to read-in analogous grounds within existing grounds. Addressing caste discrimination through race and ethnic origin in the UK and transgender discrimination through sex in India are encouraging signs.[32] Where there is explicit allowance for reading-in analogous grounds, as in South Africa and Canada, the possibility of claiming on independent analogous grounds is even more promising.[33] Thus, despite the closed or open form of lists, claiming on multiple grounds, one or few of which are analogous, is conceivable in principle.

But, as the jurisprudence in the last chapter revealed, this is rather elusive for intersectional claims. Other than *Corbiere*, where the Canadian Supreme Court read in a new embedded analogous ground of aboriginality-residence, courts in cases like *Brink, Mossop, Gosselin v Quebec (Attorney General)*,[34] and *Jordan* did not attempt to recognize marital status (*Brink*), sexual orientation (*Mossop*), socio-economic disadvantage/reliance on social assistance (*Gosselin*), and employment status (*Jordan*) as analogous grounds relevant to the claims at hand.[35] Similarly, while the Supreme Court of India has recently gone on to recognize analogous grounds in single-axis claims, intersectional claims like *Air India* have neither considered the ground of sex to cover incidents of sex discrimination related to marital status, pregnancy, and age; nor considered these incidents as possible grounds of discrimination in themselves.[36] The US jurisprudence also limited the possibility of reading-in analogous grounds in the context of intersectional discrimination.[37]

[32] *Chandhok v Tirkey* [2015] ICR 527 (UKEAT) (interpreting 'caste' within the ground of 'ethnic origin' for the purposes of the Equality Act 2010); *NALSA* (n 15); *P v S and Cornwall County Council* [1996] IRLR 347 (CJEU).

[33] Section 15(1) of the Canadian Charter uses the words 'in particular' and s 9(3) of the South African Constitution uses 'including', before their respective lists of grounds.

[34] [2002] 4 SCR 429 (SCC) (hereafter *Gosselin*).

[35] Cf *Egan v Canada* [1995] 2 SCR 513 (SCC) (where the analogous ground of sexual orientation was recognized but the claim still failed) (hereafter *Egan*).

[36] It remains to be seen whether Chandrachud J's obiter in *Navtej Johar* (n 12), that claims like those based on both sex and height are presumptively covered within art 15(1) of the Constitution of India, gains any traction in future cases.

[37] For example, the 'plus' characteristic in cases involving two grounds must be an immutable one. See *Arnett v Aspin* 846 F Supp 1234 (1994) (United States District Court, Eastern District of Pennsylvania) 1241 ('[T]he current line drawn between viable and nonviable sex-plus claims is adequate—that the "plus" classification be based on either an immutable characteristic or the exercise of a fundamental

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The question has not really arisen in the context of EU law or the ECHR for intersectional claims, and the question does not quite arise under individual human rights treaties like the UN Convention on the Elimination of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of Persons with Disabilities (CRPD) which are limited to single grounds but do recognize, as the last chapter showed, intersections with other grounds, without having to recognize other grounds as 'analogous' to the main axis of sex or disability in CEDAW or CRPD respectively. Thus, for jurisdictions like Canada and South Africa, which *have* had single-axis claims succeed on analogous grounds, it is useful to ask what inhibits them in recognizing analogous grounds in intersectional claims?

We must begin with the test for recognizing analogous grounds in these jurisdictions. The leading test for identifying analogous grounds in Canada is one of actual or constructive immutability.[38] While the Supreme Court of Canada has hinted at other factors like 'the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against', they are taken to 'flow from the central concept of immutable or constructively immutable personal characteristics' without being independently relevant.[39] In the same way, factors like the relevance of a personal characteristic being the basis of stereotypes and affecting personal identity have been taken as derivative of the central construct of immutability.[40] However, the focus on immutability or fundamental choice has been criticized for being too narrow and only 'tangentially relevant'[41] to other indicia like political power, historical disadvantage, marginalization, prejudice, and stereotyping. Thus, in contrast, the South African Constitutional Court has read-in analogous grounds like citizenship,[42] HIV status,[43] and refugee status[44] in Section 9(3) without a single-minded focus on immutability. Analogous grounds are simply taken to be those that have the potential to violate human dignity[45] and the Court approaches this inquiry by identifying patterns of historical group disadvantage based on the prospective analogous ground.[46] In addition, it has considered other factors like political marginalization,[47] immutability,[48] and

right. And, although I have uncovered no other case that recognises a "sex-plus-age" discrimination claim under Title VII, it is clear that age is an immutable characteristic.').

[38] *Corbiere* (n 21) [13].
[39] Ibid.
[40] Ibid.
[41] Rosalind Dixon, 'The Supreme Court of Canada and Constitutional (Equality) Baselines' (2013) 50 Osgoode Hall Law Journal 637, 653.
[42] *Larbi-Odam v Member of the Executive Council for Education* 1998 (1) SA 745 (SACC) (hereafter *Larbi-Odam*).
[43] *Hoffmann v South African Airways* 2001 (1) SA 1 (SACC).
[44] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (SACC).
[45] *Harksen v Lane NO* 1998 (1) SA 300 (SACC) [47] (hereafter *Harksen*).
[46] Ibid [50] (Goldstone J); *Larbi-Odam* (n 42) [19]–[20].
[47] *Khosa v Minister of Social Development* 2004 (6) SA 505 (SACC) [71] (Mokgoro J).
[48] *Harksen* (n 45) [50] (Goldstone J).

personal choice[49] in making this determination. Underlining all of these is the idea of historical disadvantage which is considered a 'powerful indicator' for identifying analogous grounds.[50] That said, neither sex work nor employment status in *Jordan* were argued or considered to be potential analogous grounds from the perspective of historical disadvantage suffered by female sex workers. The reason may have been practical, in that Section 9(5) of the South African Constitution offers a presumption of unfairness for cases based on listed grounds. The presumption does not extend to analogous grounds, where the claimant bears the burden of proof to show that the discrimination based on them is actually unfair. Claiming on analogous grounds thus only compounds the obstacles in claiming on multiple grounds to prove intersectional discrimination.

A further problem with analogous grounds is that each of the contenders for the criteria of grounds—immutability, personal choice, dignity, autonomy, historical disadvantage, political powerlessness, marginalization, stereotyping, prejudice, or stigma—seem individually insufficient in explaining the basis of all possible grounds, listed or otherwise. For example, while age as a ground may be explained through a criterion like immutability, it may not be appreciated through the idea of political powerlessness which is more appropriate for a ground like citizenship; however, citizenship may not speak as much to personal identity as religion does, but religion and citizenship may both be explained by personal choice and autonomy; and yet, disability may be explained through none of them in particular, but in reference to a shared basis in all of them and in reference to historical disadvantage, marginalization, stereotyping, and prejudice. Thus, not all grounds 'fit' a single criterion for grounds.[51] This is because the identities recognized as grounds or personal characteristics each relate to a distinct set of disadvantages for which they need to be recognized and protected from discrimination. For example, race is problematic for the fact that it is immutable and one cannot shrug off the disadvantages which are associated with it, while religion is protected for the reason that, even though it can be changed, it can only be changed at a very high personal cost because it is important to people to retain and celebrate their religious affiliations without such disadvantage; disability, on the other hand, is presumably protected for neither of those reasons (based on immutability or personal choice), but because of the structural 'barriers' which inhibit the participation of disabled persons in society and contribute to their historical disadvantage, marginalization, and negative portrayal as lacking in worth or dignity. While historical disadvantage seems to run through most of these grounds, even that cannot be the only reference point for identifying grounds. With the recent rise of immigration and

[49] *Member of Executive Council for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (SACC) [61]–[67] (Langa CJ) (hereafter *Pillay*).

[50] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 139 (hereafter Fredman, *Discrimination Law*).

[51] Ibid 130–39.

displacement of people around the world, migrants or non-permanent residents of a state may be able to argue that they face a constant battering based on their socio-economic, cultural, and political status, quite on a par with other vulnerable groups in a state (including the poor, sexual minorities, and disabled persons). Their disadvantage may not be historic but is otherwise similar to disadvantage suffered by these social groups.

The criteria for the selection of grounds must then relate to and be extrapolated from a wide range of factors. A single criterion for all grounds can be limiting and unrepresentative of the diversity of disadvantage that grounds are meant to reflect, especially the peculiar nature of intersectional discrimination suffered on multiple grounds. This point is borne out in the South African Constitutional Court's decision in *Jordan*. The Court had found that the gender-neutral provision which criminalized both merchant and customer in the sex trade did not constitute unfair discrimination on the basis of gender under Section 9(3) of the Constitution. The majority in *Jordan* had doggedly focussed on the gender neutrality of the provision, ignoring the statistical evidence which showed that those targeted under the criminal provision were actually only women. But what was more problematic was the Court's framing of the employment status of sex workers in the illusory terms of choice—where women knowingly and willingly accepted the 'risks' of the trade,[52] including the indignity and incrimination which came with it. While employment status as a sex worker was not strictly immutable and involved some level of personal choice, this framing was misleading since it ignored indicia which better explained their status in terms of political powerlessness, exploitation, violence, stereotypes, prejudice, and marginalization. Thus, not only did the Court choose to ignore gender, a ground listed under Section 9(3) of the Constitution and attracting a presumption of unfairness under Section 9(5), but it made light of the employment status of sex workers which was the key to understanding the interminable cycle of disadvantage for female sex workers who were predominantly poor, abused, and vulnerable. The casualty was the lack of appreciation of the grounds on which discrimination was based in this case—not on gender alone, but specifically the intersection of gender as well as employment status of the women as sex workers. The specific nature of employment modified the character of discrimination at play which was not visited upon women and men in other forms of employment and even male sex workers. The key to the recognition of unfair discrimination in *Jordan*, then, lay in the recognition of intersecting grounds having caused such discrimination, viz. gender and the analogous ground of employment status or sex work that was based on a range of factors which explained what was problematic with it as a status to be protected from discrimination.[53]

[52] *Jordan* (n 3) [16] [52] [66].

[53] L'Heureux Dubé J makes this point emphatically: 'The enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination. If anything, a finding

In conclusion, it is useful to reiterate that intersectional claims will be better served only when there is a genuine possibility of being argued on multiple grounds. This possibility is genuine when the factors for recognizing analogous grounds are not constrained by traditional indicia of immutability and personal choice, and include political powerlessness, historical disadvantage, marginalization, stereotyping, prejudice, and stigma. A wider set of factors, taken individually or in combination, is better suited to describing existing or new grounds in a far more accurate way, representing the kind of disadvantages that can attach to grounds and to people belonging to the disadvantaged groups defined by those grounds.

A clarification is in order before we move on from grounds. The insistence on recognizing analogous grounds in reference to a range of factors should not be misconstrued as a demand for recognizing intersectionality through embedded grounds for every combination of grounds. While this worked in *Corbiere* for the ground of aboriginality-residence, this may not be as useful or even tenable in other cases. This fearful idea—of necessarily recognizing intersectionality via embedded grounds—was instilled by the *DeGraffenreid* Court which viewed a claim based on both sex and race as attempting 'to combine two causes of action into a new special sub-category'[54] and was reiterated in *Judge v Marsh* which warned against discrimination law transforming into a 'many-headed Hydra'.[55] The fear has evidently failed to materialize. For example, Black women's discrimination claims have never demanded the recognition of a separate hybrid ground of race–sex or gender–race as 'a super-category'[56] in order to succeed. No other case arguing for intersectional discrimination has expressed itself in this way either. Instead, the demand for the recognition of the nature of intersectional disadvantage suffered by Black women *as Black women* is not asking either for the recognition of that group per se as a matter of identity politics or the recognition of a separate ground which may denote that group perfectly in discrimination law. Such a claim would belie the complexity in intersectionality which resides neither in groups nor grounds purely but in the co-constitutive nature of systems of disadvantage or structures of power associated with either.

In any case, the claim for recognizing analogous grounds is to align our understanding of disadvantage based on identity categories in intersectionality with that of grounds in discrimination law. It is only for the purposes of allowing

of discrimination is a precondition to the recognition of an analogous ground.' *Egan* (n 35) [52] (L'Heureux-Dubé J).

[54] *DeGraffenreid v General Motors* 413 F Supp 142 (1976) (United States District Court, Eastern District of Missouri) 143 (hereafter *DeGraffenreid*).

[55] *Judge v Marsh* 649 F Supp 770 (1986) (United States District Court, District of Columbia) (hereafter *Judge v Marsh*).

[56] *DeGraffenreid* (n 54).

intersectional discrimination to also be based on non-traditional grounds like employment status, migrant status, poverty, residence, and physical appearance. Analogous grounds are sufficient for the purposes of intersectionality, when considered as independent but interactive systems of disadvantage, and not necessarily as categories which amalgamate into existing grounds and disappear into super-categories or form ever-so-small hybrid grounds based on every possible permutation of identities.

3. Direct and Indirect Discrimination

Discrimination, it is thought, comes in two forms—direct and indirect discrimination. Direct discrimination is understood as unequal treatment which is explicitly based on a ground or a protected characteristic. Indirect discrimination or disparate impact (in the US) is understood as inequality of results which is based on a neutral rule or practice that disproportionately affects those belonging to a particular disadvantaged group. This distinction, which appears uncomplicated on the face of it, has been vexed in practice. While some cases do show a propensity to be classified as either direct or indirect discrimination, others fail to be distinguished this way and may be classified as neither or both. The point was driven home by McLachlan J in her famed example of a rule which made it compulsory for all workers to report on Fridays.[57] The rule could be characterized as either directly discriminating against those whose religious beliefs proscribed work on Fridays, or classified as a neutral rule which applied to all employees of every religion equally but adversely affecting only those whose religion proscribed work on Fridays. The distinction seems unnecessary when ultimately the same discrimination ensues from both. McLachlan J concluded that the distinction between direct and indirect discrimination was thus too vague and malleable given that 'an adjudicator may unconsciously tend to classify the impugned standard in a way that fits the remedy he or she is contemplating'.[58] However, the distinction dictates the moral blameworthiness, justifications, standard of scrutiny, rules of burden of proof, and choice of remedies, based on how one classifies the rule. The distinction is thus far from superficial given its very practical implications.

The debate over the two forms of discrimination and the distinction between them resurfaces in cases of intersectional discrimination with even more gusto. Take the case of prohibition of Muslim women's headscarves. The prohibition can be viewed as explicitly directed against Muslim women based on the grounds of gender and race or religion. It can also be considered as a neutral prohibition on all

[57] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 SCR 3 (SCC) [27].

[58] Ibid [28].

kinds of headgear applicable to everyone and affecting Muslim women disproportionately on the basis of their gender and race or religion. It can also be couched as a prohibition on women's head coverings alone, in which case the prohibition would be based on the ground of gender explicitly but affect Muslim women based on the two grounds of gender and race or religion. The rule could also be couched as a prohibition on the display of all philosophical or religious beliefs, in which case it would be directly based on the ground of religion but would affect Muslim women based on the two grounds of gender and race or religion. It could even be a prohibition on the display of all religious beliefs and affect Muslim women, on the basis of their gender and race, as a form of Islamophobia or cultural prejudice against those perceived to be Arabs or Middle Eastern. All these permutations affect the same intersectional group, viz. Muslim women. But the permutations differ in the many ways they are couched, namely the criteria they are based on—whether a single ground, a neutral one, multiple grounds, or a combination of grounds and neutral considerations—and in the many ways their impact can be described—whether felt on the basis of gender and race (where intersectional impact is distinctly a combination of sexism and racial prejudice or otherness based on non-Europeanness) or gender and religion (where the intersectional impact is a combination of sexism and faith or preference for Judeo-Christian values). The sheer range of what may be described as either direct or indirect intersectional discrimination, or both, is mindboggling. Classification based on subtle differences can thus be exhausting and perhaps not too fruitful given the crossover between the categories.

Yet, form and classification matter in the way we understand discrimination substantively. The categories outlined in the previous chapter revealed that the frames of thinking about discrimination affected whether we understood the nature of intersectional discrimination at all. Making sense of the case law qua direct and indirect forms of discrimination may also help understand intersectional discrimination in a comprehensible way. One way to ensure this is to understand the relationship between grounds and impact, not simply in the single-axis format which populates our thinking of direct and indirect discrimination but to look more closely at the relationship between the two as it transpires in intersectional cases. Based on the case law canvassed in the previous chapter, four kinds of relationship between discrimination and grounds can be posited in intersectional claims—(i) discrimination which is directly based on multiple grounds and causes impact on those grounds; (ii) discrimination which is based on neutral criteria and causes indirect impact on multiple grounds; (iii) discrimination which is based facially on a single ground but causes impact on that and other grounds; and (iv) discrimination which is based on one or more grounds, coupled with a neutral consideration, and causes discriminatory impact on multiple grounds. Categories (i) and (ii) are what may be readily classified as direct and indirect intersectional discrimination respectively. The other two categories are harder to pin down. What helps in such cases is to appreciate the relationship between the criteria and

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grounds invoked, and the impact they lead to, which is intersectional in the way we have defined intersectional discrimination thus far. Case law can assist with this.

Relationship (i) exemplifies straightforward cases of direct intersectional discrimination where unequal treatment is meted out to someone specifically because of their personal characteristics. Employers or service providers who would not hire or serve fat Black men because they do not like or trust them or consider them worthy of holding a job or of being served are guilty of direct intersectional discrimination when relying on the grounds of both weight/obesity and race/colour in excluding fat Black men. The treatment of the claimant in *Baylis-Flannery v DeWilde*[59] is typical of direct intersectional discrimination by an individual who sexually and racially targets the claimant because she is a Black woman. The animus is more than amply clear in such cases. Where it is not, and the treatment can be explained on grounds other than race and sex, cases of direct intersectional discrimination tend to fail.[60] But besides the US, most jurisdictions do not rely on animus or intention to discriminate, in establishing direct discrimination, but on simply a coincidence of reasons for discriminating with grounds of discrimination, or a coincidence of 100 per cent of those affected being defined by membership of a disadvantaged group. Even under these tests, cases of direct intersectional discrimination may be identified rather easily. Thus, legislative provisions—such as those in *Bhe* and *Hassam*—which specifically exclude certain sections of women from intestate inheritance (i.e. women in customary marriages and those in Muslim polygynous marriages respectively) are also cases of direct intersectional discrimination irrespective of whether the legislatures harboured any intention to deprive these groups of inheritance. All that is needed to appreciate discrimination in these cases is that the legislative provisions are crafted in a way that they rely on certain protected characteristics or grounds to determine who qualifies for a certain benefit, or that the provision exclusively excludes certain groups defined by certain protected characteristics or grounds, namely, all those affected are women married under and governed by customary law (*Bhe*) or Muslim widows of polygynous marriages (*Hassam*). The legislation in *Corbiere* was similarly problematic having invoked both aboriginality and lack of residence on the reserve as the criteria for limiting voting rights. These intersectional cases are all forms of direct discrimination in reference to either the motive or reasoning of the discriminator or the 100 per cent coincidence of those affected being defined by two or more grounds of discrimination specifically. But the effect of such discrimination is that intersectional claimants end up suffering disadvantage which is unique to them. Thus, the claimants in *Corbiere* faced the unique disadvantage of being excluded from voting as aboriginal band members living off-reserve, while also facing the disadvantages suffered by aboriginal people generally. The effect or the impact of discrimination

[59] 2003 HRTO 28 (hereafter *Baylis-Flannery*).
[60] See, for example, *Bahl v The Law Society* [2004] EWCA Civ 1070 (UK Court of Appeal).

was thus intersectional because it represented the sameness and difference in patterns of group disadvantage when considered as a whole and in its full context.

The question which arises is whether we can simply focus on the impact to find for intersectional discrimination rather than trying to connect the criteria for differentiation, or reasons for treatment, to personal characteristics or grounds. This is what indirect discrimination does anyway: notwithstanding the neutrality of the discriminator's criteria, it focusses on the eventual disproportionate impact upon those who share a particular set of personal characteristics. Despite its apparent simplicity, there are great challenges to making a successful case of indirect intersectional discrimination based on impact rather than direct intersectional discrimination explicitly based on grounds. This is because indirect intersectional discrimination on multiple grounds does not just come about in one form but many—unlike its single-axis counterpart. These forms often overlap with direct discrimination, complicating our view of the neat distinction between direct and indirect forms of discrimination even further.

In indirect intersectional discrimination, we are thinking of at least three types of cases—relationships (ii) to (iv) above. Let us take them in turn. The locus classicus of *DeGraffenreid* exemplifies (ii). *DeGraffenreid* can be classified as a typical case of indirect intersectional discrimination where the neutral policy of 'last hired first fired' ended up disproportionately affecting Black women. Needless to say, inter alia, the fact that discrimination was not overtly blameworthy, and did not affect white women and Black men but specifically Black women, exacerbated the claimants' plight in establishing the claim. It was then not just the conceptual myopia of failing to see intersectionality which contributed to its defeat, but also the fact that the Court declined to look beyond the pale of neutrality. The judicial failure lies in the resistance to recognizing indirect discrimination based on a neutral policy.

But (ii) may be further divided into a type of indirect intersectional discrimination which is not simply based on one neutral policy or rule, but two or more of them which cumulatively lead to indirect intersectional impact based on multiple grounds. The case of *Tilern de Bique v Ministry of Defence*[61] comes to mind here. The discrimination in the case was said to be based on two independent neutral conditions—one of which was based on immigration and prohibited the claimant from bringing family from overseas for childcare, and the other of which was based on the expectation of constant availability for work that was impossible for the claimant to comply with as a single mother without childcare. Both the conditions were neutral (i.e. not based on grounds) and neither caused any unjustifiable direct or indirect discrimination independently. It was only the combined application of the two that impacted the claimant as a non-British army officer who was also a

[61] [2009] UKEAT/0075/11/SM (hereafter *Tilern*).

single mother without any family in the UK. It was only women like her who were going to be disproportionately impacted by the two conditions—given their inability to arrange affordable childcare and to comply with the conditions of military service. Those who were British nationals or had families in the UK, and those who were not single mothers, did not face these disadvantages. The Employment Appeal Tribunal thus determined that the two neutral conditions were indirectly discriminatory on the basis of both race and gender.

Tilern de Bique is an important case to remember. Intersectional discrimination, by its very nature, is about structures or systems of powers which collide, interact, and hence co-constitute one another to yield forms of disadvantage which are complex and hence often insidious. In the UK, migrant women detained at Yarl's Wood and the overwhelming numbers of BAME or immigrant victims of the Grenfell Fire tragedy are typical examples where structures, not necessarily designed to exclude or disadvantage intersectional victims, end up doing just that, in that, the way these systems operate hits those who are severally and severely disadvantaged because of their poverty, race, colour, gender, immigration status, employment status, etc. Sex work is another apt example. Neutral provisions criminalizing the sale and purchase of sex do not just fall on anyone. In effect, they predominantly criminalize a very clear section of the population which is both female and poor, and hence vulnerable to a distinct set of disadvantages which, admittedly, are similar to those faced by poor people and women generally, but which are also different from them because of the nature of sex work which is precarious, degrading, and entrapping. This was exactly what had happened in *Jordan*. But the South African Constitutional Court failed to appreciate this intersectional impact based on poverty, gender, and employment status in failing to go past the neutrality of the criminal provision. Openness to the many complex ways in which neutral systems operate is thus extraordinarily important in revealing insidious and subterranean forms of intersectional discrimination.

However, indirect intersectional discrimination may not just ensue from neutrality. It can also be based on single or multiple grounds and can cause intersectional impacts on grounds other than those on which they are overtly based. Thus, in the case of (iii), discrimination can be based on a single ground directly but cause indirect impact on that as well as other grounds of discrimination. *Volks* is one such example. To recall, the exclusion from intestate succession in *Volks* was overtly based only on marital status but had a particularly detrimental impact on female cohabiting partners. The case was argued as a matter of direct discrimination based on marital status. However, the disadvantage suffered by Mrs Robinson was due to her inability to exercise the choice to marry and her economic vulnerability as a female partner. The legislative criterion of marital status which excluded her from intestate succession was insufficient in bringing to light the disadvantage associated with her position. The nature of indirect intersectional disadvantage thus went underappreciated in *Volks*. *Gosselin* mirrors this failure in that the

discrimination analysis was confined to the single ground of age because the social assistance scheme was age-based, and thus failed to appreciate the intersectional impact which accrued on the basis of not only age but also gender and poverty. In other words, *Gosselin* may have been a case challenging the legislative *criterion* of age for the distribution of social benefits, but it was certainly not a case which caused discrimination, as in *impacted* people, based on the *ground* of age alone. It could have well been a case which challenged the legislative *criterion* of being thirty years of age or below for claiming the full rate of social assistance, on *grounds* of age, reliance on social assistance, and gender, because, on evidence, it was clear that young women on social assistance were disproportionately *impacted* by the impugned legislative criterion. Cases like *Volks* and *Gosselin* require more than a superficial consideration of the relationship between criterion, grounds, and impact to understand what direct and indirect discrimination are really about.

A final type of indirect intersectional discrimination may be of the kind that is directly based on criteria which touch upon multiple grounds but that impacts intersectional claimants on a different set of grounds, namely, relationship (iv). Such a case is not inconceivable. The service industry's rules of grooming and physical appearance may be explicitly based on criteria like height, weight, hair, makeup, and uniform dress code. These may individually and together impact women far more than men. But together the criteria may have an even more disproportionate impact on Muslim women or Black women based on their preference to don a headscarf or wear their hair natural, respectively. The intersectional impact is thus indirectly based on the grounds of gender, race, or religion, irrespective of the fact that the criteria invoked by the discriminator may have been based on a different set of criteria based on enumerated or analogous grounds, some of which may have even been apparently neutral.

Finally, it must be said that the appreciation of indirect intersectional discrimination in its diverse forms ultimately depends on the legislative and judicial commitment to it. In the UK, for example, the unenforced Section 14 on combination discrimination in the Equality Act 2010 is limited to direct discrimination thus excluding a claim of indirect intersectional discrimination under the provision. The apparent reason for this exclusion was the 'unnecessary and disproportionate increase in the cost and the complexity of the law'.[62] Other jurisdictions are not so explicit in their disavowal but have not been able to do justice to the case law which appears to be of the type of indirect intersectional discrimination. Once again, the complexity of the matter seems to deflate the enthusiasm for addressing intersectionality, when complexity should be the reason for appreciating its significance as a specific form of discrimination. This section has contributed to breaking down the complexity of intersectional discrimination by laying bare the different

[62] HL Deb 13 January 2010, vol 716, col 547 (Lady Royall).

forms in which it occurs. These are understood not simply as direct and indirect discrimination based explicitly on single or multiple grounds. Instead, they are best understood by deconstructing the relationship between discriminatory criteria (whether single or multiple neutral rules or policies, or based on single or multiple grounds), the impact of the application of that criteria on intersectional claimants (patterns of group disadvantage), and the grounds on which such impact seems to occur (multiple enumerated or analogous grounds). The hope is that cases of intersectional discrimination will be examined in greater detail in this precise way rather than the classificatory model of tactlessly fitting the square pegs of intersectional discrimination into the round holes of direct and indirect discrimination.

4. Wrongful Discrimination

We have now reached the heart of the discrimination analysis. What is so wrong about intersectional discrimination that a judge must enjoin it? This is the ultimate question discrimination law is geared to answer. The interpretation of the non-discrimination guarantees, the meaning and recognition of grounds, and the classification of discrimination as direct or indirect are all preliminaries for answering this substantive question of whether discrimination actually occurred in a given case. We are now poised to answer this question.

It is useful to begin by reiterating what intersectional discrimination is about. Consider Patricia Monture's dilemma:

> I do not know, when something . . . happens to me, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian woman.[63]

This dilemma illustrates the problem with intersectional discrimination squarely. That when a person with multiple identities experiences discrimination, they often cannot make sense of their discrimination. Thus, the conceptual framework of intersectionality has been offered to help resolve this dilemma to understand in what way do multiple identities inform the experience of discrimination. An appreciation of the framework will reveal the nature of discrimination at play in a particular case, that is, what is wrong about the treatment or impact suffered by the claimant. For example, Monture may ultimately be complaining that she was deprived of a job because of being stigmatized as an Indian woman[64] or stereotyped

[63] Patricia A Monture, 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' in The Chilly Collective (eds), *Breaking Anonymity: The Chilly Climate for Women Faculty* (Wilfrid Laurier 1995) 274.

[64] Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart 2016) ch 1 (hereafter Solanke, *Discrimination as Stigma*).

as lazy,[65] or because a prejudiced clientele refuses to be served by Indian women.[66] If her voting rights are curtailed, she may complain of social and political marginalization,[67] or denial of political participation,[68] or of being treated as a second-class citizen.[69] If she were excluded from an otherwise all-white photo of her graduate class, she may complain of being demeaned[70] or of a loss of dignity.[71] If she were asked to remove her headscarf for the photo she may have been forced to 'cover' her identity.[72] If she were denied admission into a graduate programme because of her personal characteristics she could say that her 'deliberative freedoms',[73] 'capabilities',[74] or autonomy[75] were curtailed. If she received a lower rate of social assistance, she could claim that she was oppressed[76] or disadvantaged.[77] Whatever the substantive conception of equality or non-discrimination—dignity, autonomy, perpetuation of stereotypes or prejudices, stigma, being demeaned, curtailment of deliberative freedoms, marginalization, etc.—the application of the framework of intersectionality should reveal the specific harm that is suffered by the claimant (denial of job/voting rights/admission into college/receipt of social assistance) in reference to the substantive conception. In other words, we are looking for a substantive explanation of discrimination which O'Regan J in *Brink* defined as 'against people who are members of disfavoured groups [that] lead to patterns of group disadvantage and harm'.[78]

This section argues that the appreciation of the framework of intersectionality is necessary to get to the bottom of what these patterns of group disadvantage and harm

[65] Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 University of Pennsylvania Law Review 149, 169 (hereafter Alexander, 'What Makes Wrongful Discrimination Wrong').

[66] Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 University of Toronto Law Journal 291, 297–303.

[67] Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 South African Journal on Human Rights 1, 10–16; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 Modern Law Review 16, 22 (hereafter Collins, 'Social Inclusion').

[68] John Hart Ely, *Democracy and Distrust* (HUP 1980) 77–88 (hereafter Ely, *Democracy and Distrust*).

[69] Cass R Sunstein, 'The Anticaste Principle' (1994) 92 Michigan Law Review 2410 (hereafter Sunstein, 'The Anticaste Principle').

[70] Deborah Hellman, *When is Discrimination Wrong?* (HUP 2008) ch 2 (hereafter Hellman, *When is Discrimination Wrong?*).

[71] Denise G Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 1 (hereafter Réaume, 'Discrimination and Dignity').

[72] Kenji Yoshino, 'Covering' (2002) 111 Yale Law Journal 769; Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006).

[73] Sophia Moreau, 'What is Discrimination' (2010) 38 Philosophy and Public Affairs 143, 147 (hereafter Moreau, 'What is Discrimination').

[74] Amartya Sen, *Development as Freedom* (OUP 1999) (hereafter Sen, *Development as Freedom*); Martha Nussbaum, *Women and Human Development* (CUP 2001) (hereafter Nussbaum, *Women and Human Development*).

[75] Khaitan, *A Theory of Discrimination Law* (n 20) chs 4–5.

[76] Young, *Justice and the Politics of Difference* (n 20) ch 2.

[77] Owen Fiss, 'Groups and the Equal Protection Clause' (1976) Philosophy and Public Affairs 107, 108 (hereafter Fiss, 'Groups').

[78] *Brink* (n 4) [42] (O'Regan J).

look like in intersectional cases. In this sense, the framework of intersectionality established in chapter 2 is a prerequisite to the discrimination analysis. But then the framework needs to be supported with a rich understanding of discrimination, that is, the disadvantages and harms which constitute it (section 4.1). These two elements reinforce one another so that where the court is aware of intersectionality, it often also applies a broad understanding of discrimination. Where it misses the conceptual backdrop of intersectionality it also misses the nature of discrimination at play. Thus, the framework of intersectionality and the courts' conception of discrimination operate hand in hand, in a helical way (section 4.2). The main takeaway from this discussion is that there is no new type of harm or wrong in intersectional discrimination. Most of our substantive understandings of what is wrong about discrimination may easily accommodate harms of intersectional discrimination. This is because the harms are in fact the same, like stereotyping, prejudice, unequal worth, loss of dignity, being demeaned, stigma, and lack of autonomy or substantive freedoms. What is different is the account of patterns of group disadvantage based on multiple identities which cause them, as opposed to membership in a single disadvantaged group. It is the distinctive explanation of these patterns which makes each intersectional claim unique.

4.1 The Meaning of Discrimination

Amartya Sen's famed question: 'equality of what?'[79] engenders a wide spectrum of responses. Commentators and courts have both yielded rich accounts of what is meant by equality or non-discrimination. There has been an extensive effort in delineating the human interests protected in the general guarantees of equality and non-discrimination and in defining what their breach entails. This section outlines some of the prominent accounts, each of which seeks to proffer a distinctive understanding of wrongful discrimination. The purpose of referencing these accounts is to show the variety of explanations of discrimination which intersectionality can plug into. They provide precise cues and descriptions for answering what is wrong about a certain kind of treatment or impact. The analytic strength and breadth of these accounts is immediately useful in explaining the wrong of intersectional discrimination, just as it is the case in single-axis claims.

Conceptions of discrimination have been advanced either as embedded in a single value or as comprehensive theories embodying a whole range of values. For example, Denise Réaume, Deborah Hellman, and Iyiola Solanke have offered trenchant accounts of the first kind.[80] Réaume argues that inequality resides in

[79] Amartya Sen, *Inequality Reexamined* (HUP 1992) 12.

[80] See also Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 South African Journal on Human Rights 34; Sandra Liebenberg, 'The Value of Human Dignity in

indignity such that: 'The central insight in a dignity-based account is that valuing human dignity means acknowledging the inherent worth of human beings; therefore violating dignity involves conveying the message that some are of lesser worth than others'.[81] Similarly, Hellman considers wrongful discrimination to be one which *demeans* by treating another as not fully human or not of equal moral worth.[82] Solanke considers discrimination to be that which *stigmatizes*, or creates a continuum of disempowerment in terms of social, economic, and political power.[83] Sen and Nussbaum offer a similar account, classifying inequality or disadvantage as lack of *capability* which deprives people of genuine choices for pursuing a life which they consider valuable.[84] Similarly, according to Sophia Moreau, 'the interest that is injured by discrimination is our interest in a set of . . . deliberative freedoms: that is, freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender'.[85] While these accounts appear individual centric in nature, other theories have social goals like integration, inclusion, and solidarity as their explanation for equality and non-discrimination.[86] Ely relies on a representation-reinforcing justification for equality and non-discrimination which strengthens the political participation of 'discrete and insular minorities'.[87] Group-based justifications are also found in the accounts of Fiss and Sunstein. For Sunstein, equality prohibits 'caste like' distinctions based on group characteristics of individuals.[88] Fiss relies on the 'group-disadvantaging principle' for prohibiting actions which render certain people worse off than others.[89] Explanations of wrongful discrimination can exist for specific grounds as well. For example, MacKinnon suggests a 'dominance' view of sex discrimination such that inequality between sexes is seen as a consequence of power and subordination.[90] Similarly, Brodsky and Day argue for the specific recognition of socio-economic disadvantage as a distinctive wrong in discrimination law.[91]

Interpreting Socio-Economic Rights' (2005) 21 South African Journal on Human Rights 1; Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012).

[81] Réaume, 'Discrimination and Dignity' (n 71) 22.
[82] Hellman, *When is Discrimination Wrong?* (n 70) 35.
[83] Solanke, *Discrimination as Stigma* (n 64) ch 1.
[84] Sen, *Development as Freedom* (n 74) 5; Nussbaum, *Women and Human Development* (n 74) 90–91.
[85] Moreau, 'What is Discrimination' (n 73) 147.
[86] Catherine Barnard, Simon Deakin, and Gillian S Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart 2004); Collins, 'Social Inclusion' (n 67) 24.
[87] Ely, *Democracy and Distrust* (n 68) 77–88.
[88] Sunstein, 'The Anticaste Principle' (n 69) 241–42.
[89] Fiss, 'Groups' (n 77).
[90] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987) 42.
[91] Gwen Brodsky and Shelagh Day, 'Denial of the Means of Subsistence as an Equality Violation' [2005] Acta Juridica 149.

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In contrast, comprehensive theories seek to consolidate a range of values and goals to be furthered in equality and non-discrimination. Young[92] and Fraser[93] devote their accounts of group-based injustices to the dimensions of redistribution and recognition. While redistribution is about material benefits or burden, recognition has to do with the positive affirmation and valuation of groups, giving space to individuals and groups to define themselves, and to be valued and respected for it. Thus, devaluation, disparagement, disrespect, demeaning, stereotyping, stigmatising, maligning, ignoring, disconsidering, and deprecating may all be classified as recognition harms. Young further classifies redistributive and recognition harms as occurring in the forms of domination and oppression, going on to identify 'five faces of oppression' as exploitation, marginalization, powerlessness, cultural imperialism, and violence.[94] Each speaks to a distinct harm which may be caused by discriminatory practices against particular social groups. Fredman consolidates redistribution and recognition with participation and transformation into a four-dimensional framework of substantive equality. The participatory dimension advocates for the full social and political participation of disadvantaged groups in society, while the transformative dimension requires accommodation of differences and structural change instead of exacting conformity as the price of equality.[95]

Likewise, judicial accounts of equality and non-discrimination are expansive in nature. The Canadian Supreme Court frequently refers to human dignity as the fundamental value underpinning the guarantee of equality in the Canadian Charter.[96] Violation of dignity may typically occur with 'imposition of disadvantage, stereotyping, or political or social prejudice'.[97] Prejudice is broadly understood as being treated as inferior to others because of a group characteristic, while stereotyping may result from irrelevant and misplaced biases against persons of a particular group.[98] While other justifications like autonomy and self-determination have also appeared in judicial reasoning, they have not been centrally relied upon in finding for discrimination under Section 15(1) of the Canadian Charter. Similarly, the South African Constitutional Court uses violation of human dignity as the touchstone for identifying unfair discrimination which perpetuates patterns of group disadvantage.[99] These patterns are often related to prejudices or

[92] Iris Marion Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory' (1997) I/222 New Left Review.

[93] Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1997) I/222 New Left Review; Nancy Fraser, 'A Rejoinder to Iris Young' (1997) I/223 New Left Review.

[94] Young, *Justice and the Politics of Difference* (n 20).

[95] Fredman, *Discrimination Law* (n 50) 25.

[96] *Egan* (n 35) [36] (L'Heureux-Dubé J).

[97] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) 451 (hereafter *Law v Canada*).

[98] Moreau, 'What is Discrimination' (n 73) 302–03; Alexander, 'What Makes Wrongful Discrimination Wrong' (n 65) 158–59, 192.

[99] *Harksen* (n 45).

stereotypes.[100] In the case of the UK, according to Bob Hepple, the Equality Act 2010 refers to no less than nine theories of discrimination: consistent treatment; the removal of barriers to equal treatment; respect for equal worth or dignity of the individual; recognition of identity, difference, and diversity; equal opportunity; redistribution; individual choice or freedom; equality of capabilities; and fairness.[101] But equality in the UK is mainly a comparative concept with the discrimination analysis seldom going beyond the idea that a claimant receives 'less favourable treatment' or is put at a 'particular disadvantage' because of a personal characteristic.[102] The explanation of specific disadvantage is not necessarily developed once it is established that it exists on a comparative basis. This is true for the US as well, except for explanations which have emerged in the context of specific grounds like race and sex.[103] Indian jurisprudence, too, has historically relied on a comparative understanding of discrimination, without reference to substantive interpretations of equality and non-discrimination. This has started to change of late with the Supreme Court's interest in comparative doctrine, especially from Canada and South Africa and their references to dignity, autonomy, stereotyping, prejudice, and vulnerability.[104] The Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) have also expanded their discrimination analyses to reflect on the harms or disadvantages for which each considers discrimination to be wrong. They have specifically shown an inclination towards an anti-stereotyping approach.[105] In addition, since the invocation of the right to equality and non-discrimination under Article 14 of the ECHR is dependent on the case falling within the ambit of another human right, discrimination is necessarily seen as something which limits the equal enjoyment of human rights protected under the ECHR.

Each of these philosophical and doctrinal accounts, whether based on a single value or a range of values, represent what may be wrong about discrimination when it is wrong. Do general accounts of wrongful discrimination assist in explicating the nature of wrongful intersectional discrimination? I believe that they do. Most of the conceptions when interpreted sufficiently broadly have the explanatory potential to serve as placeholders for describing the wrong of intersectional discrimination. It is this explanation that the courts should uncover and elucidate

[100] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (SACC) 73 (Kriegler J); *Jordan* (n 3) [60] (O'Regan and Sachs JJ).

[101] Bob Hepple, 'The Aims of Equality Law' (2012) 61 Current Legal Problems 1, 2.

[102] *Preddy v Bull* [2013] UKSC 73; *R v JFS* [2009] UKSC 15.

[103] *Brown v Board of Education of Topeka* 347 US 483 (1954); *United States v Virginia* 518 US 515 (1996).

[104] See esp, *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 (Supreme Court of India), which spearheaded this trend (hereafter *Anuj Garg*).

[105] *Kostantin Markin v Russia* [2010] ECHR 1435; Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (2015) EU:C:2015:480. See Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 719.

in intersectional cases. The next section explores how these conceptions have been used in intersectional cases in comparative doctrine.

4.2 Wrongful Intersectional Discrimination

All jurisdictions have a conception of what they consider discriminatory and why. Each conception can either be interpreted broadly to embody a range of discrimination wrongs or it can be interpreted narrowly to reflect a limited understanding of protection from discrimination. Courts seem to have moved in both directions when it comes to adjudicating actual or potential intersectional claims. An incisive and broad understanding of discrimination is visible in successful claims like *Hassam* and *Corbiere*. On the other hand, a narrow conception of harm is visible in cases which were possibly intersectional but were argued as single-axis and hence eventually failed, viz. *Volks* and *Gosselin*. A comparison between the approaches in these two sets of cases reveals why it is important for courts to broaden their compass for detecting wrongful intersectional discrimination.

It is useful to begin with *Hassam*. The South African Constitutional Court in *Hassam* was committed to tracing sameness and difference in patterns of group disadvantage in relation to Muslim women in polygynous marriages by considering their identity as a whole and in the context of the South African history and constitutional principles, including the ideal of transformation. Through this it arrived at a thorough explanation of the harm and disadvantage resulting from the impugned legislative provision. Writing for the Court, Nkabinde J described the 'nature of discrimination' both in terms of the 'deprivation of legal recognition of their marriage'[106] as well as causing 'significant and material disadvantage' and 'denial of benefits'.[107] The exclusion from benefits which were afforded to other people entrenched the economically vulnerable position of Muslim women in polygynous marriages and also reinforced harmful stereotypes and 'patriarchal practices that relegate[d] women in these marriages to being unworthy of protection'.[108] It also implied that widows of polygynous Muslim marriages were less worthy of respect than widows of civil marriages or African customary marriages.[109] These particular harms contributed to the violation of dignity—considered key to a violation of Section 9(3) of the Constitution.[110] The Court interpreted dignity both expansively and precisely in describing what was wrong about discrimination based on religion, gender, and marital status at the same time.

[106] *Hassam* (n 6) [14] [33] [36].
[107] Ibid [34].
[108] Ibid [37].
[109] Ibid [46].
[110] *Harksen* (n 45) [53].

Similarly, in *Corbiere*, the Canadian Supreme Court applied the test of human dignity in answering the question of whether the disenfranchisement of off-reserve band members on the basis of the analogous ground of aboriginality-residence was actually discriminatory. According to the Court, simply put, the test was whether 'the distinction undermines the presumption upon which the guarantee of equality is based—that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?'[111] The answer was yes, based on the Court's determination that the disenfranchisement perpetuated 'historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance'.[112] This was not all, though. The denial of the right to vote was not simply one of not being able to cast a vote but the denial of the right to full participation which meant that off-reserve band members could not have their interests counted and voices heard. It was based on a stereotypical assumption about off-reserve members that they were 'not interested in maintaining participation in the band or in preserving their cultural identity'.[113] The denial thus conveyed the message that they were 'less worthy and entitled'[114] and 'less deserving'[115] as members of the band. All of these individual wrongs, of diminishing the participation and status of the Batchewana band members, spoke to what L'Heureux Dubé J described as the purpose of Section 15(1) of the Canadian Charter: 'to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian society'.[116] Thus, in her concurring opinion, L'Heureux-Dubé J used the fourfold criteria of 'pre-existing disadvantage, vulnerability, stereotyping and prejudice'[117] to test the violation of human dignity under Section 15(1). It was the combination of all of these types of specific wrongs that constituted a violation of human dignity in this case.

A similar exercise ensued in the Human Rights Tribunal of Ontario decision in *Baylis-Flannery*. At first, while making a finding in favour of the claimant, the Tribunal only held that the treatment was discriminatory, as in inappropriate in terms of the sexist and racist behaviour of the defendant.[118] But then, in explaining how the intersectional nature of discrimination exacerbated the claimant's mental anguish, it elaborated on what was so discriminatory or inappropriate about the defendant's actions. In the Tribunal's opinion, the impact on the 'personhood' of a claimant was serious in that the defendant had 'wilfully and recklessly injured her

[111] *Corbiere* (n 21) [16].
[112] Ibid [17].
[113] Ibid [17].
[114] Ibid.
[115] Ibid [18].
[116] Ibid [63].
[117] Ibid [70].
[118] *Baylis-Flannery* (n 59).

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dignity and worth', causing 'damage to her physical and emotional well-being'.[119] It further noted that the defendant's actions were based on a 'stereotypical view of attractive, young, Black women over whom he can assert economic power and control'.[120] The Tribunal rounded off its remarks by referring to the touchstone of human dignity set out most prominently in the Supreme Court of Canada's decision in *Law v Canada*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with the physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits . . . Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within society.[121]

The Tribunal applied this understanding of human dignity to *Baylis-Flannery*. It thus wove in elements of physical and bodily harm with recognitional aspects like self-worth, as well as participatory harms, like marginalization and being ignored and devalued, in terms of how individuals and groups relate to the society and public at large. Dignity seems to be a catch-all in this situation, capable of describing what is wrong about intersectional discrimination in maximal detail.

Likewise, the consideration of merits of individual communications before the CEDAW Committee or the Human Rights Committee is brief but, in some noteworthy intersectional cases, distinctly precise in explaining what is wrong about discrimination. As set out in the previous chapter, this is attributable in large part to the awareness that treaty bodies have shown in recent years to intersectionality. But it is also because they have been aware of the diversity of discrimination wrongs and the need to respond to them via a broad and robust conception of equality and non-discrimination. For example, in *RPB v Philippines*, the CEDAW Committee found discrimination in respect of each of the specific disadvantages suffered by the claimant as a deaf mute woman—the lack of access to sign language interpretation in courts, the imposition of rape myths and stereotypes in investigating and adjudicating her complaint, the failure of the judicial system to consider her vulnerability and to provide her reasonable accommodation, and the unreasonable delay in conducting the proceedings. But then, after relaying these instances as instances of discrimination, the Committee further explained *why* exactly that was the case. Thus, in the case of the denial of sign language interpretation, the Committee explained why the denial mattered, namely, because its provision is 'essential to ensure the author's full and equal participation in the proceedings' and

[119] Ibid [146].
[120] Ibid [47].
[121] *Law v Canada* (n 97) [53].

to comply with 'the principle of equality of arms'.[122] This is what the Committee meant by the guarantee of 'the enjoyment of the effective protection against discrimination'. Discrimination was thus not just a matter of specific instances of violations but a broad normative understanding of why these instances were wrong, so to speak. It is this broad normative conception of discrimination coupled with the specific detailing of intersectional patterns of group disadvantage that explicates what is wrong about intersectional discrimination.

When this broad, normative understanding is lacking, courts may fail to recognize and remedy wrongful intersectional discrimination. This is often accompanied by a lack of application of the framework of intersectionality in terms of appreciating its different strands in the discrimination analysis. All these losses thus transpire together. *Gosselin* exemplifies this. The majority in *Gosselin* relied on a particularly limited understanding of human dignity, considered to be the touchstone of equality under Section 15(1) of the Canadian Charter. The Court began by citing that '[d]iscrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances'.[123] But in determining whether this was actually the case, it applied the perspective of the legislature to hold that the distinction was not discriminatory since it was not *meant* to treat the claimant and those in her position 'as less worthy and less deserving of concern, respect and consideration than others'.[124] The legislator's intention, according to the Court, was to affirm young people's potential rather than demeaning them or denying them dignity.[125] The Court took judicial notice of this legislative purpose on the basis that it considered it 'counter-intuitive' for people below the age of thirty to have suffered any historical disadvantage, vulnerability, stereotyping, or prejudice based on age (unlike race or gender).[126] Reliance on the stereotype of young people's self-sufficiency and capability justified their exclusion from a higher rate of social assistance. In serving a measure of judicial 'tough love',[127] the Court ignored the socio-economic vulnerability of those on social assistance. The version of dignity applied in *Gosselin* is simply a matter of the legislature's intention. It is removed from the actual experience of the claimant, which was, first and foremost, socio-economic—in that the lack of a higher rate of social assistance left Louise Gosselin unable to support her basic food, clothing, and shelter needs—but in which she was also left in a precarious situation whereby her physical security and integrity were compromised, including her mental and psychological well-being. None of this was an affront

[122] *RPB v Philippines*, CEDAW Committee (2014) Communication No 34/2011, CEDAW/C/57/D/34/2011 [8.7].
[123] *Gosselin* (n 34) [21].
[124] Ibid [26].
[125] Ibid [42].
[126] Ibid [33].
[127] Gwen Brodsky, Rachel Cox, Shelagh Day, and Kate Stephenson, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 Canadian Journal of Women and the Law 193 [69].

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to dignity in the way dignity was understood and applied by the Supreme Court of Canada. Instead, the majority acknowledged the impact as, at best, a matter of choice and, at worst, a matter of misfortune of the claimant.

The decision in *Volks* mirrors this. *Volks* considered the constitutional validity of a provision which excluded the survivor of a stable, permanent relationship from the right to claim maintenance from their deceased partner's estate. Skweyiya J's majority opinion focussed exclusively on finding if there was any harm whatsoever associated with marital status discrimination. He interpreted the inability of the claimant to marry her long-term partner while he was alive as a matter of choice for her partner. To the judge, nothing about the claimant's inclination and her partner's resistance to marry was unfair or problematic. Gender inequality and economic vulnerability were not accounted for either in relation to grounds of discrimination or in the context of impact of discrimination. The reason, as in *Gosselin*, was that the exclusion was only meant by the legislature to affirm the dignity of individuals in choosing to marry. The fact that the choice was, in reality, only available to men was not something the Court could address or change. The deceased male partner's refusal to marry the woman 'who cared for him, put everything into the relationship and gave her heart and soul to it, bringing up a number of children born of the relationship between them in the process', was met with 'sympathy', deeming the conduct of the male partner 'unconscionable'.[128] But it was not something which affected her dignity since it was 'entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased'.[129] Again, the breach of dignity was to be assessed through the will of the legislature and the choice of the deceased, but not the claimant's choice to marry and the ensuing disadvantages which accompanied the denial of that choice. A narrow conception of dignity and how it is breached weighed down the possibility of finding for intersectional discrimination in *Volks*.

A final point must thus be made about the breadth of the substantive conception of discrimination. The conception of discrimination and the values it offends should not simply be a matter of perspective, whether solely of the discriminator or of the claimant. No doubt, both play a part in understanding whether there was discrimination in a given instance, but their perspectives must necessarily be combined with a more objective, perhaps universal one.[130] This is why it is important for discrimination law to have its own normative understanding of what is wrong about discrimination. Different philosophical and doctrinal accounts thus refer to different substantive core of dignity, autonomy, freedoms, respect, worth, etc. When interpreted broadly, these are entirely capable of explaining the wrong of intersectional discrimination, as they do for single-axis discrimination. A broad

[128] *Volks* (n 2) [59].
[129] Ibid [60].
[130] L'Heureux Dubé J calls it the 'subjective-objective' perspective, *Law v Canada* (n 97) [59].

and inclusive normative conception of discrimination, then, lies at the heart of our understanding of what constitutes wrongful intersectional discrimination in a variety of cases.

5. Comparison

Discrimination analysis mostly takes the form of a two-step inquiry. First, we ask whether there has been any differentiation or discriminatory impact based on a ground. Second, we ask whether such discrimination is actually wrongful. Ascertaining the type of discrimination (direct versus indirect), the grounds it is based on (enumerated or analogous), and whether it constitutes wrongful discrimination (based on dignity, autonomy, substantive freedoms, stereotypes, prejudice, stigma, etc.) are thus the key steps in a discrimination inquiry. The last three sections dealt with these steps individually and the challenges they pose for claims of intersectional discrimination. These steps are by no means easy to establish in single-axis claims either. Courts have thus often resorted to the comparator test in the discrimination analysis to help establish either the grounds of discrimination or the wrongfulness of it, or both.[131] The test requires the claimant to compare herself to another real or hypothetical mirror comparator, namely, a person who is similarly situated in every way but for the alleged ground of discrimination. If such a comparator is better-off than the claimant, then the court can confirm both the ground of discrimination and the difference in treatment or impact suffered by the claimant. Despite its intuitive grasp, the comparator test throws more of a challenge to intersectional discrimination than it does lend a helping hand in establishing the multiple grounds on which it is based or the nature of it. This section shows that the comparator test, at least in its strict and flexible forms, is either too fastidious or too unprincipled to be useful in proving intersectional discrimination. However, as the South African experience confirms, a holistic and contextual approach to comparison can yet be useful. The argument is that comparison, like much of the rest of discrimination law, can be tailored to respond to intersectional discrimination and there is no reason why the test needs to be either adopted as is or abandoned altogether for the purposes of intersectional discrimination.

For some jurisdictions, like the UK and the US, comparison is necessary for establishing discrimination.[132] They thus require comparators for intersectional discrimination too, in the same way as for single-axis claims. The results have been

[131] See, in particular, leading judicial and statutory formulations of the comparator tests in the context of the UK in the Equality Act 2010, s 23; the US in *Teamsters v United States* 431 US 324 (1977) n 15; Canada in *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 SCR 357 (SCC) [1], [20]ff and *Withler v Canada* [2011] 1 SCR 396 (SCC) [41]ff (hereafter *Withler*); and South Africa in *Pillay* (n 49) [42]–[44] (Langa CJ), [164]–[165] (O'Regan J).

[132] US Civil Rights Act 1964, Title VII, ss 703–04; UK Equality Act 2010, ss 13, 14, 19, 23.

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mixed. Comparison has worked fortuitously or fallen flat. The lesson is that the strict requirement for proving intersectional discrimination through comparison may be indefensible in both principle and practice. Take, for example, the use of comparators in *DeGraffenreid*. The Court had made two sets of comparisons in this case. First, it used the favourable hiring statistics of white women and dismissed the claim of sex discrimination. Then, it construed the claim of race discrimination against Black women to be the same as that against Black men and combined it with another cause of action. Such a comparative exercise is suspect for several reasons. First, the Court segregated the claims of race and sex discrimination into individual claims to be proven separately as a matter of multiple discrimination. But then, even within this view of multiple discrimination, the comparators chosen for each ground were not those who did not share the relevant personal characteristic with the claimants, but those who did. Thus, the comparison for sex discrimination turned out to be white women and not Black men. The fact that white women were treated better than Black women was then used to deny sex discrimination against Black women. The result is completely antithetic to intersectionality in that it denies that what Black women face *is* sexism even when white women are not similarly disadvantaged, instead of acknowledging that the difference between their position and that of white women is evidence of a form of sexism that, when combined with racism, is uniquely experienced by Black women. Seen this way, the comparative evidence could have been used to establish the sameness and difference in patterns of group disadvantage. But the disparate invocation of comparators for each ground separately, and then employing them to deny rather than recognize the patterns of group disadvantage suffered by Black women, seems to have defeated the claim in *DeGraffenreid*.

The opposite problem ensued in *Bahl*. In order to prove race and sex discrimination separately, the Court of Appeal used a single comparator of a white man to prove both. The demand for proving race and sex discrimination separately and the insistence on using a single comparator of a white male to prove both are fundamentally incompatible. While the framing of the claim as separate claims of sex and race discrimination gave the illusion that the Court viewed Dr Bahl's claim as a matter of multiple discrimination, the choice of comparator—constructed using both the grounds to find someone with whom the claimant did not share either of the personal characteristics (i.e. a white male)—appears to indicate that the Court thought of the claim as a matter of additive (in particular, compound) discrimination. The choice of the comparator may thus have helped establish the claim of compound discrimination as a unique combination of racism and sexism faced only by Black women such as Dr Bahl. But that would not have helped appreciate the sameness in patterns of group disadvantage between Black women on the one hand, and white women and Black men on the other. This could have been particularly problematic had there been white women and Black men who *were* treated much the same as Dr Bahl, in which case the Court of Appeal may well

have towed the *DeGraffenreid* line and used that evidence to negate both sex and race discrimination rather than use the comparators to establish race and sex discrimination respectively. The choice of a white male comparator may thus easily negate the complexity of intersectionality inherent in both sameness and difference in patterns of group disadvantage simultaneously. It forces us to view discrimination always *in contrast* with or in opposition to the most privileged group, rather than in terms of the complex and concrete relationships of disadvantage between intersecting groups. What this does is create strong conformist pressures when the comparator is 'clothed with the attributes of the dominant gender, culture, religion, ethnicity, or sexuality'.[133] Couched only in terms of privilege, the court assumes that the most relevant comparator for intersectional claims will be someone who is disadvantaged in no way at all. That makes for a rather unrepresentative standard of comparison for a category of discrimination which is all about relationships of power and structures of disadvantage. Dr Bahl's claim resonated little with the hypothetical white male comparator because it was too removed from her actual position to reveal anything salient about how she was treated. The choice of a single dominant comparator was perhaps too burdensome and actually unreliable in characterizing intersectional discrimination either in terms of the multiple grounds of the claim or the disadvantage caused by them.

What the invocation of comparators in *DeGraffenreid* and *Bahl* makes clear is that there are two possible options for strict comparison in intersectional claims: finding a single mirror comparator which does not share any of the personal characteristics of the claimant (*Bahl*) or finding a mirror comparator for each ground individually (*DeGraffenreid*). As the discussion above makes plain, neither of the two options seems to have worked too well. As a consequence, jurisdictions like Canada have moved away from the strict requirement of proving discrimination through mirror comparators. Instead, Canada has adopted the flexible approach which advocates for using comparison freely between several comparators or not at all, as need be.[134] In fact, it was specifically adopted hoping that 'flexibility [could] accommodate claims based on intersecting grounds of discrimination'.[135] The extensive application of the flexible approach in Ontario Court of Appeal's decision in *Falkiner v Ontario*[136] shows that this hope has not materialized in fact. It is important to understand why.

Falkiner concerned a challenge to the 'spouse in the house rule' which excluded single parents from social assistance as soon as they started cohabiting with their partners. According to the claimants who were single mothers on social assistance, the rule caught casual relationships which were not 'spousal' and thus perpetuated

[133] Fredman, *Discrimination Law* (n 50) 11.
[134] *Withler* (n 131) [41]ff.
[135] Ibid [58] [63].
[136] (2002) 59 OR (3d) 481 (Ontario Court of Appeal) [105] (hereafter *Falkiner*).

the socio-economic disadvantage of single mothers with dependent children who were in desperate need of social assistance. They argued that the rule discriminated against them on the basis of either sex or a combination of sex, marital status, and receipt of social assistance. The Court found that the rule violated Section 15(1) of the Canadian Charter on 'the combined grounds of sex, marital status and receipt of social assistance'[137] and the discrimination was unjustifiable under Section 1. The key to the Court's discrimination analysis was flexible comparison which was used to ascertain both the grounds of discrimination as well as the discriminatory impact of the impugned rule. According to the Court, the 'flexible comparative approach [reflected] the complexity and context of the respondents' claim'.[138]

What was the approach? In short, it was a determination based on a 'set of comparisons, each one bringing into focus a separate form of differential treatment'.[139] Thus, the Court picked a comparator to reflect the discrimination associated with each ground. For the ground of sex, the Court substituted the claimants' choice of comparator from men on social assistance to single men on social assistance. But then the Court did not examine evidence in respect of single men on social assistance and directly considered evidence relating to single women on social assistance, according to which, 'although women accounted for only 54% of those receiving social assistance and only 60% of single persons receiving benefits, they accounted for nearly 90% of those whose benefits were terminated by the definition of spouse. The corresponding figures for single mothers also show the definition's disproportionate impact on that group.'[140] According to Laskin JA, 'the statistics unequivocally demonstrate that both women and single mothers are disproportionately adversely affected'.[141] Despite the precision of statistical evidence in respect of single mothers on social assistance, the conclusion from the statistics was confined to a finding of sex discrimination alone. Neither the chosen comparator nor the statistics seem to have been made full use of to appreciate the disadvantage suffered by the claimants as single mothers on social assistance based on the ground of not just sex but also marital and childcare status and receipt of social assistance. Similarly, for the ground of social assistance, the Court substituted the claimant's choice of 'persons not on social assistance' with 'single persons not on social assistance' as the correct comparator. According to the Court, while the claimant's choice of comparator did not 'on its own tell us anything meaningful beyond the fact that people on social assistance are treated financially differently than people not on social assistance',[142]

[137] Ibid [105].
[138] Ibid [81].
[139] Ibid [71].
[140] Ibid.
[141] Ibid [77].
[142] Daphne Gilbert and Diana Majury, 'Critical Comparisons: The Supreme Court of Canada Dooms Section 15' (2006) 24 Windsor Year Book of Access to Justice 111, 135.

the comparison with 'single persons not on social assistance' showed that the claimants had suffered unequal treatment: 'They have suffered adverse state-imposed financial consequences because they began living in try-on relationships. By contrast, single people who are not on social assistance are free to have these relationships without attracting any kind of state-imposed financial consequences'.[143] But the same result would have followed from a comparator like 'single women not on social assistance', 'single mothers not on social assistance', or the claimant's choice of 'persons not on social assistance'. Each of these possible alternatives could show that any person not on social assistance had the agency and resources to pursue try-on relationships without suffering the disadvantage suffered by the claimants specifically. It appears that the Court's refinement is motivated by constructing as narrow a comparator as possible in strict terms based on a single ground at a time, such that social assistance was the only material difference between the claimants and the comparator group. But such a premise remains unarticulated and leaves hanging the question as to why the narrow comparator did not entail single mothers specifically, so that the comparison was with single fathers on social assistance.

The flexibility in the choice of comparators in *Falkiner* lacks guidance. It neither follows strict comparison after choosing comparators individually for each ground, nor does it seem to abandon comparison when it seemed superfluous in light of unequivocal evidence of relative disadvantage. More importantly, what is problematic with such flexibility is that it maps onto the frame of multiple rather than intersectional discrimination in its inclination to test for discrimination individually based on each ground. Comparison for intersectional discrimination cannot be but a version of single-ground comparison rolled over multiple times for every ground. But what is it supposed to be then?

Once again, *Hassam* provides the answer here. One way comparison can work for intersectional discrimination is, when comparators are chosen, to keep in mind not just the idea that comparators need not share the relevant personal characteristics with the claimant to reveal relative disadvantage but also that they need to show this disadvantage in terms of the nature of intersectional discrimination, that is, show the sameness and difference in patterns of group disadvantage based on the relationships between groups. The South African Constitutional Court achieved this in choosing comparators comprehensively based on all possible relationships between the grounds, and then using them to reflect on the patterns of group disadvantage to appreciate the full story of discrimination in *Hassam*. For a claim that was based on three grounds—gender, marital status, and religion—there were seven possible comparisons, based on each ground independently, two of the grounds taken together, and all of them considered together. The Court therefore made seven sets of comparisons between the claimants (who were widows

[143] *Falkiner* (n 136) [73].

in Muslim polygynous marriages) and widows married in terms of Marriage Act (who did not share the religious aspect of discrimination), widows in monogamous Muslim marriages (who did not share the marital status with the claimants), widows in polygynous customary marriages (who did not share the same religion as the claimants),[144] women/widows (who shared the claimants' gender but perhaps not their religion or marital status),[145] Muslims (who shared aspects of religious discrimination but not necessarily the marital status or gender),[146] Muslim men (who did share aspects of religious discrimination but did not share gender and marital status with the claimants),[147] and persons in other kinds of relationships (who did not share the claimants marital status, gender, or religion).[148] Based on these comparisons, the Court concluded that the discrimination was based:

> on the grounds of, religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriage that are affect[ed] by the [exclusion].[149]

The Court then examined the comparators more closely to find for unfair discrimination based on the three grounds it identified. Thus, the Court used comparisons with Muslim women in monogamous marriages and women who were married under the Marriage Act or customary laws, to show the disadvantage suffered by Muslim women in polygynous marriages because of their gender, marital status, and religion at the same time. The conclusion was further used, not to undermine the generality and pervasiveness of the category of gender discrimination, but to reinforce it, in as much as the comparisons also showed that women 'constitute[d] a particularly vulnerable segment of the population'.[150] Similarly, the comparisons with Muslims in polygynous marriages and Muslims in non-polygynous marriages were used to show the disadvantage suffered by Muslims on the basis of their religion.[151] At the same time, the same comparisons were used to show the disadvantage between Muslim women and men, since only Muslim men could contract polygynous marriages.[152]

What this comparative exercise shows is that comparators can be constructed using much the same formula of picking groups which do not share one, some, and all of the personal characteristics with the claimant. However, they should be

[144] *Hassam* (n 6) [31].
[145] Ibid [10].
[146] Ibid [12] [25] [26] [33].
[147] Ibid [10] [31].
[148] Ibid [11].
[149] Ibid [34].
[150] Ibid [10].
[151] Ibid [12] [25] [26] [33].
[152] Ibid [10] [31].

deployed with the specific purpose of appreciating relative disadvantage in terms of the sameness and difference in disadvantage between different groups. Thus, to appreciate the nature of intersectional discrimination, each of the comparators is used to tell something salient about intersectional discrimination in terms of either sameness or difference in patterns of group disadvantage based on the relevant personal characteristics. Employed as the *Hassam* Court did, comparison can indeed be useful if made holistically (i.e. comprehensively in respect of all of the possible comparator groups) and contextually, to show the different patterns of group disadvantage between these groups.[153]

This approach could be helpful for jurisdictions like the UK and the US where comparison is necessary for proving discrimination. It could also be helpful for jurisdictions like Canada which have formally moved away from comparison but which, as the experience in *Falkiner* shows, are in practice unable to shrug it off. At the same time, it may be helpful for the ECtHR and jurisdictions applying EU law, which, like South Africa, do not necessarily resort to comparison but find it helpful nevertheless in cases where comparative evidence is available and may be useful in establishing discrimination. Similarly, the approach may be particularly apt for jurisdictions such as India where cases like *Air India* are defeated by bogus comparisons which justify rather than reveal the discrimination between groups like (female) air hostesses and (male) air stewards. It may even be helpful for discrimination claims before treaty bodies, especially the CEDAW Committee which has traditionally focussed on comparison with men while ignoring the relationships of power between women. Each of these possibilities can be illuminated in their individual contexts. The South African approach to comparison in *Hassam* provides a useful cue for this, as an antidote to both strict and flexible forms of using the comparator test to establish intersectional discrimination.

6. Justifications and Standard of Review

The discussion until now has focussed on the purpose of the discrimination analysis for determining wrongful intersectional discrimination based on multiple grounds. Once something is found to be discriminatory, the next question that arises is whether it can still be justified. For example, a ban on the full-face veil may be discriminatory against Muslim women on the basis of their gender and race or religion, but it may be possible to justify the ban in certain circumstances like at airport security or in a picture for an identity document. The question for our purposes, then, is should we allow such justifications for intersectional discrimination and, if so, how should we judge them?

[153] See for a fuller version of this argument, Shreya Atrey, 'Comparison in Intersectional Discrimination' [2018] Legal Studies 379.

The question of whether justifications should be allowed is often approached from the standpoint of the distinction between direct and indirect discrimination. We saw that the distinction between the two is based on whether the discriminatory criteria is explicitly based on grounds (direct discrimination) or is neutral but leads to a disproportionate impact on disadvantaged groups (indirect discrimination). However, the distinction can also be based on whether such discrimination can be justified. For example, in the UK, direct discrimination under Section 13 of the Equality Act 2010 cannot be justified. On the other hand, indirect discrimination under Section 19 of the Equality Act 2010 is, by its very definition, justifiable, in that it will not be discrimination if the measure in question can be shown to be a 'proportionate means of achieving a legitimate aim'. A similar distinction is adopted in EU law, where direct discrimination is not justifiable per se, except where the discriminatory measure constitutes a 'genuine and determining occupational requirement',[154] while indirect discrimination may be permissible if it is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[155] In contrast, in the US, both disparate treatment and disparate impact under Title VII are justifiable. Once the claimant establishes a prima facie case of disparate treatment, the defendant can still show that there was a legitimate non-discriminatory justification for such treatment and the claimant would have another chance to argue that such justification was merely a pretence for discriminatory motive.[156] For disparate impact claims, once the claimant establishes a prima facie case, the defendant can show that there was a legitimate business necessity for the neutral rule or practice and if the defendant succeeds in showing this, the claimant can argue that another measure with less discriminatory impact would have been equally effective.[157] Furthermore, both disparate treatment and disparate impact can be justified by a 'bona fide occupational requirement'.[158] Similarly, in Canada and South Africa, both direct and indirect discrimination are justifiable. Section 1 of the Canadian Charter and Section 36 of the South African Constitution provide the general limitation clauses laying down the basis on which infringements of rights, including the right to equality and non-discrimination, can be justified. In India, discrimination is always justifiable, even

[154] Compare for example, art 2(2)(a) and art 4 of Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (hereafter Race Directive); art 2(1)(a) and art 14(2) of Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (hereafter Gender Directive (Recast)); art 2(1)(a) and art 4 of the Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (hereafter Framework Directive).

[155] Race Directive (n 154), art 2(2)(b); Gender Directive (Recast) (n 154), art 2(1)(b); Framework Directive (n 154), art 2(2)(b).

[156] *McDonnell Douglas Corp v Green* 411 US 792 (1973); *Texas Department of Community Affairs v Burdine* 450 US 248 (1981).

[157] Civil Rights Act of 1964, Title VII, s 2000e-2(k).

[158] Ibid, s 703(e)(1).

though the Supreme Court has never recognized indirect discrimination as a separate cause of action.

Another way of justifying discrimination is through particular grounds. There are two ways of doing this. First, discrimination based on certain grounds, whether direct or indirect, may be classified either as unjustifiable or justifiable. Thus, for example, under UK law, direct discrimination based on disability or age discrimination is justifiable. Similarly, under EU law, several specific exemptions for direct discrimination exist for the grounds of age, marital status, and disability. Secondly, discrimination based on certain grounds may attract a different level of scrutiny than other grounds. For example, in the US, under the Equal Protection Clause of the Constitution, race attracts the highest level or strict scrutiny, sex attracts intermediate scrutiny, and all other classifications, like language or accent, attract rational scrutiny. The ECHR has also developed a staggered level of review for cases, much like the US, where grounds such as race and ethnic origin attract the strictest review.[159] There is some indication that the Supreme Court of India now treats discrimination based on the five listed grounds under Article 15(1), especially sex, to be more insidious than other kinds of distinctions made under the general right to equality under Article 14.[160] No such distinction exists in international human rights instruments, especially those dealing with single grounds like sex and disability in CEDAW and CRPD respectively.

Associated with these two ways of justifying discrimination (based on the distinction between direct and indirect discrimination, on the one hand, and on a specific ground, on the other hand) are the debates over deference and margin of appreciation. No matter which justifications are available and what standard of review a court chooses to apply to a case, there is always the possibility that the intensity of the court's review in each instance is driven by the subject matter at hand, its context, and impact. Thus, justifications are not simply about the type of discrimination or the particular ground involved, or even the standard of review the ground deserves, but about how intensely a court chooses to scrutinize them. This attracts the notion of deference both in terms of the expertise and the institutional legitimacy of the court to review a discriminator's actions. When it comes to legislative measures, courts are naturally most deferential, less so when state authorities are concerned, and perhaps least so for private employers and individuals. This also attracts the notion of margin of appreciation, peculiar to the ECtHR, where, in borderline or hard cases, the final determination of the balance to be struck between the interests of the victims and the interests of the discriminator or the beneficiaries of discrimination is left to States themselves, rather than the Court.

[159] Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review.

[160] *Anuj Garg* (n 104).

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This is the broad organization of the justification analysis which follows the discrimination analysis to ascertain whether discrimination, even if wrong, could be sustained. How does it bear on intersectional claims? Not surprisingly, given all the hurdles for intersectional claims already discussed, most claims do not come to pass at the stage of justification analysis. When they do, however, several peculiarities emerge. I want to discuss three things which come to light in comparative jurisprudence. First, notwithstanding the availability of justifications for direct and indirect discrimination, justifications often creep into the discrimination analysis such that the determination of whether there has been discrimination based on multiple grounds is often laden with justificatory considerations even when a case does not reach the stage of justification analysis. This is true even for direct discrimination which may not be justified. Second, there is a tendency to use intersectionality, where present, as a justification rather than as constituting discrimination. Third, courts apply a rather low standard of review for sustaining justifications of intersectional discrimination, no matter which grounds are involved.

Nowhere are these controversies borne out more clearly than in the Supreme Court of India decision in *Air India*. For a jurisdiction which has not formally recognized indirect discrimination, does not have a limitations clause in the Constitution, and has not even developed a justification analysis for equality or non-discrimination claims, the supervenience of justifications in India is perplexing. But it shows exactly how—despite the technical distinctions between direct and indirect discrimination, and individual grounds in terms of the justifications and standard of review they attract—justification can be all-pervasive, inhibiting a finding of intersectional discrimination from the word go in the discrimination analysis.

Air India was about the service conditions for female air hostesses working with the airline, which included mandatory retirement at the age of thirty-five years, or upon marriage within four years of service, or upon first pregnancy, whichever was earlier. The Court's entire discrimination analysis, of whether the retirement conditions violated constitutional equality, was driven by whether the conditions could be justified by Air India. At no point did the Court disentangle discrimination from its justification. It simply applied the two tests of equality—of reasonable classification and non-arbitrariness—from the perspective of whether the reasons for the impugned conditions could be considered reasonable or non-arbitrary, not whether the conditions were themselves unreasonable or arbitrary. Conceived this way, there is no independent content of discrimination at all. In fact, discrimination is only the absence of justification. It is important to unpack the implications of this.

In *Air India*, the Supreme Court applied two different tests to see whether the provisions offended equality under the Constitution of India. In the first instance, it applied the reasonable differentia test, according to which a distinction, when drawn on an intelligible basis and having some rational connection with the

purpose for which it is adopted, is sustainable.[161] Here the Court concluded that the difference in service conditions between the class of air stewards who were male and that of air hostesses who were female was not drawn on the basis of sex alone, but on several other considerations including age, marriage, and pregnancy as well as the requirements of the particular employment sector, societal conditions, and sensitivities and limitations of each sex. None of the service conditions were problematic under this test, which was too weak perhaps to find *any* distinction problematic. Multiple grounds and intersectional impact thus became justifiable reasons for which the service conditions existed rather than the reasons for which discrimination was wrongful. Intersectionality effectively ended up justifying, rather than constituting, discrimination. The reasonableness test has thus been severely criticized not just for its weak standard of review, but also for barely catching any discrimination at all.[162]

It was only when the Supreme Court applied the arbitrariness test[163] that one of the service conditions, retirement upon first pregnancy, was considered the 'most unreasonable and arbitrary provision which shocks the conscience of the Court'.[164] Termination of employment on this basis was seen as to compel 'the poor [Air Hostesses] not to have any children and thus interfere with and divert the ordinary course of human nature', which was 'extremely detestable and abhorrent to the notions of a civilised society' and 'grossly unethical, [that] it smacks of a deep rooted sense of utter selfishness at the cost of all human values' thus constituting not only 'a callous and cruel act but an open insult to Indian womanhood the most sacrosanct and cheris[h]ed institution'.[165] In contrast, mandatory retirement upon marriage within four years of service was considered 'a very sound and salutary provision' under the arbitrariness test for the reasons that:

> Apart from improving the health of the employee, it helps [sic] in the promotion and boos[t]ing up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a succes[s], all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional [air hostesses] either on a temporary or on ad hoc basis to

[161] *Anwar Ali Sarkar v State of West Bengal* [1952] SCR 284 (Supreme Court of India) (Das J) ('In order to be a proper classification so as not to offend against the Constitution it must be based on some intelligible differentia which should have a reasonable relation to the object of the Act as recited in the preamble.').

[162] Tarunabh Khaitan, 'Beyond Reasonableness–A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 Journal of the Indian Law Institute 177.

[163] *EP Royappa v State of Tamil Nadu* AIR 1974 SC 555 (Supreme Court of India) ('Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.').

[164] *Air India v Nergesh Meerza* 1982 SCR (1) 438 (Supreme Court of India) [84].

[165] Ibid.

> replace the working [air hostesses] if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan'.[166]

What appears more arbitrary than the service conditions is the Court's application of the arbitrariness test. Riddled with antiquated notions of sex and gender, arbitrariness as a standard seems to turn on affirmation of stereotypes rather than questioning them as discriminatory. In sum, both the tests—reasonable differentia and non-arbitrariness—seem ill-conceived in rooting out discrimination. This is so because the standards are devoid of any substantive consideration of discrimination as wrongful and are only defined through the lens of justification, especially when that justification is based on multiple grounds or identities.

Air India, though is not alone in this. The Canadian Supreme Court and the South African Constitutional Court, too, have done much the same in cases like *Gosselin, Volks*, and *Jordan*, despite provisions like Section 1 of the Canadian Charter and Section 36 of the South African Constitution which set a high bar for justifications. Thus, the majority's discrimination analysis in *Gosselin* was dominated by the justifications offered by the government. The Canadian Supreme Court accepted without question the generalizations relied upon by the legislature in assuming that those under thirty years of age did not suffer any historic disadvantage, stereotyping, or prejudice.[167] The government's good intentions of enabling young adults to be self-sufficient was sufficient for the Court to find that there was in fact no discrimination in the case.[168] Similarly, in *Volks*, the majority plainly accepted justifications like upholding freedom of testation and choice to marry for excluding cohabitating partners from intestate succession, finding that these considerations discounted any possibility of unfair discrimination in the first place.[169] On the other hand, in *Jordan*, the impact of disproportionate criminalization of female sex workers was justified not only by the legislature's lack of interest and intention in harming their human dignity, but also by the risks voluntarily assumed by the sex workers in choosing to offer their bodies for sex. Their choice justified the stigma, including of criminalization, attached to sex work. The Court thus refused to find anything discriminatory about a neutral provision criminalizing sex workers and customers alike. The line of reasoning invoked in these cases confirms that justificatory considerations have become central to the finding of discrimination. Much like the Indian Supreme Court in *Air India*, the majorities in all three cases invoked justifications alongside the discrimination analysis to defeat a finding of wrongful discrimination rather than saving justifications for Section 1 of the Canadian Charter or Section 36 of the South African Constitution. The result

[166] Ibid [82].
[167] *Gosselin* (n 34) [59]–[66].
[168] Ibid [65].
[169] *Volks* (n 2) [60] [81] [82] [85] [87] [94].

was that the Courts barely considered the impact of discrimination and, consequently, the nature of intersectional discrimination, but instead focussed on justifying any prima facie argument of discrimination which could have been made.

The point is not simply about the location of justificatory considerations—whether within or after the discrimination analysis, or well beyond in the limitation clauses—but the way justifications are used to deny any discrimination at all.[170] Discrimination and justification analysis may well be done simultaneously or separately but to let justifications ride over the determination of the causal inquiry—of whether certain grounds lead to a certain kind of discriminatory impact which is considered wrongful—is forsaking the commitment to adjudicate upon discrimination as such.[171] Thus, it becomes important to stress that justifications should not divert the court from the focus of the discrimination analysis of determining which grounds cause discrimination and how.

Here,intersectional cases seem to have particularly suffered because courts have not only assessed discrimination through justifications but also used intersectionality as a justification in itself. Thus, direct intersectional discrimination as in *Air India* was justified as 'meant to be so' and hence not wrongful *since* intersectional. The fact that discrimination may have been based on multiple grounds of sex, age, pregnancy, and marital status was used as a reason for it to not have been discriminatory at all since only single-axis discrimination was believed to be prohibited under the Constitution. On the other hand, indirect intersectional discrimination is seen as unintended and hence justified as merely happenstance or misfortune. In *Gosselin*, the intersectional impact of being under thirty years of age, reliant on social assistance, and female, understood as rendering the claimant poor, homeless, and vulnerable to sexual abuse and depression, was considered too exceptional and hence ignorable.[172] The *Volks* Court, too, lamented the intersectional impact upon Mrs Robinson because she was female and unmarried,[173] but that impact was seen as justifiable given the neutral framing of the provision based on marital status. Besides failing to detect indirect discrimination, what is regrettable is that the Court is acknowledging but ultimately ending up justifying the intersectional impact suffered by the claimant. This spin on intersectionality points to the need for resisting the acceptance of intersectional impact as a justification that is unintended and hence excusable. Such an understanding is plainly against the text and spirit of non-discrimination provisions which prohibit discrimination

[170] Although some courts and commentators maintain that the two must be delineated: *Volks* (n 2) [209] (Sachs J); *Harksen* (n 45) [51]–[52] (Goldstone J); *Law v Canada* (n 97) [81]. See also Titia Loenen, 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 South African Journal on Human Rights 401, 410–11.

[171] See Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 South African Journal on Human Rights 149, 175; Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the *Harksen* Test' (2011) 128 South African Law Journal 479, 504–05.

[172] *Gosselin* (n 34) [46]–[48].

[173] *Volks* (n 2) [59] [66] [68].

comprehensively, including, either explicitly or through interpretation, indirect and intersectional forms of discrimination. It is also against the plain language of limitation clauses like Section 1 and Section 36 which do not suggest that justifications which are *neutral* and lead to *unintended* impact will perforce be sustainable.

Lastly, it is clear that courts seem to be applying a rather low standard of review or level of scrutiny in these cases. In *Volks*, the Court accepted the government's purpose of ensuring freedom of succession and to marry, in excluding cohabitating partners from intestate succession without subjecting these justifications to any searching scrutiny. Similarly, the governmental purpose of enabling young adults by giving them a lower rate of social assistance was ratified by the Court in *Gosselin* without more. In *Jordan*, the neutrality of the provision in punishing anyone involved in the sex trade was taken as proof that no discrimination existed in the first place. The standard of review in these cases seems to have been one of mere rationality, reasonableness, or non-arbitrariness. What is interesting to note is that the standard of review seems to drop when the majorities in these cases considered justifications specifically in response to intersectionality or impact suffered on multiple bases. It is counterintuitive that intersectionality dips the standard of review such that legislative distinctions in these cases did not need to be shown to be justified but merely stated in order to be accepted. The rationale for this is clearly amiss.[174]

A searching and structured standard of review is required for giving the justification analysis a meaningful role in discrimination law, including for intersectional discrimination.[175] It is widely argued that the appropriate standard of review is one of proportionality.[176] In addition to asking about the legitimacy of the impugned measure, proportionality is concerned with testing the suitability and necessity of, as well as any excessive burdens imposed by, the measure.[177] The tripartite test is meant to inherently respect rights by not taking infringements lightly and requiring precise explanations of legitimate aim, suitability, necessity, and balance. Proportionality is popular with the European courts in particular. While the CJEU rejected intersectionality in *Parris*, its next-best response to intersectionality in the form of capacious single-axis discrimination shows that proportionality as a structured form of review indeed works for indirect intersectional cases where justification is allowed. What is notable in the CJEU's approach is that it only proceeds

[174] See Sheila McIntyre, 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 Queen's Law Journal 731; Denise G Réaume, 'The Relevance of Relevance to Equality Rights' (2006) 31 Queen's Law Journal 696.

[175] Murray Wesson, 'Discrimination Law and Social Rights: Intersections and Possibilities' (2007) 13 Juridica International 74, 81.

[176] Sheldon Leader, 'Proportionality and the Justification of Discrimination' in Janet Dine and Bob Watt, *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012); Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174; Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1. See also *Brink* (n 4) [46].

[177] Paul Craig, *Administrative Law* (5th edn, Sweet & Maxwell 2003) 622.

to discuss the possibility of justification once discrimination is established. Thus, in a case like *Kutz-Bauer*, the Court first satisfied itself that a part time scheme which excluded a vast majority of women from benefiting from it (since their retirement age was set five years earlier than that of men), constituted indirect sex discrimination under Directive 76/207.[178] It then proceeded to ask whether the scheme could be objectively justified by criteria unrelated to any discrimination on grounds of sex (legitimate aim). Not only are the aims meant to be objectively justifiable, but it is also required to show that the aims cannot be achieved by other means (necessity) and the means chosen to achieve those aims are actually capable of advancing those aims (suitability). The Court was quick to remind that while combating unemployment and encouraging early retirement were all acceptable aims, they were insufficient as 'mere generalisations . . . to show that the aim of the disputed provisions is unrelated to any discrimination based on sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen are or could be suitable for achieving that aim'.[179] Similarly, while budgetary considerations could influence the choice of social policy, they could not 'themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes'.[180] In sum, the Court reaffirmed the broad discretion EU Member States have in designing social policy, but pointed out that it 'cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal treatment for men and women'.[181] In this case, the effect of the policy was intersectional in that it ended up disadvantaging women of a certain age because their retirement age was different from that of men. The Court was clear that purported aims like combating unemployment and budgetary deficits, or unintended consequences like intersectional disadvantage for older women, could not be used to justify discrimination without more.

It is useful to note that the standard of review in a case like *Kutz-Bauer* cannot simply be classified as high or low. The CJEU is not just asking for very weighty, substantially weighty, or merely important reasons for the discrimination to be sustained, but is carrying out a structured qualitative assessment of legitimate aims, suitability, necessity, and balance, and also providing specific guidance as to what kind of considerations can be shown to satisfy each of the limbs of the proportionality analysis. It is thus both the CJEU's structured form of review, as well as its specificity of the kind of justifications deemed acceptable, which makes a difference to finding for intersectional cases. The latter is particularly important, in that when the Court is analysing the justifications, it is aware of accepting as justifiable neither general or neutral explanations, on the one hand, nor specific but

[178] Case C-187/00 *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-2741 [51].
[179] Ibid [58].
[180] Ibid [59].
[181] Ibid [57].

unintended intersectional impact, on the other. In the absence of an understanding that intersectionality is *not* an acceptable justification, structured analysis, proportionality, or other heightened forms of review alone will be insufficient in rooting out intersectional discrimination.

This conclusion is reinforced in the ECtHR jurisprudence which purports to carry out a structured proportionality analysis with varying intensities of review for different grounds, but is not always successful in resisting intersectionality-based justifications as rationalizing the discrimination at play. Take, for example, the treatment of intersectionality in *SAS v France* which concerned the legality of the full-face veil ban under Articles 3, 8, 9, 10, 11, and 14 of the ECHR. The argument in respect of Article 14 was that the ban constituted indirect intersectional discrimination against Muslim women because of their sex, religion, and ethnic origin.[182] The government responded with two arguments—that the practice of wearing a full-face mask was applied to everyone and not just Muslim women and that, in any case, the practice was voluntary and hence Muslim women had put themselves at a disadvantage and could not subsequently complain of discrimination.[183] The Court agreed with the claimants that the ban on the full-face veil had a disproportionate impact on Muslim women because of their sex and religion, but ultimately held that the ban had 'an objective and reasonable justification'.[184] In particular, the Court was satisfied by the necessity and the suitability of the ban which was both non-specific (i.e. it applied to everyone) and limited (i.e. it did not prohibit Muslim women from wearing other religious insignia like the *burqa*). Intersectional discrimination, to the extent that it existed, was thus tolerable. But the strongest argument for the ECtHR was one regarding the legitimate aim pursued by the ban, namely the preservation of the conditions for 'living together' in France. The state had a wide margin of appreciation in defining and pursuing this aim, which was about how French society wanted to organize itself as a plural, tolerant, and broad-minded democracy. This choice was always one for individual societies to make since there was no European consensus on it anyway. The Court decided that it had a duty to exercise a degree of restraint in its review of Convention rights and accordingly found the ban to be proportionate.

It is clear that proportionality itself does not do the trick for intersectional discrimination despite being a structured form of review. Intersectional justifications and the margin of appreciation may yet supersede a finding of wrongful discrimination. This may particularly be the case for unenumerated and analogous grounds which attract less scrutiny than grounds which are enumerated. In fact, even within the enumerated grounds, some seem to attract a higher standard of review

[182] *SAS* (n 10) [80].
[183] Ibid [86].
[184] Ibid [161].

than others. Thus, under the ECHR, the proportionality review for discrimination based on the grounds of race and sex has been stricter than it has been for other grounds.[185] Yet, it is not clear why the review becomes leaner, with a wider margin of appreciation, in cases where race and sex combine, such as in cases involving Muslim women's dress.[186] If at all, there is an argument to be made for the strictest form of review when grounds (especially those like race which are listed and recognized as 'suspect') combine with others. This argument has been made in the context of the US, making a case for applying a strict standard of scrutiny for Black women's claims based on race and sex under the Equal Protection Clause.[187] There is merit in arguing that when a suspect ground like race is involved, the standard of review should be high, even if it is combined with other grounds. In any case, what should be relatively straightforward, though, is not accepting the same reason as an argument for lowering the standard of review. Just as intersectionality cannot serve as a justification for discrimination, it cannot serve as a reason for less searching scrutiny, regardless of whether we agree to give intersectional claims involving suspect grounds the highest level of scrutiny.

It is useful to collate the conclusions here. As more cases of intersectional discrimination are litigated, more defendants will seek to justify it. It is therefore important to stress that the justification analysis should not overtake a determination of discrimination per se—on what grounds it is based and whether it is wrongful. Justifications should be treated as they are, that is, as justifying rather than eliminating discrimination. Importantly, intersectionality should not become a justification itself, especially when it occurs indirectly. The fact that intersectionality explains a form of discrimination, and not its rationalization, should go uncontested. Finally, there is little justification for the low standard of review which has often been applied to intersectional cases. But a robust form of review is not just about high or low levels of scrutiny. The form of review has to be about the structure of justification analysis which lays out the lines of inquiries (legitimate aim, suitability, necessity, balancing) and the kind of responses (costs, budgetary considerations, unemployment, social cohesion, democratic values) deemed acceptable. Instead of quibbling over variable levels of scrutiny based on the different combination of grounds involved, we may be better served by insisting on a structured and consistent form of review which provides greater guidance for, and promise of withstanding, the justification analysis in intersectional claims.

[185] The cases of Roma women's sterilization which could presumably be classified as based on race and sex, have succeeded under the proportionality test, albeit under arts 3 and 8 of the ECHR and not under art 14 of the ECHR. See *NB v Slovakia* (2010) Application No 29518/10; *VC v Slovakia* (2012) Application No 18968/07.

[186] See n 10.

[187] Judy Scales-Trent, 'Black Women and the Constitution: Finding Our Place, Asserting Our Rights' (1989) 24 Harvard Civil Rights-Civil Liberties Law Review 9.

7. Evidence and Burden of Proof

Thus far we have considered substantive issues of discrimination: on what grounds do intersectional claimants argue; what type of claims do they bring—direct or indirect discrimination; what is the substantive conception of discrimination that explains what is wrong in their complaint; does comparison help establish such discrimination; can the defendant justify the discrimination anyway, and how? All of this rests as much on doctrinal issues as on evidence. It is, after all, the evidence that is brought forth which makes a difference to the conclusions reached in respect of each of the substantive issues arising in discrimination cases. So, what kind of evidence is acceptable and who bears the burden of persuasion based on that evidence—the claimant, the defendant, or both?

Like single-axis discrimination, intersectional discrimination can be established by qualitative or quantitative evidence. What either must do is show the distinct nature of intersectional discrimination, that is, the sameness and difference in patterns of group disadvantage. The explanation of this distinct nature looks different for each intersectional claimant. As chapter 2 showed, the explanation is long and comprehensive for a group like Dalit women who are disadvantaged because of both their caste and gender. The evidence must eventually help us arrive at this explanation for intersectional claimants and the particular instances of discrimination of which they complain. Furthermore, because the nature of intersectional discrimination resides in social structures and norms, it is important for evidence to be led from this perspective, focussing on unearthing broader patterns rather than isolated explanations of disadvantage. Only a wide range of evidentiary material can help render such discrimination comprehensible and thus redressable. It is useful to look beyond legal sources, to accounts of such patterns of group disadvantage in sociology, anthropology, psychology, history, economics, feminist studies, and other relevant disciplines. Each has engaged with intersectionality in elaborate ways, revealing the lived experience and reality of those who are caught between multiple and intersecting systems of power. The South African Constitutional Court leads by example in admitting elaborate explanatory accounts of intersectionality in cases like *Bhe* and *Hassam*. The Court is defined by its acute appreciation of South Africa's discriminatory past as well as the contemporary society in its social, political, economic, and cultural context. Discrimination analysis under Section 9(3) of the South African Constitution is thus highly contextual. This is only possible with the help of rich qualitative and quantitative evidence the Court seeks out from parties, amici, or experts.

South African jurisprudence is also an example of making good use of qualitative evidence without necessarily demanding statistical proof. Statistics or quantitative evidence of any kind can be immensely helpful, just like qualitative accounts of discrimination. The problem arises when courts consider statistics to be necessary for the proof of intersectional discrimination. First, statistics for indirect

intersectional discrimination, where the claimant has to show that an entire group has been put at a disadvantage, may not always be available. Second, even if they are available, it may be unrealistic to demand these statistics from the claimant or a party which does not have access to them. Both problems emerged pointedly in the Canadian Supreme Court's handling of *Gosselin*. Louise Gosselin was expected to produce qualitative and quantitative evidence, not just in respect of herself but in respect of the entire class of persons—young persons below the age of thirty years and reliant on social assistance—and show how many accessed the various programmes which allowed them to receive an enhanced sum of social assistance, how many accessed and dropped out of these programmes, how many continued to be in need of places on these programmes, and how many lived below the poverty line. Some of these statistics were unavailable, not just to the claimant but to the government itself. Where available, the government, not Louise Gosselin, would have had access to them since it managed both the payments of social assistance as well as the vocational and education programmes for young adults. The majority considered neither the availability nor the access to such evidence too seriously. According to the Court, it was upon Louise Gosselin to establish the claim on behalf of her class with concrete statistics. Even if it were 'prepared to accept that some young people must have been pushed well below the poverty line',[188] since it did not know 'how many, nor for how long', the complainant had failed to discharge her burden of proof.

The obvious flaw in the Court's evidentiary approach was addressed by the minority in *Gosselin*. In Bastarache J's dissenting opinion, he pieced together every bit of evidence brought forth by the claimant to find that the claimant had not only established a violation of her human dignity but also that her situation was illustrative of the manner in which the social assistance scheme operated and affected the human dignity of those in her position; hence, there was 'no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30'.[189] Rather, he required the state to adduce evidence to discharge its burden under the justification analysis because '[g]iven the government's resources, it is much more appropriate to require it to adduce proof of the importance and purpose of the program and its minimal impairment of equality rights in discharging its burden under s. 1'.[190] Bastarache J's approach is particularly helpful for intersectional claims in that it is both fair and pragmatic in the kind of evidence each party is expected to bring forth to make their case. It is fair because it asks the claimant to bring in evidence mainly in respect of her own position of disadvantage, and then draws conclusions about broader patterns of group disadvantage based on that and extends it to those in her position. It is pragmatic because it leaves the government

[188] *Gosselin* (n 34) 463.
[189] Ibid [255] (Bastarache J).
[190] Ibid [259].

to bring in counter-evidence in the justification analysis because it is far easier for the government to have access to statistics in respect of its own programmes. This approach to statistics has been popular with Canadian tribunals at least.[191] In its most radical statement on the kind of evidence useful in establishing intersectional claims, the British Columbia Human Rights Tribunal in *Radek* proclaimed that:

> the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the [Human Rights Code] are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants . . . the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible.[192]

What is radical about this approach is that it dispenses with the requirement of proving intersectional discrimination through statistics alone, especially cases of an indirect and systemic nature, and instead takes a contextual view of evidence that may be available and ultimately useful. Such a view of evidence is dependent on what is asked of intersectional claimants in the first place or what burden of proof is on the parties; an issue we now turn to consider.

The question of who bears the burden of proof in a discrimination case is normally divided into two stages—first, establishing whether a prima facie case of discrimination exists, and second, considering whether such discrimination actually exists and, if so, whether it is justifiable. The apportioning of the burden of proof for both stages differs vastly between jurisdictions. In the US, under Title VII, the claimant bears the burden at the first stage for establishing a prima facie case of discrimination. The burden then shifts to the defendant at the second stage to articulate a legitimate, non-discriminatory reason for the impugned action.[193] But, throughout, the ultimate burden is borne by the claimant to persuade the court, either directly, that the defendant's explanation is merely a pretext for a discriminatory motive, or indirectly, that the defendant's explanation for their actions is

[191] See esp *Radek v Henderson Development (Canada) and Securiguard Services (No 3)* 2005 BCHRT 302 [513] (The Tribunal disagreed with the respondents' submission that 'statistical evidence of disproportionate effect is essential to a claim of systemic discrimination, either generally or in the present case. Rather, to return to first principles, what is necessary is evidence of "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . ." Statistics may be a "signal" of such effects, but they are not necessary in every case. The signal should not be confused with the thing signified. The evidence as a whole should be considered to determine if practices or attitudes are present which have the effect of limiting persons' opportunities due to their membership in one or more protected groups.') (citing *CNR v Canada (Human Rights Commission)* [1987] 1 SCR 111 (SCC) [34]).

[192] Ibid [509].

[193] *McDonnell Douglas Corporation v Green* (1973) 411 US 792.

inadequate.[194] This is different from the Equal Protection Clause, where the burden of proof is based on the standard of scrutiny that a ground attracts. While the claimant bears the burden of establishing a threshold case of discrimination, the burden of justification is dependent on the sliding scale of scrutiny from strict to rational, as explored in the previous section. In the UK, Section 136 of the Equality Act 2010 does not explicitly place the burden on the claimant to prove a prima facie case of discrimination, but it has been interpreted as such to be the case.[195] However, a court is meant to consider all evidence brought forth by both the parties to draw this initial conclusion. The burden of proof at the second stage is on the defendant to show that they did not contravene an equality provision. In Canada, under the Canadian Charter, the burden at the first stage is on the claimant but, once met, the burden shifts to the respondent state under Section 1 of the Charter.[196] South Africa follows this shifting burden of proof framework but apportions the burden differently in that the burden of proof on the state at the second stage is higher. This is because of the unique provision in Section 9(5) of the Constitution which provides that once discrimination is shown to be based on grounds listed under Section 9(3) of the Constitution, such discrimination is presumed to be unfair. Similar provisions exist in EU law, though member states are explicitly allowed to introduce rules of evidence which are more favourable to the claimants in discrimination law.[197] The ECtHR also seems to have followed the two-step framework of a shifting burden of proof, though there is little clarity over the burden of proof in the particular case of Article 14.[198] As international courts with a unique set of investigatory powers and referral systems, there are no strict stipulations of procedural rules to be followed by the CJEU and the ECtHR. In respect of their equality and non-discrimination jurisprudence, these courts are thus more similar to international human rights bodies like the CEDAW Committee and the Human Rights Committee which govern their own procedure and do not impose arid rules of evidence upon the parties. There is an expectation that the parties produce all that they can to support their case and there is an understanding that, ultimately, it is the totality of circumstances and evidence which should be considered. Thus, issues of burden of proof which have arisen in actual or potential intersectional cases relate, in the main, to some of the jurisdictions we have considered so far (US, UK, South Africa, and Canada). India is an outlier in this respect, adopting neither the shifting burden of proof nor the presumption of discrimination format. On the contrary, it applies a presumption of constitutionality when legislative provisions are challenged under Article 14 of the Constitution.[199] There is some indication

[194] *Texas Department of Community Affairs v Burdine* (1981) 450 US 248.
[195] *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913.
[196] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (SCC) 178.
[197] See Race Directive (n 154), arts 8, 21.
[198] Oddný Mjöll Arnardóttir, 'Non-discrimination Under Article 14 ECHR: The Burden of Proof' (1999–2012) 51 Scandinavian Studies in Law 13.
[199] This does not apply to pre-constitutional colonial legislation. See *Anuj Garg* (n 104).

that Article 15(1) operates with a presumption of wrongful discrimination like Section 9(5) in South Africa when a non-legislative distinction is based on a listed ground. All other classifications under Article 14 on the general right to equality must be 'examined with the presumption that the State action is reasonable and justified'.[200]

The trouble for intersectional claimants is that they seem to have borne an inexplicably heavy burden of proof at every stage.[201] Take, for example, the case of *Judge v Marsh* where the US District Court of Columbia was quick to point out that, although intersectional claims could be brought on two grounds, the burden of proof on the employer remained the same while the claimant continued to bear the same burden, 'difficult though it may be, of establishing by a preponderance of the evidence that her employer's challenged decisions were based on this narrowly defined [intersectional] subgroup'.[202] These words have since become a self-fulfilling prophecy. The erratic fate of claims argued on two grounds in the US shows that courts have assumed that the burden of proof on claimants in these cases is inevitably high and that it is difficult to show evidence of discrimination related to a subgroup. This, though, is no fault of the intersectional claimants themselves. As the Court in *Judge v Marsh* remarked, 'the generally small sample size and lack of historical data . . . undermined the evidentiary value of the statistics' relating to Black women's discrimination.[203] The argument is tautologous; if the group is narrowly defined, such as Black women or eligible Black women or eligible Black women in a particular organization or neighbourhood, the statistics relating to them will inevitably be narrow. Given the long history of racial and gender oppression, it is also possible that a long history of employment may not be readily available in Title VII cases. The demand to bring specific evidence in respect of a subgroup and then doubting that evidence for being too specific are thus conflicting moves.[204] Similarly, the requirement for showing discriminatory motive for claims of direct intersectional discrimination is equally problematic since the defendants can too easily show that either multiple grounds had nothing to do with their actions or that their actions were predicated on other criteria like qualifications and experience, which were far more complex and subjective. Thus, in *Judge v Marsh*, the Court readily accepted the subjectivity of reasons for not selecting the claimant, a

[200] *Kathi Raning Rawat v State of Saurashtra* AIR 1952 SC 123 (Supreme Court of India).

[201] Though it is uncontroversial that the standard of proof is one of preponderance of probabilities. The controversy lies in respect of the relatively high intensity of this standard as applied to claimants of intersectional discrimination.

[202] *Judge v Marsh* (n 55) 780.

[203] Ibid.

[204] See also similar conflicting statements in *Jeffers v Thompson* 264 F Supp 2d 314 (2003) (United States District Court, Maryland) ('The more specific the composite class, the more readily a plaintiff can demonstrate that the beneficiary of the contested employment decision does not belong to the class. A prima facie case is not supposed to be difficult to establish . . . The ultimate burden of persuasion remains always on the plaintiff . . . And the more specific the composite class in which the plaintiff claims membership, the more onerous that ultimate burden becomes.') Ibid 326–27.

Black woman, as nothing to do with race or sex. The defendant's burden of proof appears incommensurately low, as the claimant's appeared high in bringing statistical evidence which was specific, historical, and substantial all at the same time. Yet, the defendants asked for the claimants to bear a 'more demanding evidentiary burden' or bring 'more persuasive evidence to support [a] claim than would otherwise be necessary' for the reason that claims of direct intersectional discrimination are 'implausible' in professional contexts and make 'little economic sense'.[205] Such demands have been rejected only at the altar of overwhelming direct and circumstantial evidence of direct discrimination in sex-plus and race-plus cases.[206] Claimants in age-plus and disability-plus cases meanwhile continue to face insurmountable standards of proof, including an insistence on proving discrimination to be solely or specifically connected to particular grounds, an approach rooted in single-axis thinking.[207]

The US courts have been unrealistic in what they expect of intersectional claimants for succeeding in their claims.[208] Tribunals in the UK have thus been wary of enforcing burden of proof provisions in intersectional cases too strictly. In *O'Reilly v BBC*[209] both the parties and the Court agreed that instead of focussing on channelling the discrimination analysis via the shifting burden of proof framework from the claimant to the defendant, it was more helpful to focus on 'the reason why'[210] discrimination occurred at all by analysing the evidence and drawing appropriate inferences from primary facts and 'deciding the matter on the balance of probabilities on a consideration of the totality of the evidence'.[211] This is essentially the approach which succeeded for the claimant in *Tilern de Bique* where the Employment Appeal Tribunal (EAT) upheld the ruling of the Employment Tribunal (ET) that the combined operation of the immigration and constant-availability conditions of employment in the army constituted discrimination based on both race and gender. This conclusion was based on the primary facts established before the ET, namely that the claimant and those in her position faced substantial difficulties in meeting the requirements of their job given the difficulties they faced in arranging child care and the inflexible attitude of the army in accommodating their needs or relaxing the requirements for them. These facts were established firmly before the ET, while the Ministry of Defence had failed to discharge the burden of

[205] *Lam v University of Hawaii* 40 F 3d 1551 (9th Cir 1994) (USCA) 1563.

[206] Ibid.

[207] See esp *Gross v FBL Fin Services, Inc* 557 US 167 (2009) 180, where the US Supreme Court held that '[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision'.

[208] See discussion in Deborah A Widiss, 'Griggs at Midlife' (2015) 113 Michigan Law Review 993 (2015) on why indirect intersectional discrimination remains undeveloped in the US.

[209] [2010] UKET/2200423/2010 (hereafter *O'Reilly*).

[210] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [7]–[10]; *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48 [29]–[30].

[211] *O'Reilly* (n 209) [237].

justification. The EAT was clear that no more was required to prove discrimination when primary facts went undisputed. The UK Supreme Court in *Hewage* clarified these matters further for intersectional claimants. First, the Court emphasized that 'it is important not to make too much of the role of the burden of proof provisions'.[212] The only time this controversy comes live is when evidence before the courts is genuinely deficient to conclude one way or the other in a case. Aside from what the Supreme Court thought would be few such cases, the burden of proof should be of no real importance in intersectional cases. Secondly, and in those few cases, the burden of proof upon a claimant arguing on two grounds cannot be too high at the first stage of the discrimination analysis. The claimant is only required to prove a prima facie case of intersectional discrimination at this stage (so that the Tribunal can assume that discrimination may have occurred on the said grounds); at the second stage, the burden of proof shifts onto the defendant to show that an adequate explanation existed for such discrimination.[213] In fact, the Court went so far as to say that the assumption at the second stage of the discrimination analysis is that there *is* no adequate explanation for discrimination. There is no assumption of any kind at the first stage.[214] The implication is clear. That the defendant in a case may bear a greater burden of proof at the second stage than the claimant does at the first stage.

This is largely the approach which has proven to be successful for intersectional claimants in South Africa, where discrimination based on enumerated grounds is 'presumed' to be unfair. The burden is thus upon the defendant to show that discrimination can be justified under Section 36 of the Constitution. This is not a light burden given that, under Section 36, justification should be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. In deciding this question, regard must be had to the 'nature of the rights infringed, the nature of the discriminatory conduct, the provisions themselves, as well as the impact of the discrimination on those who are adversely affected'.[215] Significant amongst these is the unequivocal evidence of the impact of discrimination, which, when admitted, makes it near impossible to pass muster in the justification analysis. In *Hassam*, the minster had advanced no justification for discrimination and the Court went no further on his behalf to indulge in a justification analysis. Conversely, the piecemeal appreciation of intersectional impact (as in *Volks* and *Jordan*) made it easier for the courts to justify discrimination without having the state explain their legislative choices as against the evidence of impact. Smoking gun evidence of the kind available in cases which show a clear intention to discriminate are difficult to come by, given that the majority of cases are not

[212] *Hewage v Grampian Health Board* [2012] UKSC 37 [32].
[213] Ibid [25].
[214] Ibid [32]; see also Equality Act 2010, s 136.
[215] *Hassam* (n 6) [41].

intentional but involve complex structures, policies, and norms which have an intersectional impact on disadvantaged groups. We need a wealth of qualitative and quantitative evidence to show such discrimination. But what is perhaps more important is for the courts to have evidentiary approaches and burden of proof provisions which allow for such evidence to be brought forth and examined fairly. The success of intersectional claims thus relies on both the appreciation of such evidence as well as the appreciation of the burden each party bears in producing and proving their case based on it.

8. Remedies

All the fuss about getting intersectional discrimination right is ultimately about fixing it. As chapter 2 described, the whole project of intersectionality is about transforming structures of disadvantage and systems of powers which are co-constituted. The goal is to upturn the structures and systems which cause intersectional discrimination and to reimagine societies as truly equal where no one is intersectionally disadvantaged. The fundamental goal of transformation is what inspires intersectionality as a theory and in turn what must inspire discrimination lawyers to redress it as a category of discrimination.

How do we achieve this goal through remedies in an intersectional claim? Remedies in adjudication are naturally limited. This is because they relate to the legal claim before the court. Unless the claim is a broad one that challenges a large-scale social policy, thereby requiring wholesale reconception or programmatic response, remedies in individual cases of discrimination involve specific relief like damages, compensation, penalties, declarations, injunctions, interdicts, and legal costs.[216] Courts can also order remedies with a broader remit, issue guidelines, or direct the defendant to instate structural policies which address intersectional discrimination. In fact, remedies in intersectional claims may be no different in form than those for other categories of discrimination. But they are, like all other things considered so far, highly dependent on how the courts choose from different conceptual and doctrinal positions, and, in particular, from the range of remedial offerings available in a jurisdiction. For example, in EU law, remedies are often

[216] UK Equality Act 2010, s 124; Civil Rights Act of 1964, Title VII, s 2000e-5 [s 706] (g)–(k); Constitution of India, art 32; South African Constitution, ss 38, 172; Canadian Charter, s 24(1); European Communities Act 1972, art 249; Race Directive (n 154), art 15; Gender Directive (Recast) (n 154), art 18; Framework Directive (n 154), art 9; ECHR, art 13. Under international law, the Human Rights Committee, CEDAW Committee, and CRPD Committee may issue any of these remedies as well, but relief is suggestive in nature and not legally enforceable in a court of law. See art 7 of the CEDAW Optional Protocol ('recommendations'); art 5(4) of the International Covenant on Civil and Political Rights Optional Protocol 1 ('views'); and art 5 of the CRPD Optional Protocol ('suggestions and recommendations').

left to the discretion of the member states.[217] The equality Directives mandate the member states to introduce measures for 'real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered'.[218] They also allow member states to make rules for issuing penalties in cases of discrimination as well as encouraging collective agreements and practices for preventing discrimination.[219] In contrast, the UK's position under the unenforced Section 14 has been that combination discrimination could not give rise to higher indemnification.[220] There is no such bar in Canada, where the primary remedy in intersectional claims before human rights tribunals is in the form of aggravated monetary compensation. There is no bar in South Africa either, but the issue of remedies for intersectional discrimination, especially under constitutional law, raises some very distinctive questions. For example, in the case of *Bhe*, the Constitutional Court considered a host of complex issues in designing an effective remedy: the appropriateness of substituting the long-standing customary law of succession with a legislative scheme suitably adjusted by the Court; the breadth of relief to cover those in a similar position as the claimants and affected by the repeal; and retrospectivity.[221] These issues are both specific and significant but go beyond the scope of this book. These specificities will inevitably need to be worked out in each discrimination law regime, both federally and provincially, and in respect of specific laws which apply to different subject matters, grounds of discrimination, etc. Here, we must resolve two issues which have emerged at the forefront of the remedies debate. First, should intersectional discrimination be indemnified with aggravated monetary indemnification, where such a form of remedy is appropriate? Secondly, should intersectional claims be limited to the claimant and those in her position or extend to everyone who shares some disadvantage with the claimant?

The issue whether intersectional discrimination should be indemnified at a higher rate than other claims of discrimination divides opinion. One opinion is that direct intersectional discrimination should attract higher indemnification than indirect discrimination since it is more morally culpable.[222] Irrespective of

[217] See Christa Tobler, 'Remedies and Sanctions in EU Non-Discrimination Law' (2005) European Commission.

[218] Gender Directive (Recast) (n 154), art 18; Race Directive (n 154), art 15; Framework Directive (n 154), art 17.

[219] Gender Directive (Recast) (n 154), arts 25, 26.

[220] Government Equalities Office, 'Equality Bill: Assessing the Impact of a Multiple Discrimination Provision. A Discussion Document' (April 2009) <http://webarchive.nationalarchives.gov.uk/20100212235759/http://www.equalities.gov.uk/pdf/090422%20Multiple%20Discrimination%20Discussion%20Document%20Final%20Text.pdf> accessed 29 March 2019 (hereafter GEO, 'Equality Bill').

[221] *Bhe* (n 5) [101]–[121] (Langa DCJ).

[222] Victoria Chege, 'The European Union Anti-discrimination Directives and European Union Equality Law: The Case of Multi-dimensional Discrimination' (2012) 13 ERA Forum 275; *Jumard v Clwyd Leisure Ltd* [2008] IRLR 345 (UKEAT) [50] ('The offence, humiliation or upset resulting from

whether a jurisdiction requires proof of the perpetrator's animus in establishing direct discrimination, such a claim may work only in cases where there is evidence of the perpetrator's state of mind in fact. Such cases, though, are rare. Others have argued that higher indemnification is necessary in order to incentivize intersectional claims.[223] Surely, the argument goes, if intersectional claims on multiple grounds are not better compensated than claims based on a single ground, there is little practical benefit to having courts recognize intersectional claims, especially in those situations where monetary remedies are preferable. The argument is not entirely meritless. Intersectional discrimination is hard to prove given the unfavourable judicial attitudes towards it. The rigmarole of succeeding in an intersectional claim may pay off only when a claimant is duly compensated. A bar on accessing aggravated indemnification can dissuade meritorious claims of intersectional discrimination.[224]

Yet, in principle, higher monetary relief should not be granted for bravery in pursuing hard claims in court or for incentivizing future claims of such nature. Higher indemnification may make sense for the reason that there is something extraordinary or aggravated about discrimination in the case. Intersectional discrimination should not by itself be treated as aggravated or exceptional since it goes against the point of intersectionality—that it is a rather common form of discrimination—even if discrimination law has not recognized it as its mainstay. There may of course be cases of intersectional discrimination which are exceptional. Certain forms of discrimination, harassment, and violence against Dalit women definitely qualify as exceptional because of the gravity of violations against them.[225] It is the qualitative nature of what Dalit women suffer which makes a difference to whether their discrimination claims should be considered for a higher rate of indemnification, if indemnification is appropriate. This is an important point. Intersectionality has no quantifiable stakes. It is not as if intersectional discrimination is necessarily worse or more problematic than other categories of discrimination or that discrimination on two grounds is actually double discrimination and one on three grounds is triply wrong.[226] As the EAT in *Jumard* aptly remarked, 'the degree of injury to feelings is not directly related to the number of

a deliberate act of race discrimination may quite understandably cause greater injury to feelings than, say, a thoughtless failure to make an adjustment under the Disability Discrimination Act.') (hereafter *Jumard*).

[223] Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 Canadian Journal of Women and the Law 25, 40.

[224] This is the position of the UK government in respect of the unenforced s 14 of the Equality Act 2010, namely that no aggravated indemnification can be sought. See GEO, 'Equality Bill' (n 220).

[225] See chapter 2, section 3.

[226] *Jumard* (n 222) and *Khanum v IBC Vehicles Ltd* [1999] UKEAT/685/98 warning against double counting for the purposes of damages when a single cause of action is at issue, simply because a claim is based on two grounds.

grounds on which discrimination has occurred'.[227] This is because the multiplicity of grounds in an intersectional claim does not explain what is wrong about intersectional discrimination per se. Intersectional wrongs matter in a qualitative sense. More importantly, as posited in chapter 2, intersectional discrimination occurs *as a whole* rather than as fragments of the individual identities involved. So, in a single cause of action, multiple identities create a qualitatively different experience which can only be examined together to understand the sameness and difference in patterns of group disadvantage.[228] The case for higher indemnification should thus be made on a case by case basis based on the severity of disadvantage suffered by the claimant. In which case, neither a mandatory provision enabling, nor a bar or an upper limit on, monetary remedies for intersectional discrimination is justifiable.

Take the example of the Ontario Human Rights Tribunal in *Baylis-Flannery*.[229] There was ample direct evidence to conclude that the claimant had suffered discrimination and harassment due to her race and sex as a Black woman. When it came to calculating damages for mental anguish, the Tribunal referred to intersectionality to find that the mental anguish caused was greater than that suffered because of a single ground since the 'employer repeatedly diminish[ed] her based on his racist assumptions of the sexual promiscuity of Black women'.[230] It thus found that the claimant was due 'restitution for all of the enumerated grounds of discrimination that she suffered by adding them together within the restitution she receives for general damages'.[231] Despite an intersectionality-friendly analysis discussed in the last chapter, the approach to higher damages in *Baylis-Flannery* is suspect. It is not immediately clear that the mental anguish is *greater* simply because the claimant was targeted both for her race and sex. Would the claimant have suffered less mental anguish had the perpetrator expressed persistent interest in 'young girls' rather than 'young Black girls'.[232] There is more needed to understand

[227] *Jumard* (n 222) [49]. See also *Birmingham City Council v Desmond Jaddoo* (2004) UKEAT/0448/04.

[228] See esp *Morrison v Motsewetsho* (2003) HRTO 21, where the Ontario Human Rights Tribunal did not view multiple grounds themselves as separate causes of action for each claimant. Cf. *Jumard* (n 222) [60] ('The losses flowing from the two forms of race and disability discrimination, at least where they did not arise out of the same facts, should have been separately considered.').

[229] *Baylis-Flannery* (n 59).

[230] Ibid [149].

[231] Ibid. See also *Comeau v Cote* [2003] BCHRT 32 [131] ('Finally, I find that the impact of the discrimination on the basis of both age and disability or perceived disability to be more hurtful to Mr. Comeau, than if it were only on one ground. As the impugned conduct was tied to both Mr. Comeau's age and his health, it was an attack on two aspects of his dignity, feelings and self respect. The Respondents' conduct branded Mr. Comeau as old and physically incapable. The experience gained with his age was reduced in significance, as he was also perceived as physically incapable as a result of his health. This was not a view Mr. Comeau had had of himself at any time prior. Although it is difficult to assess how much of the hurt and humiliation was attributed to the perceived disability and how much to the perception that his age hampered his performance, I am satisfied that this intersectionality of prohibited grounds had a greater impact on Mr. Comeau's dignity, feelings and self respect than would discrimination on either ground in isolation.').

[232] *Baylis-Flannery* (n 118) [24] [107].

why each ground should count for more, adding to the mental anguish and hence the damages.[233] Of course, there may be cases in which Black women are at risk of greater injury. For example, the case of Black women's hair exemplifies this possibility where the same hairstyles (such as corn rows, braids, or dreads) can be worn by white and Black women, but Black women face greater disadvantage because of the nature of Black women's hair and the history of wearing it in, what are distinctly, Black hairstyles.[234] But unless such an explanation emerges for acts of intersectional discrimination, not every cause of action should be a case for greater monetary indemnification.

This approach also prevents intersectionality from being treated simply as an aggravating factor in determining damages. Intersectionality as a theory is relevant in defining what we mean by intersectional discrimination and hence determining liability for such discrimination in law. It is not something which can be acknowledged and addressed simply by adding it at the stage of remedies for higher indemnification. Courts have incorrectly tried to segregate liability and remedy for intersectionality in this way. For example, in *Arias v Desai*, the Ontario Human Rights Tribunal noted that '[w]hile Ms Arias' age was not relevant to the issue of liability for sexual harassment, the Tribunal finds that the Respondents must be responsible for the extent of the damage that flows from their acts due to her particular vulnerability'.[235] The evidence before the Tribunal was unequivocal. That Ms Arias was in fact treated differently from others in a similar situation and that her young age was a particular factor in the way she was treated and how she responded to sexual harassment. This evidence should make a difference to liability in the first place because it shows on what grounds discrimination occurred and why it was wrong. Instead, intersectionality was simply added to the determination of damages to increase the amount payable. Such a treatment of intersectionality tells a cautionary tale against treating intersectionality as simply a matter of aggravated indemnification.

The second issue is whether the remedies, whatever they may be—damages, compensation, penalties, declarations, injunctions, interdicts, or reasonable accommodation—should relate only to the claimant and those in her position or if they should be conceived widely and relate to the disadvantaged groups more broadly? An adequate response to intersectional discrimination should address, for example, the Dalit women's unique position of disadvantage defined by sex and

[233] *Jumard* (n 222) [49] ('It may be, for example, that a tribunal takes the view that the injury to feelings in, say, a case of race and disability discrimination is not materially different from the injury that would have been experienced had it been race alone.').

[234] *Rogers v American Airlines, Inc* 527 F Supp 229 (1981) (United States District Court, Southern Division New York); *Hollins v Atlantic Company, Inc* 188 F 3d 652 (6th Cir 1999) (USCA); *Cooper v American Airlines* 149 F 3d 1167 (4th Cir 1998) (USCA). See, for an excellent reflection on this, Paulette M Caldwell, 'A Hair Piece: Perspectives on the Intersection of Race and Gender' (1991) Duke Law Journal 365.

[235] 2003 HRTO 1, 41.

caste, but it should also address the forms of sexism and casteism they suffer and share with upper-caste women and Dalit men respectively. This global approach to remedies may seem self-evident in the way intersectional discrimination is defined—as both similar to and different from discrimination based on individual grounds. Obvious as it seems, claims which have had remedies designed, keeping in mind both the specific claimant as well as her relationships with other disadvantaged groups, are predominantly those in international law.[236] Communications decided by the CEDAW Committee are representative of this global approach and provide useful guidance for domestic courts and international bodies alike.

In *Alyne v Brazil*,[237] the author's daughter, a Black woman, had died in the absence of adequate emergency services for pregnant women in Brazil. The CEDAW Committee ordered the state government to provide appropriate reparation, including adequate compensation to the author. In addition, the Committee issued a range of general recommendations, such as mandating the state to provide adequate, accessible, and affordable emergency obstetric care to all women and ensuring the enforcement of their right to reproductive health with access to adequate remedies and sanctions. The state was also directed more broadly to reduce preventable maternal deaths through programmatic and policy interventions. The only thing lacking in these recommendations was an appreciation of intersectionality in the general recommendations, thus speaking not only to all women broadly, but specifically to the intersectional group of Black and racial minority women in Brazil. This was important because the specific violation in *Alyne* was intersectional in that the author's pregnant daughter was at the receiving end of poor obstetric care not only because the quality, availability, and timeliness of these services was generally low, but because African women and women of colour who were also socio-economically disadvantaged were perhaps worse off than others in all these respects. Thus, sex, race, and socio-economic background had specifically 'contributed to the failure to provide necessary and emergency care to [the author's] daughter, resulting in her death'.[238] Given this finding, it would have been appropriate not only to provide for specific damages and compensation to be made to the author but also to design the recommendations so as to address the specific

[236] In addition to the specific claimant (say, a Black woman), courts may extend relief to the specific subgroup to which the claimant belongs (all Black women). The contention is that there may be a legitimate case for extending relief to even broader groups like white women and Black men, that is, those with whom the claimant shares some disadvantage based on sex and race respectively. This is a relatively uncontentious proposition for single-axis claims. For example, the South African Constitutional Court has consistently remarked that '[c]entral to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. . . 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' (S *v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (SACC)). Reaffirmed in *Bhe* (n 5) and *Hassam* (n 6).

[237] *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Communication No 17/2008, UN Doc CEDAW/C/49/D/17/2008 (views adopted on 25 July 2011).

[238] Ibid [7.7].

disadvantages faced by women of colour from socio-economically disadvantaged backgrounds. Because intersectional claimants suffer differently, it is important for this difference to be reflected in remedies. Intersectional claims should therefore attract remedies which provide relief not only for the individual claimant (a socio-economically disadvantaged African woman) but also those in her position (other socio-economically disadvantaged African women) and other possible disadvantaged groups who share her disadvantage in some way (all women).

The CEDAW Committee has been able to issue recommendations in later decisions which are global in both this general and particular way. Thus, in *Kell v Canada*,[239] the CEDAW Committee made two sets of recommendations, first, concerning the author, for the state to provide her with adequate housing and commensurate damages for the violation of her right to non-discrimination as an aboriginal woman, and second, concerning aboriginal women more broadly, for the state to recruit and train legal aid officers and to review the legal aid system to ensure that aboriginal women who were victims of domestic violence had effective access to justice.[240] The facts of this case were narrowly confined to the particular legal strictures which affected aboriginal women. But where facts have been more easily relatable to women generally, the Committee has made recommendations relating to all women, such as in *Jallow v Bulgaria*, where it extended its recommendations to preventing domestic violence in respect of all 'women victims of domestic violence, in particular migrant women'.[241]

This brings us to the final point about remedies in intersectional discrimination: that they should be structural in nature. The point about not having intersectional discrimination indemnified at a higher rate necessarily and the point about making remedies holistic is the same. It is to insist that remedies in intersectional discrimination be constructed as complementing the nature of intersectional discrimination specifically. Remedies that complement intersectional discrimination are inevitably those which reflect the complex structure of intersectional discrimination, which is, after all, about sameness and difference in patterns of group disadvantage. This structural make-up of intersectionality should be reflected not only in respect of the type of remedy awarded (especially going beyond monetary indemnification) and in relation to whom it is awarded (the claimant, those in her position, and the broader disadvantaged groups to whom she belongs) but also in the way remedies are designed and ordered.

Structural remedies go beyond monetary relief and directly attack the structures of disadvantage which lead to a breach of equality and non-discrimination guarantees. They are inevitably more elaborate than a mere dollar figure and more reflexive

[239] CEDAW Committee, Communication No 19/2008, UN Doc CEDAW/C/51/D/19/2008 (views adopted on 28 February 2012).
[240] Ibid [11].
[241] CEDAW Committee, Communication No 32/2011, UN Doc CEDAW/C/52/D/32/2011 (views adopted on 23 July 2012).

in terms of relating to the particular structures of disadvantage at stake in each case. They thus require some effort in being designed. The South African Constitutional Court's painstaking work in *Bhe* is a good example of where it was easier to find for unfair discrimination against Black and African women, and women governed by customary law, than to address 'the most difficult aspect . . . the issue of remedy'.[242] According to Langa DCJ, the decision that the customary law of inheritance was unconstitutional opened at least four courses of action for the Court:

> (a) whether the Court should simply strike the impugned provisions down and leave it to the legislature to deal with the gap that would result as it sees fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary law rules of succession should be developed in accordance with the 'spirit, purport and objects of the Bill of Rights'; or (d) whether to replace the impugned provisions with a modified section 1 of the Intestate Succession Act or with some other order.[243]

The first option was impractical. Those governed by customary law could not simply be left in a vacuum without any provision governing intestate succession.[244] The second option was unfair. Those whose rights were infringed could not continue being governed by a discriminatory regime in the hope that the legislature would rectify their situation.[245] The third option was inappropriate. The Court found itself ill-placed to ascertain the exact content of the customary law to develop per the mandate of Section 39(2) of the Constitution.[246] The process of judicial development of customary law in line with the Bill of Rights was considered too slow and piecemeal given that it would depend on individual cases which came up before the courts and thus would not be 'sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates'.[247] Thus, the Court considered it best to leave it for the legislature to rectify the discrimination in the long run. But, in the interim, the Court was left to 'fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place'.[248] This was essentially the fourth option: to replace the customary law of succession with that of the civil law of succession under the Intestate Succession Act. Although better than the other courses, this choice was still problematic. It did not entirely take into account the position of women in polygynous

[242] *Bhe* (n 5) [101].
[243] Ibid [105] (citation omitted).
[244] Ibid [107].
[245] Ibid [108].
[246] The provision states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[247] *Bhe* (n 5) [113].
[248] Ibid [116].

customary marriages since that was not a subject of civil law; it would also not have accommodated complex relationships in extended families which were common in a customary environment, and would have possibly had a negative impact upon vulnerable groups such as poor rural women.[249] The Court took all these objections on board. While it was slow to extend the relief to those whose interests were not heard or represented, it was clear that the relief could not be limited to women in monogamous marriages alone and must, in order to avoid creating further inequalities, protect those in polygynous marriages. The Court further explained how this would affect the order of inheritance of children from multiple spouses if they had to inherit under the civil law system.[250] Its final order reflected all these general principles, effectively replacing the customary law of succession with appropriately modified civil law. The order ultimately declared the claimants in the case, the women who brought the claim, as heirs, and took care of any future claims of intestate succession until the legislature enacted a suitable law. By this point, the Court had given all the indicators to the legislature for designing such a law which was transformative, not piecemeal, in reforming the customary law of inheritance.

Bhe's consideration of remedy was complex and extensive. What lies at the core of the Court's approach is the understanding that the remedy had to be the one that was most effective in actually relieving the condition of the claimants and those in their position as women governed by customary law. Remedying their situation involved a commitment to appreciating the historical traditions of the African communities, the civil regime of intestate succession, and the constitutional provisions which governed both. The complex details of these matters and their extensive consideration is what comes to define the Court's structural approach to remedy, which goes beyond the determination of the rights of the parties alone. It is both the approach to and the nature of remedy as structural which is truly befitting of intersectionality.

Bhe is a rare example of this.[251] Structural remedies are often left to equality bodies and human rights commissions or the governments and the legislatures. The tort-like adjudicatory model of discrimination law has been largely limited to individual-centred relief, with declaratory and monetary remedies ruling the roost. This model has inevitably failed to make a real dent in intersectional discrimination, which is structural in nature. Yet, if we assume the normative

[249] Ibid [118].

[250] Ibid [125] ('First, a child's share would be determined by having regard to the fact that there is more than one surviving spouse. Second, provision should be made for each surviving spouse to inherit the minimum if there is not enough in the estate. Third, the order must take into account the possibility that the estate may not be enough to provide the prescribed minimum to each of the surviving spouses. In that event, all the surviving spouses should share what is in the estate equally.').

[251] *Hassam* (n 6) reaffirmed much of the *Bhe* (n 5) analysis in relation to retrospectivity but was a far simpler case in terms of the remedy, that is reading-in the word 'spouse' in the Intestate Succession Act as including spouses of Muslim polygamous marriages.

positions offered in this book, recalibrating the entire apparatus of discrimination law by adjusting each of the individual cogwheels in the apparatus, structural remedies may not elude us after all when we come to them. This is because, once we update our understanding of discrimination as one which includes the category of intersectional discrimination inspired by intersectionality theory, we are immediately abreast of the complex structures of disadvantage which cause such discrimination. The appreciation of this complexity is at the heart of intersectional discrimination. Once we know the structures which lead to intersectional discrimination, in terms of the 'patterns of group disadvantage' we have spoken of so far, there is no bar in designing remedies which speak to these structures directly in terms of limiting and eventually eliminating them. In fact, once justices become attuned to intersectionality, even the adjudicatory model of discrimination may have real potential to become an effective site for fighting intersectional discrimination because of its keen diagnostic purpose of learning the *basis* of discrimination as residing in multiple grounds and the *nature* of such discrimination. The diagnostic purpose of discrimination law has something quite pointed and unique to offer in terms of understanding both precisely and comprehensively what intersectional discrimination really looks like in specific instances. It provides a genuine opportunity not only to understand intersectional discrimination this way but, because of this understanding, to conceive of ways to help dismantle the structures through which it comes about. Re-centering discrimination law around this diagnostic purpose and around intersectionality may thus ultimately help design meaningful structural remedies, as the South African Constitutional Court did in *Bhe*.

There are, no doubt, limitations to what courts can do in this respect given that they are limited by the individual and often narrow cases with which they are presented. Issues of individual justice, timeliness, costs, retrospective nature of relief, restrictions on deciding matters actually litigated, and even expertise and knowledge of broader socio-economic, cultural, and political contexts define the remedial reach of courts. These are limitations of design which cannot be studied here. That is a project for another book. For this project, it is important not to underestimate the normative dimensions of discrimination law as laid down in constitutional and legislative texts and enforced by courts. If these dimensions are reformed to include intersectionality, we activate the possibility of finding for intersectional discrimination. What that means in real terms is that an intersectional claimant may succeed in obtaining relief. Given the history of resistance to intersectional claims, this result in itself would be a significant victory. The hope is that each instance of intersectional discrimination not only obtains its due relief, but also opens up transformative opportunities to truly understand and remedy intersectional discrimination as more than the isolated or discrete instances which come up before the courts.

Conclusion

We return to the imagery of discrimination law as a complex apparatus of interconnected cogwheels. The image reminds us of the co-dependent nature of all cogs. The functioning of the apparatus is thus dependent on each of the individual cogs working independently and simultaneously. This is what this chapter has shown: that each of the concepts and tools invoked in discrimination law doctrine will have to be individually recalibrated with respect to intersectionality for a claim of intersectional discrimination to succeed.

However, the consideration of each of the cogs or concepts discretely may give the impression that they have an autonomous existence of their own. Far from it. None of these transpire on their own and are often too entangled in discrimination claims. Thus, for example, the exercise in determining the relevant grounds may coincide with the classification of the claim as direct or indirect discrimination, which may in turn be determined by comparators and may eventually all be answered through the substantive test of discrimination applied by a court. Questions of evidence, burden of proof, and level of scrutiny may or may not even feature very distinctly or at all. This much is clear from reading any case of intersectional discrimination, whether a successful one like *Hassam* or a potential one like *Gosselin*. Key concepts of discrimination are all fused together in actual discrimination cases.

The purpose of disentangling these concepts was to show that, despite such eventual fusion, there is an independent content to each concept, and understanding it helps us understand what it does in intersectional claims. The risk in not disentangling concepts has been that intersectional claims have simply failed within the grand scheme of discrimination law and we have known in no comprehensive detail why that has been the case. While we have known something about why intersectional claims fail, either conceptually or doctrinally, taking apart actual cases of discrimination law in the format of the last two chapters gives us a concrete sense of the reasons for such failure, and, also, for the modest successes. This understanding helped us develop the normative positions adopted in the chapter in respect of each of the concepts. It is useful to reiterate the positions here. The hope is that these will help recalibrate the apparatus of discrimination law in such a way that it can process a claim of intersectional discrimination successfully.

First, the possibility of redressing intersectionality in discrimination law resides in the interpretation of equality and non-discrimination guarantees as signifying the causal basis of discrimination in certain grounds or personal characteristics. There is no reason why the causal basis of discrimination needs to be limited to a single ground. Even the most unwieldy constitutional and legislative provisions can and should be interpreted as including the prohibition of discrimination based on multiple grounds.

Secondly, and on a related note, it is important not to limit the possible grounds of discrimination to those enumerated or otherwise recognized in law but to develop the criteria for or ways of reading-in analogous grounds, which are far more representative of the intersectional disadvantage people suffer because of their identities. So, while it is useful to retain the idea of grounds in discrimination law because it explains what is distinctive about the field, it is also useful to have a broadly conceived test for identifying grounds.

Thirdly, intersectional discrimination may not necessarily be amenable to the categorization of direct or indirect discrimination developed for single-axis claims. It would be more helpful for intersectional claims to be understood not just in terms of grounds and their impact but to focus on the specific relationship between the criteria of discrimination (which may or may not be neutral), the grounds of discrimination (which may or may not coincide with the criteria), and the impact of such discrimination in terms of the specific disadvantages it leads to.

Fourthly, like the grounds of discrimination, the substantive test for discrimination should be broadly conceived so that it is able to catch the specific disadvantages associated with grounds, especially when they intersect. Most tests for discrimination are well capable of capturing intersectional disadvantage if interpreted inclusively, but they need to be attuned to the specific form it takes.

In terms of actually proving intersectional discrimination, several things need to be considered. The comparator test, which is a heuristic devised to confirm the grounds of discrimination and/or whether there was any relative disadvantage or discrimination, may not always come in handy. In the way that comparison is popularly made (i.e. in strict or flexible forms), comparison not only proves to be unprincipled but also unhelpful when invoked in intersectional claims. Instead, fifthly, the South African approach to holistic and contextual comparisons provides both a principle for the selection of comparators and a purpose for deploying the comparators, in terms of appreciating the nature of intersectional discrimination residing in sameness and difference in patterns of group disadvantage.

Sixthly, it is important to segregate all these issues, which are issues of discrimination, from issues of justification. Intersectionality should not be used as a justification but treated as a form of discrimination itself. Otherwise, we run the risk of reinforcing the single-axis framework of discrimination where all discrimination which is based on more than one ground is not treated as problematic. The standard of review of the justification analysis should be attuned to phasing out intersectionality-based justifications.

Seventhly, evidentiary issues and the burden of proof should be evenly and fairly determined as between the parties at all stages of the discrimination analysis. A shifting burden of proof framework is necessary for intersectional claimants, who may otherwise bear an insurmountable burden in bringing in evidence which is neither accessible nor available to them. The purpose of all evidence for establishing an intersectional claim should be, either qualitatively and/or

quantitatively, to explicate the nature of intersectional discrimination in terms of the same and different patterns of group disadvantage. As chapter 2 showed for Dalit women, these patterns are unique for every combination of characteristics and for each claimant in her own situation. A judge in a discrimination claim should use the evidence to unearth the distinct explanation of intersectional disadvantage in that claim.

Finally, remedies in intersectional claims should be determined on a case by case basis just as for any other claim. There is no good reason to think that intersectional claims can only be redressed through higher indemnification, as is popularly contended. But there are good reasons to contend that remedies should be structural, both in terms of their focus and design, and global with respect to the intersectional disadvantage they seek to redress. This is because, for intersectionality to truly be a part of discrimination law, the latter must embrace its transformative ideals, namely, for upturning the structures of disadvantage that intersectionality seeks to illuminate and thereby relieving everyone who is so disadvantaged.

Conclusion

This book sought to realize intersectionality in discrimination law. As the preceding chapters have shown, the road to this destination is a long one. The theoretical, conceptual, and doctrinal steps to be undertaken span the entire breadth of the discourses of both intersectionality and discrimination law. What becomes clear is that both intersectionality and discrimination law must be understood on their own terms, and then in relation to one another, to arrive at an account of intersectional discrimination. This account is primarily a juridical one, aimed at establishing a successful claim of intersectional discrimination before the courts. It is also aspirational in nature. It is trying to envision discrimination law—an apparatus conceived for single-axis discrimination—as amenable to intersectionality. Instead of having intersectionality unsuccessfully mould itself into the single-axis model, the project reimagines a fundamentally distinct mould for the category of intersectional discrimination.

This means remoulding the way in which inequalities or discrimination have been conceived until now. In the context of the hypothetical scenario visited in chapter 1, it means having Lord Phillips reimagine a fat Black man's claim as a claim of intersectional discrimination proper. When the shopkeeper said, 'I do not serve people like you', there were not one but two possibilities in characterizing the discrimination at hand. Discrimination in this case either could have been based on the man's race or weight. Or it could have been based on both the man's race and weight at the same time. In case of the latter, how would Lord Phillips have understood the nature of discrimination based on multiple grounds?

Intersectionality explains the nature of such discrimination. When considered as a whole and in its full context, defined in terms of history, region, time, circumstances, etc., discrimination against a fat Black man is based on patterns of group disadvantage which are not only similar to those experienced by corpulent persons and Black persons but also different from them and which are unique to those both corpulent and Black at the same time, such as the claimant. Thus, the disadvantage is both the same as and different from other patterns of group disadvantage. As chapter 2 argued, it is this dynamic relationship between sameness and difference, understood as a whole and in its full and relevant context, that explains the nature of disadvantage at play in Lord Phillips' hypothetical scenario. Intersectionality would thus have allowed Lord Phillips to both acknowledge and understand discrimination which goes beyond the single-axis model.

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But, in going beyond strictly single-axis discrimination, Lord Phillips may have encountered several categories of thinking about multi-ground discrimination including substantial, capacious, and contextual forms of single-axis discrimination, multiple discrimination, additive (as in combination or compound) discrimination, and embedded discrimination. In order to make sense of the category of intersectional discrimination, he would have needed to have distinguished between these categories as distinct from the qualitative understanding of intersectional discrimination defined qua intersectionality. This exercise, undertaken in chapter 3, further clarifies the conceptual sphere of intersectional discrimination as a distinct category of discrimination per se.

Despite such theoretical and conceptual clarity, there still would be no sure-fire route to translating this understanding into the doctrine of discrimination law. In fact, the entire apparatus of discrimination law would have to be recalibrated to accommodate this understanding of the nature of intersectional discrimination against a fat Black man. A constitutional or statutory guarantee of non-discrimination would have to be interpreted as prohibiting such discrimination based on multiple grounds and understood in the particular way that intersectionality proposes. Grounds of discrimination would have to be chosen such that an unenumerated ground like weight could be recognized as the basis of discrimination. This means going beyond traditional frames of recognizing grounds as based on either immutability or fundamental choice, and instead relating to a broader set of factors which speak to forms of disadvantage associated with a particular characteristic or identity such as weight or physical appearance. This entails widening the conception of what disadvantage or discrimination itself is. Most substantive tests of discrimination—whether in the form of impairment of dignity or autonomy, or entrenchment of stereotypes, prejudices, etc.—have the capacity to explain what is wrong about a shopkeeper refusing to serve a fat Black man because he is a fat Black man. However, such disadvantage or discrimination need not necessarily be reduced to direct or indirect discrimination given that the divide between the two is strained and artificial in intersectional cases. What matters instead is to trace the relationship between the criteria, grounds, and impact of discrimination in specific detail. In the same vein, applying too strict or too flexible a form of comparison may not help in determining either the grounds or the nature of intersectional discrimination. A holistic and contextual use of all the available comparators may yet assist in establishing intersectional discrimination before courts. Matters relating to the burden of proof, standard of review, justification analysis, and remedies are more typical and require careful unravelling in each jurisdiction to truly 'get' intersectionality in a discrimination claim. Chapter 4 considered the nitty gritty of each of these.

The takeaway is that Lord Phillips would have to thoroughly fine-tune his understanding of discrimination law to reflect the specific ways in which each of its central concepts could respond to intersectionality. With all these manoeuvres, if he did

end up finding for the fat Black man, he would have accomplished what few justices have. The rarity of successful claims of intersectional discrimination should give us a sobering idea of the urgency of intersectionality as a juridical project. Because people *are* intersectionally discriminated against, it is high time to make discrimination law address that discrimination, thirty years after Crenshaw's first intervention in 1989.

Transforming discrimination law this way would be an extraordinary feat for intersectional claimants. That, though, will not itself fulfil intersectionality's transformative ambitions for seeing a radical and substantial change in the way inequalities are created and reproduced. Discrimination law is, after all, a clunky apparatus of such social transformation. I have acknowledged it before and must do so again: the limitations of discrimination law—in terms of its ex-post tort-like adjudicatory model of justice with highly technical concepts like grounds, comparison, direct and indirect discrimination, justification, etc.—circumscribe its potential as a site for realizing intersectionality in totality. There are other sites, and radical transformation will only come about when they are actively co-engaged. Positive discrimination may be an obvious choice here. Affirmative action in the form of quotas or preferential treatment; reasonable accommodation; and positive action, like equality duties for fostering good relations, are certainly part of the broader project for discrimination law and are considered suitably influential in addressing intersectionality.[1] Human rights law, beyond the right to equality and non-discrimination, is also considered to be a viable tool for addressing violations which are intersectional in nature. This is specifically true of the UN treaty body jurisprudence which draws an explicit link between rights and their realization on an equal basis with others and without any discrimination.[2] Social movements and praxis too have contributed tremendously to mobilizing and mainstreaming intersectional frames of thinking and effecting social change.[3] This project is thus a small but significant part of the broader transformative project of intersectionality. A few parting remarks may help underscore that.

This project is but small within the field of intersectionality studies, which, we must acknowledge, is a vast one. It is too rich and diverse to be consolidated in one project. This is especially relevant when coming up with a 'definition' of intersectionality. I said in chapter 2 that intersectionality cannot be defined in a

[1] See Sandra Fredman, 'Positive Rights and Duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge Cavendish 2008); Andrea Krizsan, Hege Skjeie, and Judith Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regime* (Palgrave 2012); Mieke Verloo, 'Intersectionality and Positive Action' (2015) 2 Journal of Diversity and Gender Studies 45.

[2] Gautheir de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 17 Human Rights Law Review 633; Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 Equal Rights Review 103.

[3] The literature in this field is vast, but see, for example, Sharon Doetsch-Kidder, *Social Change and Intersectional Activism: The Spirit of Social Movement* (Palgrave Macmillan 2012).

single stroke. Instead, what I have tried to do is to pick the strands that I think have been central to intersectionality in the way it was initially set out by Crenshaw and in other seminal works in the last few decades. I am relying on the intellectual labour of others to arrive at a version of intersectionality that I consider to be salient for defining the category of intersectional discrimination in discrimination law. Similar sources may well lead others to define intersectionality differently for the purposes of discrimination law. Much like academic work on theories of justice, theories of human rights, and theories of discrimination law, intersectionality theory is a broad church and may have many versions or justificatory accounts that contribute to the development of the field of discrimination law. This is just one such bid for translating intersectionality into discrimination law.

If there are any universalizing tendencies appearing in this project, they should be read down. For one, the account of intersectional discrimination suggested here should not be seen as the archetype of discrimination. It cannot replace other categories of thinking about discrimination, including single-axis discrimination. Not all discrimination is intersectional, even when suffered by those intersectionally disadvantaged, such as groups of Dalit women and Black women. They, too, may sometimes be discriminated against specifically on the basis of race, caste, gender, or poverty alone. It is only when multiple strands of inequality *do* seem to be relevant that we should turn to intersectionality. We would have to be exceptionally clear about which patterns of disadvantage lead to discrimination in actually categorizing discrimination as intersectional or single-axis.

That said, there are good reasons to see all multi-ground discrimination as basically intersectional. That is, when multiple grounds are implicated in a claim, as seen in chapter 3, it may best be understood in terms of intersectionality and characterized as intersectional discrimination. That is because there is no other way of both clearly and comprehensively getting to grips with the nature of discrimination, when multiple identities are involved, than to see it as transpiring as a matter of similar and different patterns of group disadvantage based on those multiple identities considered as a whole and in their full context. Any other way of categorizing such discrimination (substantially, capaciously, or contextually single-axis, multiple, additive, or embedded) misses something of this complete way of looking at discrimination. To serve the diagnostic purpose of discrimination law, it is then useful to see discrimination as either single-axis or intersectional.

But it may also be significant to see that the account matters in an expressive sense, and not only in this diagnostic sense. In as much as courts end up ignoring intersectional discrimination and classifying it as anything but, they end up conveying an unsympathetic attitude towards it. Intersectional discrimination may be met with disbelief and even derision.[4] If judicial disposition and language

[4] See, for example, the discussion with respect to *Gosselin* and *Volks* in chapter 4, section 4.2 on wrongful discrimination.

matters,[5] it is important to challenge these attitudes and have justices show openness and empathy towards those suffering intersectional discrimination. This may have a considerable impact on how those severally and severely disadvantaged may view themselves and their position vis-à-vis the courts and the legal system. In this way, adjudication of intersectional discrimination may play a pivotal role in conveying a strong commitment to ending intersectional discrimination. A transformed future may not depend on this project alone, but it may certainly be enabled by a transformed discrimination law which takes intersectionality seriously enough to redress it.

[5] Richard H McAdams, 'The Expressive Power of Adjudication' (2005) 5 University of Illinois Law Review 1043.

Bibliography

Ackermann L, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012)

Agnes F, 'From Shah Bano to Kausar Bano: Contextualizing the "Muslim Woman" Within a Communalized Polity' in Loomba A and Lukose RA (eds), *South Asian Feminisms: Contemporary Interventions* (DUP 2012)

Akerkar S, 'Theory and Practice of Women's Movement in India: A Discourse Analysis' (1996) 30(17) Economic and Political Weekly 2

Albertyn C and Goldblatt B, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 South African Journal on Human Rights 248

Albertyn C and Kentridge J, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 South African Journal on Human Rights 149

Alexander L, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 University of Pennsylvania Law Review 149

Ambedkar BR, *Annihilation of Caste* (Verso 2016)

Arnardóttir OM, 'Non-discrimination Under Article 14 ECHR: The Burden of Proof' (1999–2012) 51 Scandinavian Studies in Law 13

Arnardóttir OM, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review

Arriola ER, 'Gendered Inequality: Lesbians, Gays and Feminist Legal Theory' (1994) 9 Berkeley Women's Law Journal 103

Ashiagbor D, 'The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-discrimination Law' in Morris A and O'Donnell T (eds), *Feminist Perspectives on Employment Law* (Cavendish 1999)

Atrey S, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5 Oñati Socio-Legal Series 1512

Atrey S, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence Under Article 15' (2016) 16 Equal Rights Review 160

Atrey S, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35 Nordic Journal of Human Rights 220

Atrey S, 'Comparison in Intersectional Discrimination' [2018] Legal Studies 379

Austin R, 'Sapphire Bound!' (1989) Wisconsin Law Review 539

Barak A, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012)

Barnard C, Deakin S, and Morris GS (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart 2004)

Bhagwat V, 'Dalit Women in India: Issues and Perspectives—Some Critical Reflections' in Jogdand PG (ed), *Dalit Women in India: Issues and Perspectives* (GPH 1995)

Bhatia G, *The Transformative Constitution* (HarperCollins 2019)

Bhavnani K and Bywater K, 'Dancing on the Edge: Women, Culture, and a Passion for Change' in Bhavnani K, Foran J, Kurian PA, and Munshi D (eds), *In on the Edges of Development: Cultural Interventions* (Routledge 2009)

Botha H, 'Equality, Plurality and Structural Power' (2009) 25 South African Journal on Human Rights 1

Intersectional Discrimination. Shreya Atrey, Oxford University Press (2019). © Shreya Atrey
DOI: 10.1093/oso/9780198848950.001.0001

Brodsky G, 'Gosselin v Quebec (Attorney General): Autonomy with a Vengeance' (2003) 15 Canadian Journal of Women and the Law 194
Brodsky G and Day S, 'Denial of the Means of Subsistence as an Equality Violation' [2005] Acta Juridica 149
Brodsky G, Cox R, Day S, and Stephenson K, 'Gosselin v. Quebec (Attorney General) (Women's Court of Canada)' (2006) 18 Canadian Journal of Women and the Law 193
Butler J, *Gender Trouble* (Routledge 1990)
Caldwell K, 'We Exist: Intersectional In/Visibility in Bisexuality & Disability' (2010) 30 Disability Studies Quarterly
Caldwell PM, 'A Hair Piece: Perspectives on the Intersection of Race and Gender' (1991) Duke Law Journal 365
Carastathis A, *Intersectionality: Origins, Contestations, Horizons* (University of Nebraska Press 2016)
Carbado DW, Crenshaw KW, Mays VM, and Tomilson B, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 Du Bois Review 303
Carbado DW and Gulati M, *Acting White? Rethinking Race in "Post-Racial" America* (OUP 2013)
Castillo RAH, 'The Emergence of Indigenous Feminism in Latin America' (2010) 35 Signs 539
Chakravarti U, *Gendering Caste: Through a Feminist Lens* (Stree 2003)
Chan C, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1
Chege V, 'The European Union Anti-discrimination Directives and European Union Equality Law: The Case of Multi-dimensional Discrimination' (2012) 13 ERA Forum 275
Cho S, Crenshaw KM, and McCall L, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785
Collins H, 'Discrimination, Equality and Social Inclusion' (2003) 66 Modern Law Review 16
Collins PH, *Black Feminist Thought* (2nd edn, Routledge 2009)
Collins PH and Bilge S, *Intersectionality* (Polity Press 2016)
Combahee River Collective, 'A Black Feminist Statement' in Nicholson L (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997)
Conaghan J, 'Intersectionality and the Feminist Project in Law' in Grabham E, Cooper D, Krishnadas J, and Herman D (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish 2009)
Constituent Assembly of India Debates, Vol III, 29 April 1947
Coogan-Gehr K, 'The Politics of Race in US Feminist Scholarship: An Archaeology' (2011) 37 Signs 83
Cook AE, 'Reflections on Postmodernism' (1992) 26 New England Law Review 751
Cooper AJ, *A Voice from the South* (OUP 1988)
Cooper D, 'Intersectional Travel through Everyday Utopias: The Difference Sexual and Economic Dynamics Make' in Grabham E, Cooper D, Krishnadas J, and Herman D (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish 2009)
Cowen S, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 South African Journal on Human Rights 34
Craig P, *Administrative Law* (5th edn, Sweet & Maxwell 2003)
Crenshaw KW, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139

Crenshaw KW, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241

Crenshaw KW, 'Postscript' in Lutz H, Vivar MTH, and Supik L (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011)

Crenshaw KW, 'From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control' (2012) 59 UCLA Law Review 1418

Datar C, 'Non-Brahmin Renderings of Feminism in Maharashtra: Is it a More Emancipatory Force?' (1999) 34(1) Economic and Political Weekly 2964

Davis AY, *Women, Race and Class* (Random House 1981)

Davis AY, 'Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Keynote Address' (1991) 43 Stanford Law Review 1175

de Beco G, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 17 Human Rights Law Review 633

Dietrich G, 'Dalit Movement and Women's Movements' in Rao A (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005)

Dixon R, 'The Supreme Court of Canada and Constitutional (Equality) Baselines' (2013) 50 Osgoode Hall Law Journal 637

Dhamoon RK, 'Considerations on Mainstreaming Intersectionality' (2011) 64 Political Research Quarterly 230

Dodek AM, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 Supreme Court Law Review 309

Doetsch-Kidder S, *Social Change and Inter-sectional Activism: The Spirit of Social Movement* (Palgrave Macmillan 2012)

Duclos N, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 Canadian Journal of Women and the Law 25

Dutt NK, *Origin and Growth of Caste in India* (vol 1, The Book Company 1931)

Eaton M, 'At the Intersection of Gender and Sexual Orientation: Towards a Lesbian Jurisprudence' (1994) 3 Southern California Review of Law and Women's Studies 183

Eidelson B, 'Treating People as Individuals' in Hellman D and Moreau S (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)

Ehrenreich N, 'Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems' (2002) 71 UMKC Law Review 251

Ely JH, *Democracy and Distrust* (HUP 1980)

Equal Employment Opportunity Commission, Compliance Manual, ch 15 <https://www.eeoc.gov/policy/docs/race-color.html> accessed 11 March 2019

Fiss O, 'Groups and the Equal Protection Clause' (1976) Philosophy and Public Affairs 107

Fraser N, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1997) I/222 New Left Review

Fraser N, 'A Rejoinder to Iris Young' (1997) I/223 New Left Review

Fredman S, 'Positive Rights and Duties: Addressing Intersectionality' in Schiek D and Chege V (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge Cavendish 2008)

Fredman S, *Discrimination Law* (2nd edn, OUP 2011)

Fredman S, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 273

Fredman S and Alberytn C, 'Equality Beyond Dignity: Multi-dimensional Equality and Justice Langa's Judgments' (2015) Acta Juridica 430

Fredman S, 'Intersectional Discrimination in EU Gender Equality and Non-discrimination Law' (2016) European Commission <http://ohrh.law.ox.ac.uk/wordpress/wp-content/

uploads/2016/07/Intersectional-discrimination-in-EU-gender-equality-and-non-discrimination-law.pdf> accessed 30 March 2019

Galanter M, 'The Religious Aspects of Caste: A Legal View' in Smith DE (ed), *South Asian Politics and Religion* (PUP 1966)

Gardner J, 'Discrimination as Injustice' (1996) 16 Oxford Journal of Legal Studies 353

Gedalof I, *Against Purity: Rethinking Identity with Indian and Western Feminisms* (Taylor and Francis 1999)

Gilbert D, 'Time to Regroup: Rethinking Section 15 of the Charter' (2003) 48 McGill Law Journal 627

Gilbert D and Majury D, 'Critical Comparisons: The Supreme Court of Canada Dooms Section 15' (2006) 24 Windsor Year Book of Access to Justice 111

Glenn EN, 'The Social Construction and Institutionalization of Gender and Race: An Integrative Framework' in Ferree MM, Lorber J, and Hess BB (eds), *Revisioning Gender* (Sage 1998)

Goldberg SB, 'Discrimination by Comparison' (2011) 120 Yale Law Journal 728

Goldberg SB, 'Identity-based Discrimination and the Barriers to Complexity' in Schiek D and Lawson A (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011)

Government Equalities Office, 'Equality Bill: Assessing the Impact of a Multiple Discrimination Provision. A Discussion Document' (April 2009) <http://webarchive.nationalarchives.gov.uk/20100212235759/http://www.equalities.gov.uk/pdf/090422%20Multiple%20Discrimination%20Discussion%20Document%20Final%20Text.pdf> accessed 29 March 2019

Grillo T, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (2013) 10 Berkley Women's Law Journal 16

Grzanka PR (ed), *Intersectionality: A Foundations and Frontiers Reader* (Westview 2014)

Guru G, 'Dalit Women Talk Differently' in Rao A (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005)

Hancock A, 'Intersectionality's will Toward Social Transformation' (2015) 37 New Political Science 620

Hancock A, *An Intellectual History of Intersectionality* (OUP 2016)

Hand J, 'Combined Discrimination - Section 14 of the Equality Act 2010: A Partial and Redundant provision?' [2011] Public Law 482

Hannett S, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65

Harris AP, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581

Harris AP, 'The Jurisprudence of Reconstruction' (1994) 82 California Law Review 741

Hart HLA and Honoré T, *Causation in the Law* (2nd edn, OUP 1985)

Hellman D, *When is Discrimination Wrong?* (HUP 2008)

Hepple B, 'The Aims of Equality Law' (2012) 61 Current Legal Problems 1

hooks b, *Feminist Theory: From Margin to Center* (2nd edn, SEP 2000)

HL Deb 13 January 2010, vol 716, col 547

HM Treasury, 'The Plan for Growth' (March 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/221514/2011budget_growth.pdf> accessed 30 March 2019

Hutchinson AC, 'Identity Crisis: The Politics of Interpretation' (1992) 26 New England Law Review 1173

Hutchinson D, 'Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2000) 6 Michigan Journal of Race and Law 285

Iyer N, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 Queen's Law Journal 179

Jaising I, 'Gender Justice and the Supreme Court' in Kirpal BN et al (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2001)

Jagori Conference, 'A Brief Report Intersectionality: Knowing and Doing', available at <http://www.jagori.org/sites/default/files/publication/panel%20discussion%20on%20intersectionalities%2017th%20august%202015%20-%20report.pdf> accessed 1 June 2017

John ME, 'Intersectionality Rejection or Critical Dialogue?' (2015) 33(1) Economic and Political Weekly 72

Jondhale S, 'Theoretical Underpinnings of Emancipation of Dalit Women' in Jogdand PG (ed), *Dalit Women in India: Issues and Perspectives* (GPH 1995)

Jonker M, 'Comparators in Multiple Discrimination Cases: A Real Problem or Just a Theory?' in Brink M, Burri S, and Goldschmidt J (eds), *Equality and Human Rights: Nothing But Trouble?* (Utrecht University 2015)

Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (OUP 2014)

Jung CG, *Psyche and Symbol* (de Laszlo VS (ed), Hull RFC (trans), PUP1958)

Kannabiran K, 'A Cartography of Resistance: The National Federation of Dalit Women' in Yuval-Davis N, Kannabiran K, and Vieten U (eds), *The Situated Politics of Belonging* (Sage 2006)

Kannabiran K, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012)

Khaitan T, 'Beyond Reasonableness—A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 Journal of the Indian Law Institute 177

Khaitan T, *A Theory of Discrimination Law* (OUP 2015)

King DK, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1998) 14 Signs 42

Koshan J and Hamilton JW, 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 University of New Brunswick Law Journal 19

Krizsan A, Skjeie H, and Squires J (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regime* (Palgrave 2012)

Krüger R, 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) 128 South African Law Journal 479

Kumar V, 'From Social Reform to Political Mobilisation: Changing Trajectory of Dalit Assertion in Uttar Pradesh' (2003) 53 Social Action 115

Kwan P, 'Complicity and Complexity: Cosynthesis and Praxis' (2000) 49 DePaul Law Review 673

Lacey N, 'From Individual to Group' in Hepple B and Szyszczak E (eds), *Discrimination: The Limits of the Law* (Mansell 1992)

Langa PS, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351

Leader S, 'Proportionality and the Justification of Discrimination' in Dine J and Watt B, *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996)

Liebenberg S, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 South African Journal on Human Rights 1

Loenen T, 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 South African Journal on Human Rights 401

Lorde A, *Sister Outsider: Essays and Speeches* (Crossing Press 1984)

Lutz H, Vivar MTH, and Supik L (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011)

Lykke N, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing* (Routledge 2010)
MacKinnon CA, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987)
MacKinnon CA, 'Problems, Prospects, and "Personal Laws" ' (2006) 4 International Journal of Constitutional Law 181
MacKinnon CA, 'Intersectionality as Method: A Note' (2013) 38 Signs 1019
Mahanta U, 'Social Movements in a Neo-Liberal Era' in Moksnes H and Melin M (eds), *Global Civil Society: Shifting Powers in a Shifting World* (UUP 2012)
Majury D, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 Osgoode Hall Law Journal 297
Matsuda M, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 Women's Rights Law Reporter 7
May VM, *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge 2015)
McAdams RH, 'The Expressive Power of Adjudication' (2005) 5 University of Illinois Law Review 1043
McCall L, 'The Complexity of Intersectionality' in Grzanka PR (ed), *Intersectionality: A Foundations and Frontiers Reader* (Westview 2014)
McCrudden C, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499
McFall L, 'Integrity' (1987) 98 Ethics 5
McIntyre S, 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 Queen's Law Journal 731
McRuer R, 'Compulsory Able-Bodiedness and Queer/Disabled Existence' in Davis LJ (ed), *The Disability Studies Reader* (2nd edn, Routledge 2006)
Mehta P, 'Dalit Feminism at Home and in the World' in Barbara Molony and Jennifer Nelson (eds), *Women's Activism and "Second Wave" Feminism: Transnational Histories* (Bloomsbury 2017)
Menon N, 'Is Feminism about 'Women'? A Critical View on Intersectionality from India' (2015) 50(17) Economic and Political Weekly 37
Monaghan K, 'Multiple and Intersectional Discrimination in EU Law' (2012) 13 European Anti-discrimination Law Review 20
Monture-Angus P, *Thunder in My Soul: A Mohawk Woman Speaks* (Fernwood 1995)
Monture-Angus P, 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' in The Chilly Collective (eds), *Breaking Anonymity: The Chilly Climate for Women Faculty* (Wilfrid Laurier 1995)
Moon G, 'Multiple Discrimination: Justice for the Whole Person' (2009) 2 Journal of the European Roma Rights Centre 5
Moon M and Pawar U, *Amihihi Itihaas Ghadawila: Ambedakari Chatatitil Streeyancha Sahabhag* (Stree 1989)
Morales R, 'I Am What I Am' in Moraga C and Anzaldúa G (eds), *In This Bridge Called My Back: Writings by Radical Women of Color* (KTP 1983)
Moreau S, 'The Wrongs of Unequal Treatment' (2004) 54 University of Toronto Law Journal 291
Moreau S, 'What is Discrimination' (2010) 38 Philosophy and Public Affairs 143
Murphy Y, Hunt V, Zajicek AM, Norris AN, and Hamilton L, *Incorporating Intersectionality in Social Work Practice, Research, Policy, and Education* (NASWP 2009)
Nash JC, 'Re-thinking Intersectionality' (2008) 89 Feminist Review 1
Nussbaum M, *Women and Human Development* (CUP 2001)
Nussbaum M, 'India: Implementing Sex Equality Through Law' (2001) 2 Chicago Journal of International Law 49

Nussbaum M, 'India, Sex Equality, and Constitutional Law' in Baines B and Rubio-Marin R (eds), *The Gender of Constitutional Jurisprudence* (CUP 2005)

Omvedt G, 'The Downtrodden among the Downtrodden: An Interview with a Dalit Agricultural Labourer' in Rao A (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005)

'Only', Oxford English Dictionary <https://en.oxforddictionaries.com/definition/only> accessed 29 March 2019

Patil V, 'From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We've Really Come' (2013) 38 Signs 847

Pieterse M, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage' (2008) 24 South African Journal on Human Rights 397

Post R, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 California Law Review 1

Pothier D, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 Canadian Journal of Women and the Law 39

Puar JK, *Terrorist Assemblages: Homonationalism in Queer Times* (DUP 2007)

Rao A (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005)

Rawls J, *A Theory of Justice* (1st edn, OUP 1971)

Réaume DG, 'Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law' (2002) 40 Osgoode Hall Law Journal 113

Réaume DG, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 1

Réaume DG, 'The Relevance of Relevance to Equality Rights' (2006) 31 Queen's Law Journal 696

Rege S, 'Dalit Women Talk Differently: A Critique of "Difference" and Towards a Dalit Feminist Standpoint Position' (1998) 33(44) Economic and Political Weekly 39

Rege S, ' "Real Feminism" and Dalit Women: Scripts of Denial and Accusation' (2000) 35(6) Economic and Political Weekly 492

Rege S, 'A Dalit Feminist Standpoint' in Rao A (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005)

Risman B, 'Gender as a Social Structure: Theory Wrestling with Activism' (2004) 18 Gender and Society 429

Rivers R, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174

Sachs A, 'Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court' (1999) 5 Review of Constitutional Studies 76

Salem S, 'Feminist Critique and Islamic Feminism: The Question of Intersectionality' (2013) 1 The Postcolonialist

Sarkar R and Sarkar A, 'Dalit Politics in India: Recognition without Redistribution' (2016) 51 Economic and Political Weekly 14

Scales-Trent J, 'Black Women and the Constitution: Finding our Place, Asserting our Rights' (1989) 24 Harvard Civil Rights-Civil Liberties Law Review 9

Sen A, *Inequality Reexamined* (HUP 1992)

Sen A, *Development as Freedom* (OUP 1999)

Sen S, 'Motherhood and Mothercraft: Gender and Nationalism in Bengal' (1993) 5(2) Gender and History 231

Shinde T, 'A Comparison between Women and Men: An Essay to Show Who's Really Wicked and Immoral, Women or Men?' in O'Hanlon R, *A Comparison between Women and Men: Tarabai Shinde and the Critique of Gender Relations in Colonial India* (OUP 1994)

Smith B (ed), *Home Girls: A Black Feminist Anthology* (RUP 2000)
Solanke I, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 Modern Law Review 723
Solanke I, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 20 Industrial Law Journal 336
Solanke I, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart 2016)
Spelman E, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990)
Subramaniam M, *The Power of Women's Organizing: Gender, Caste and Class in India* (Lexington Books 2006)
Sunstein CR, 'The Anticaste Principle' (1994) 92 Michigan Law Review 2410
Timmer A, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 719
Tobler C, 'Remedies and Sanctions in EU Non-Discrimination Law' (2005) European Commission <https://publications.europa.eu/en/publication-detail/-/publication/d5dce8b8-09ee-4399-acf4-08bfdf8e1cd4> accessed 30 March 2019
Truscan I and Bourke-Martignoni J, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 Equal Rights Review 103
Truth S, 'Woman's Rights' in Guy-Sheftall B (ed), *Words of Fire: An Anthology of African-American Feminist Thought* (New Press 1995)
United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No 28: Core Obligations of States Parties Under Article 2, UN Doc CEDAW/W/C/GC/28 (2010)
United Nations Committee on the Rights of Persons with Disabilities, General Comment No 6 on equality and non-discrimination, UN Doc CRPD/C/GC/6 (2018)
United Nations Human Rights Committee, CCPR General Comment No 28: Article 3 (The Equality of Rights Between Men and Women) UN Doc CCPR/C/21/Rev.1/Add.10 (2000)
United Nations Secretary-General, 'Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies', Report, 14–18 September 1998, HRI/MC/1998/6
Valdes F, 'Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities' (1995) 5 Southern California Law Review and Women's Studies 25
Verloo M, 'Intersectionality and Positive Action' (2015) 2 Journal of Diversity and Gender Studies 45
Wesson M, 'Discrimination Law and Social Rights: Intersections and Possibilities' (2007) 13 Juridica International 74
Widiss DA, 'Griggs at Midlife' (2015) 113 Michigan Law Review 993 (2015)
Wing KW, 'Brief Reflections toward a Multiplicative Theory and Praxis of Being' (1991) 6 Berkley Women's Law Journal 181
Wing KW, (ed), *Critical Race Feminism: A Reader* (2nd edn, NYUP 2003)
Yoshida K, 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain' (2013) 21 Feminist Legal Studies 195
Yoshino K, 'Covering' (2002) 111 Yale Law Journal 769
Yoshino K, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006)
Young IM, *Justice and the Politics of Difference* (PUP 1990)
Young IM, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19 Signs 713
Young IM, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory' (1997) I/222 New Left Review
Yuval-Davis N, 'What is 'Transversal Politics'?' (1999) 12 Soundings 9

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1. Republic of South Africa.—The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(*a*) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(*b*) Non-racialism and non-sexism.

(*c*) Supremacy of the constitution and the rule of law.

(*d*) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2054

NANHRI & SAHRC

IN - COUNTRY MEETING ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION

Network of African National Human Rights Institutions
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THE NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS

&

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN - COUNTRY MEETING ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION

29 – 30 NOVEMBER 2017
JOHANNESBURG, SOUTH AFRICA

Network of African National Human Rights Institutions
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south african human rights commission

The Network of African National Human Rights Institutions (NANHRI)

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit- organization and regional umbrella body that brings together 44 National Human Rights Institutions (NHRIs) in Africa. NANHRI, whose Secretariat is based in Nairobi, Kenya, is registered under Kenyan laws as an independent legal entity. It has been operational since 2007.

The Network works towards the establishment and strengthening of the NHRIs in Africa. It also facilitates coordination and cooperation amongst NHRIs and links them with other key human rights actors at the regional and international level. It supports these institutions through capacity building to meet their objective of protecting and promoting human rights at the national level.

Vision

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

Mission

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

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The South African Human Rights Commission (SAHRC) and the Network of African National Human Rights Institutions (NANHRI) acknowledge the contribution of all individuals who assisted in the hosting of the In-Country Meeting on Sexual Orientation, Gender Identity and Expression.

We wish to thank the Deputy Chairperson of the African Commission on Human and Peoples' Rights (ACHPR), Commissioner Lawrence Mute, who also serves as the Special Rapporteur on the Right to Freedom of Expression, for his presence and informative contributions throughout the duration of the meeting. We further wish to thank the SAHRC Deputy Chairperson, Commissioner Priscilla Jana, for her continued support toward the expansion of SOGIE rights in South Africa, and Adv. Pansy Tlakula, former Chairperson of the ACHPR for sharing her thoughts and experience in advancing SOGIE rights on the continent.

We further express our gratitude and appreciation to all panelists and participants, emanating from civil society, government departments and Chapter 9 institutions, for their presentations and generous contributions toward the robust discussions that made the meeting successful.

Importantly, the SAHRC and NANHRI Secretariat would like to recognise and appreciate the efforts put in by their staff for organizing the meeting and producing this report.

NANHRI is a regional membership organization presently bringing together 44 African NHRIs. It works towards the establishment and strengthening of the NHRIs in Africa as well as to facilitate coordination and cooperation amongst and between them, and with other key human rights actors at the regional and international level. It also provides practical assistance and support to these institutions for them to meet their objective of protecting and promoting human rights within their jurisdictions.

Glenton Matthyse from Gender Dynamix said Religion plays a major role as to why LGBTI members are still discriminated against today

Ms Vernet Napo (right) from the Commission for Gender Equality, Dr Shanelle Van & Der Berg Pandelis Gregoriou (both SAHRC) as one of the panelists tackling SOGIE-based discrimination in South Africa.

Panelists presenting includes Sibongile Ndashe (second right) from the Initiative for Strategic Litigation in Africa, Wendy Isaack from Human Rights Watch and Carrie Shelver from Coalition of African Lesbians

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ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
CGE	Commission for Gender Equality
CAL	Coalition of African Lesbians
CSO	Civil Society Organisation
DoJ&CD	Department of Justice and Constitutional Development
GALA	Gay and Lesbian Memory in Action
GDx	Gender Dynamix
HRW	Human Rights Watch
ISLA	Initiative for Strategic Litigation in Africa
LGBT	Lesbian, Gay, Bisexual, Transgender
NANHRI	Network of African National Human Rights Institutions
NHRI	National Human Rights Institution
NIS	National Intervention Strategy
NOC	National Operations Center
NTT	National Task Team
RRT	Rapid Response Task Team
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALC	Southern African Litigation Center
SAPS	South African Police Service
SOGIE	Sexual Orientation, Gender Identity and Expression

Executive Summary

In June 2011, the United Nations Human Rights Council (UNHRC) adopted the first resolution on human rights, sexual orientation and gender identity, which was led by South Africa. Subsequently in May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted Resolution 275 on the 'Protection against Violence and other Human Rights Violations on the basis of their real or imputed Sexual Orientation or Gender Identity'. In March 2016, the SAHRC co-hosted the first African Regional Seminar on Finding Practical Solutions to ending violence and discrimination based on Sexual Orientation, Gender Identity and Expression (SOGIE). The Seminar culminated in the signing of the Declaration on Practical Solutions on Ending Violence and Discrimination against Persons Based on Sexual Orientation, Gender Identity and Expression (Ekurhuleni Declaration). An important recommendation emanating from the Seminar was for National Human Rights Institutions (NHRIs) to utilise their mandate for monitoring, promoting and protecting human rights to develop plans of action to take the process forward in their respective countries beyond the Seminar.

Despite the constitutional recognition and statutory protections afforded to lesbian, gay, bisexual, transgender and gender non-conforming (LGBT/GNC) persons in South Africa, LGBT/GNC persons continue to face numerous challenges, including gender or sexual orientation-based discrimination and hate crimes; difficulties accessing justice when these violations occur; and the prevalence of traditional gender roles which perpetuate stereotyping and marginalisation of vulnerable groups.

In response to these challenges, the SAHRC, in partnership with the Network for African National Human Rights Institutions (NANHRI), convened a meeting of over 50 delegates representing government departments, civil society stakeholders and Chapter 9 institutions, to address SOGIE-related issues in Johannesburg, South Africa.

Informed by the Ekurhuleni Declaration, the objectives of the meeting included:

- Documenting the country's progress and persisting challenges regarding SOGIE-related issues;
- Discussing societal and community based threats and challenges faced by LGBT / GNC persons;
- Encouraging a coordinated approach between government, Chapter 9 Institutions and civil society in responding to the discrimination and hate crimes experienced by persons with diverse sexual orientation, gender identity and expression;
- Identifying the main issues to be addressed in future to feed into the ongoing development of the SAHRC's strategy on SOGIE rights;
- The production of a report and the development of advocacy and educational materials; and
- Capacity building and sensitization training of different role players of their role in protecting the rights of LGBT / GNC persons in South Africa.

Key outcomes of the meeting, particularly as they relate to the SAHRC, include:

- **Regional Interventions** – The SAHRC should engage more robustly with regional bodies, including the ACHPR, African Union and NHRIs on the continent to further promote and protect the rights of LGBT / GNC individuals on the continent.
- **Strategic Litigation and Complaints Handling** – Beyond using litigation as a means of resolving individual complaints, the SAHRC should work closely with lawyers, social movements and civil society actors, working in both the domestic and regional contexts, to ensure that litigation interventions build on existing jurisprudence to further expand SOGIE rights.
- **Policy Interventions and Research Outputs** – The SAHRC should collaborate with civil society actors to ensure that a streamlined approach is adopted regarding policy interventions impacting on SOGIE rights. In addition, the SAHRC should proactively engage with civil society actors and academics to ensure that all SOGIE-related research reports and recommendations emanating therefrom are relevant and impactful toward the advancement of SOGIE rights.
- **Criminal Justice** – The SAHRC should actively engage with South African Police Service (SAPS) to fast-track the development of systems to disaggregate data required to monitor the investigation and resolution of SOGIE-based hate crimes.
- **Sensitization Training** – the SAHRC should actively engage in sensitization training with relevant State departments, including members of the judiciary, particularly with respect to how the use of language in behavior, policies and judgments can perpetuate the marginalisation and exclusion of LGBT / GNC persons.

Tashwill Esterhuizen from the SA Litigation Centre said during his presentation that members of the LGBTI although a small minority fall part of a diverse society that everyone belongs to

1.0 SUMMARY OF PROCEEDINGS

DAY 1

1.0 SUMMARY OF PROCEEDINGS – DAY 1

Welcome and opening remarks

The Deputy Chairperson of the SAHRC, Commissioner Priscilla Jana opened the meeting by welcoming all delegates, and affirming the significance of the meeting in light of the SAHRC's constitutional mandate to protect and promote the recognition of human rights. Despite the Constitution of the Republic of South Africa, 1996 (Constitution) being among the most progressive in the world, recognising explicitly the rights of LGBT persons, severe rights violations are experienced by LGBT persons. Moreover, when seeking redress, and in reporting these violations such persons face secondary victimisation in their own communities and police stations.

The reality of the experience of LGBT persons precipitated the need to bring together groups from different backgrounds, with influence over domestic and regional spheres in the SOGIE space, to settle on a clear way forward to translate South Africa's legal protections into more tangible protections for some of the most vulnerable persons in the country.

Keynote address

The keynote address was delivered by Adv. Pansy Tlakula, former Chairperson of the ACHPR, who commended the NANHRI and the SAHRC for convening the meeting. Adv. Tlakula acknowledged the work undertaken by NANHRI in taking the lead to ensure the implementation of the Declaration on Practical Solutions to ending violence and discrimination against persons based on Sexual Orientation, Gender Identity and Expression (Ekurhuleni Declaration). The Ekurhuleni Declaration was adopted in 2016 at the First African Regional Seminar on Finding Practical Solutions for Addressing Violence and Discrimination Based on Sexual Orientation, Gender Identity and Expression, inspired by the historic Resolution 275 on Protection against Violence and other Human Rights Violations against persons on the basis of their real or imputed Sexual Orientation and Gender Identity, adopted by the ACHPR.
The Ekurhuleni Declaration contains a multi-pronged, comprehensive and practical plan of action which, amongst others, urges the African Union (AU), the ACHPR, Regional Bodies, NHRIs and Civil Society Organisations (CSOs) to advance the rights of LGBT persons.

Adv. Tlakula charged delegates with giving serious consideration as how best to engage the AU and its organs with a human rights mandate in a constructive and non-confrontational dialogue on the meaning of some of the Articles of the African Charter on Human and Peoples' Rights (African Charter). Taking into consideration the prescripts of the African Charter, which include, inter alia, the right to enjoy the rights and freedoms therein without any distinction of any kind - such as race, sex, gender or other status, the right to equality and equal protection of the law, the right to dignity and freedom - such a dialogue would have to address the basis upon which it can be said that the

rights entrenched in the African Charter extend to all individuals, to the exclusion of LGBT persons.

While there is little doubt that much is being done to advance LGBT rights on the African continent, a lot more remains to be done. In order to effectively address violence, discrimination and other human rights violations against LGBT persons, challenges that hamper progress must be identified and strategies to address these challenges developed.

Adv. Tlakula closed her address by affirming to those still struggling to accept the rights of LGBT persons, to remember that human beings are human beings, irrespective of our sexual orientation, gender identity or expression.

Overview and objectives

Marie Ramtu, Program Officer at NANHRI, gave a brief description about NANHRI and its role in the SOGIE project. The role of NANHRI as an umbrella body for NHRIs in Africa which provides capacity strengthening support for its members was explained.

Following the adoption of Resolution 275, NANHRI initiated a project to strengthen the capacity of civil society and relevant stakeholders to protect the rights of LGBTQI+ persons. The SOGIE project, which was started in December 2016 with five African NHRIs (Ghana, Kenya, Malawi, Uganda and South Africa), commenced with staff from these countries undertaking online training which was subsequently followed up by a face-to-face training in Nairobi, Kenya in March 2017. The outcome of the training was to have each country organise its own in-country training on SOGIE and human rights.

The objective of the project was to build the capacity of NHRI staff to respond to SOGIE-related violence and discrimination, and improve collaborative efforts between NHRIs and CSOs in responding to SOGIE-related violations and discrimination. It is anticipated that staff can also reconcile work/ professionalism with cultural/personal beliefs.

Sibongile Ndashe (left) from the Initiative for Strategic Litigation in Africa with Commissioner Lawrence Mute as panelists on Day 1

Regional Strategies to Tackle SOGIE-Based Violence And Discrimination

The panel presentations were opened by the Deputy Chairperson of the ACHPR, Commissioner Lawrence Mute, who drew up a set of considerations to address when advancing the agenda of human rights violations against people on the basis of their sexual orientation, gender identity and expression.

These include the need for rights claimants, or those undertaking advocacy on behalf of rights claimants, to consider the bigger picture and realise the conceptualisation of SOGIE rights as human rights. It is also crucial to assess where and from whom you are seeking help. Tailoring the approach to salient dynamics would depending on whether you are approaching a technical body, or a political body. Finally, the Commissioner reiterated the universality of the African Charter, which protects all persons from violations of their rights. The African Charter has been signed and ratified by a number of countries, including South Africa. Activists, human rights defenders, and civil society stakeholders therefore need to be in a position to hold their respective governments fully accountable to their commitments.

Speaking to the use of litigation to advance SOGIE rights across the continent, Sibongile Ndashe of the Initiative for Strategic Litigation in Africa (ISLA) highlighted that approaches to the law itself can have the implication of contributing toward SOGIE-based violence in Africa. There has been significant prioritisation of decriminalisation as a means of advancing related rights, such as spousal benefits or access to health care, for example, without addressing the root causes that lead to violence or the multiple ways in which SOGIE-based violence manifests. ISLA has devised an incremental approach to hold states accountable and to develop jurisprudence that makes linkages to the various ways that sexual rights are violated. The approach allows local courts and African human rights mechanisms to highlight the linkages between "everyday" issues such as freedom of association, consent and privacy in ways that are gradual, and thus less likely to be divisive. For example, in the Ugandan case of *Jacqueline Kasha & Others v Rolling Stone Ltd and Another,* the court established that irrespective of sexual orientation, the "outing" of the applicants in Rolling Stone magazine, and the magazine's calls to "hang" the identified homosexuals, violated their inherent rights to privacy, dignity and protection from inhuman treatment. With the goal of incrementally building rights, and minimizing the potential harmful effects of the law, ISLA promotes partnerships between legal experts and social movements as critical to striking the balance between much needed expertise possessed by lawyers, and the crucial knowledge possessed by grassroots activists of the extent of discrimination. This approach is thus cognizant of how law is interpreted and implemented, and whom it affects.

Wendy Isaack from Human Rights Watch (HRW) presented research findings contrasting the respective positions of Ghana and Nigeria, with respect to the protection of LGBT persons against violence and discrimination. Ghana was presented as a country of contradictions. While Ghana

criminalises "unnatural carnal knowledge" in its Criminal Offences Act, the law is rarely, if ever, enforced, and unlike several of its neighbors, Ghana has not taken steps in recent years to stiffen penalties against consensual same-sex conduct or to expressly criminalise sexual relations between women. Moreover, at least two government agencies, the Ghana Police Force and the Commission on Human Rights and Administrative Justice (CHRAJ), have reached out to LGBT people and taken proactive steps to help ensure their protection. However, LGBT persons in Ghana continue to be subjected to the most brutal violence from their communities because of their sexual orientation and gender identity. The retention of the provision pertaining to "unnatural carnal knowledge" in section 104(1)(b) of its Criminal Offences Act - commonly referred to as the anti-gay law – is often seen as tacit state approval of discrimination, and even violence, on the basis of real or imputed sexual orientation and gender identity. The law also fuels a social environment in which there is pervasive violence against lesbian, bisexual and gender non-conforming women in the home and LGBT people more generally in communities where they live. LGBT Ghanaians interviewed by HRW said that the combination of the criminalization of adult consensual same-sex conduct and the profoundly religious and socially conservative Ghanaian context has an insidious effect on their individual self-expression.Ghana is a liberal democracy, with a constitution that guarantees fundamental human rights to all its citizens, has a relatively responsive police force, and an independent national human rights institution; however, the government has consistently rejected calls by United Nations bodies, including the Human Rights Council during the Universal Periodic Review of Ghana's human rights record, to repeal the law against "unnatural carnal knowledge." Despite positive initiatives from the CHRAJ and from some individuals within the Ghana Police, the government is thus far failing to adequately protect LGBT persons from violence. HRW has since petitioned the ACHPR to put pressure on the Ghanaian government to protect persons from such grotesque forms of violence, and approaches by HRW to assist Ghana in implementing the necessary measures have been met with positive responses.

In Nigeria, the passing Same-Sex Marriage Prohibition Act, 2013 (SSMPA) prompted a series of instances of mob violence, arbitrary mass arrests, detention and extortion against LGBT people by some police officers and members of the public. The SSMPA not only punishes same sex marriage, but also prohibits same sex cohabitation, and imposes harsh prison sentences on anyone who associates with organisations that purport to promote the rights of LGBT persons. Moreover, the SSMPA contravenes basic tenets of the Nigerian Constitution, including respect for dignity and prohibition of torture. It also goes against several regional and international human rights treaties which Nigeria has ratified, including the African Charter, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). Human rights treaties impose legal obligations on Nigeria to prohibit discrimination; ensure equal protection of the law; respect and protect rights to freedom of association, expression, privacy, and the highest attainable standard of health; prevent arbitrary arrests and torture or cruel, degrading, and inhuman treatment; and exercise due diligence in protecting persons, including LGBT individuals, from all forms of violence, whether perpetrated by state or non-state actors. In November 2015, the ACHPR urged the Nigerian government to review the SSMPA in order to

prohibit violence and discrimination on the basis of sexual orientation and gender identity and ensure access to HIV prevention, treatment, and care services for LGBT individuals. What has been most disheartening, however, has been a perceived lack of interest shown by the Nigerian Human Rights Commission to engage with HRW in relation to LGBT matters, including the SSMPA.

Carrie Shelver of the Coalition of African Lesbians (CAL), noted how in addition to laws criminalizing same-sex conduct, some jurisdictions also contain provisions that place additional restrictions and penalties on the 'promotion of homosexuality' and in other contexts refuse registration of organisations working on SOGIE-related issues. The current approaches, strategies and interventions of governments and CSOs to promote the rights of LGBT persons include focusing on health care (and HIV/AIDS in particular) and gender-based violence as entry points to advance SOGIE rights. National organisations are increasingly utilizing the regional and international human rights spaces to raise concerns that are not being addressed at all or addressed satisfactorily domestically. However, the emphasis on legal and policy reform has had the implication of less resources and attention being allocated to knowledge production and the building of social movements. In addition, the hierarchy of rights and violations within and among various population groups has resulted in some rights of some groups in some locations being viewed as more important than others. There also appears to be a failure in addressing the intersectional and lived realities of how different groups experience human rights violations, and the multiple forms of vulnerabilities within the LGBT community - such as race, ethnicity, gender, class and geographical location – resulting in many LGBT individuals being excluded from the gains made by the broader LGBT community.

Discussion

The discussion centered on the need to take the recommendations put forward by the panelists a step further by engaging with policy-makers who have the power to implement interventions directed toward providing greater protection to LGBT persons. While it is important from a strategic point of view for human rights activists to engage in these discussions among themselves, it is necessary to take these discussions further and initiate effective dialogue with our governments. In particular, the SAHRC as an NHRI must actively engage with regional bodies such as the ACHPR and the African Union to ensure that African governments protect the rights of NHRI individuals. Moreover, in light of its constitutional mandate to promote and protect the rights of LGBT individuals in South Africa, the SAHRC

Tackling SOGIE-Based Violence In South Africa

Matthew Clayton of The Triangle Project led the presentations on how best to tackle SOGIE-based violence in South Africa, highlighting the need to have a detailed understanding of the problem before deciding on what strategies to adopt in response. The lack of statistical information was highlighted as one of the major obstacles to presenting an accurate picture of the current state of affairs pertaining to the rights of LGBT persons. For example, in instances where a lesbian woman is murdered due to her sexual orientation, the statistic is simply recorded as one of 'murder'. Similarly when a trans woman is beaten on the basis of their gender identity, the statistic is recorded as one of 'assault'. This dearth of disaggregated data results in the inability to obtain information on crime statistics that is required to better understand the root causes of the problem. The capturing and recording of the reports is only part of the problem though, as the main obstacle to understanding the true state of SOGIE-based violence is the lack of reporting by LGBT victims due to the high levels of distrust toward the South African Police Service (SAPS), where secondary victimization in the form of discrimination is likely to occur. This is especially troubling considering the extreme forms of SOGIE-based violence in South Africa, which is unique and disassociated from other factors widely understood as drivers of crime in the country. Proposals were put forward to introduce robust hate crimes legislation; a well-funded criminal justice system that follows through with reported hate crimes; and a police service that is not only properly trained but is also held accountable to its failure to provide victims of SOGIE-based violence the protection they need.

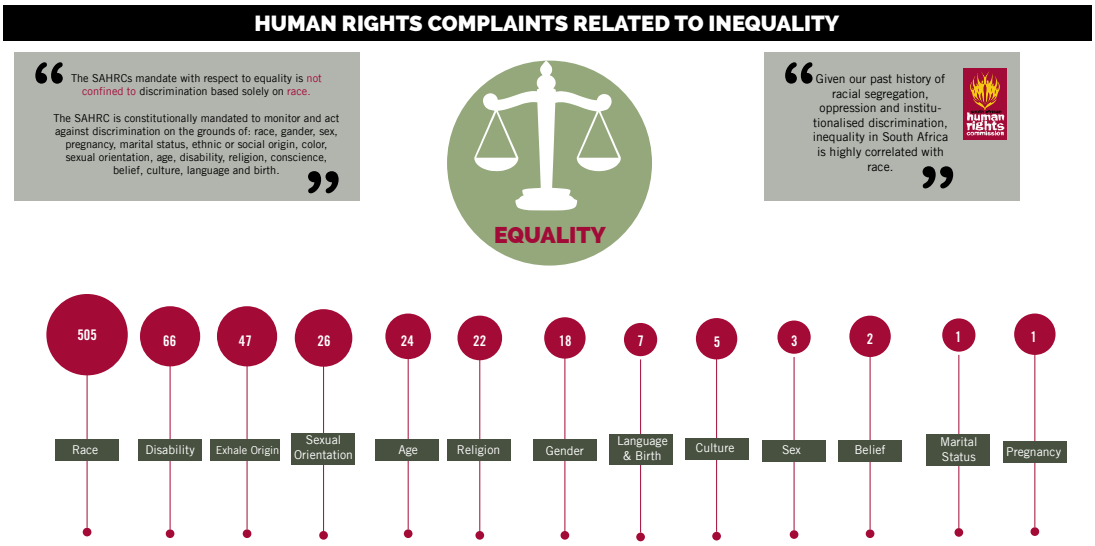
The Department of Justice and Constitutional Development (DOJ&CD), represented by Busisiwe Dhlamini, provided an overview of the strides South Africa has made in terms of developing legislation and policy – namely, Prevention and Combating of Hate Crimes and Hate Speech Bill - that serves to promote and protect the rights of LGBT persons, including SOGIE-based violence. The DOJ&CD has established a National Task Team (NTT) to develop a National Intervention Strategy (NIS) on LGBT issues, with the aim of countering the violence perpetrated on people on the basis of their sexual orientation and gender identity. The NIS follows a multi-sectoral approach, which includes government and civil society organisations (CSOs) in addressing violence against LGBT persons through four programme areas, namely: Prevention, Response, Training, and Monitoring and Evaluation at a national level. The ultimate aim is for national, regional and municipal policies, strategies, plans, budgets and legislation to have an integrated, mainstreamed approach to eradicating hate crimes. A Rapid Response Team (RRT) was also established to urgently track the pending cases committed against LGBTI persons which are in the criminal justice system, as well as to respond as soon as possible, to reported cases of violence. The RRT comprise the SAPS, National Prosecuting Authority (NPA), DoJ&CD and representatives from CSOs. Progress has been made by the RRT to ensure the fast tracking of the pending hate crimes cases within the criminal justice system. Key learnings to be taken from the ongoing process include the need to put in place proper finance and funding mechanisms to support multi-sectoral collaborations; the need to mobilise political leadership and senior officials to become the key drivers of change; as well as ensuring continuous communication and consultation within and across the sector.

Discussion

Most of the discussion centered on the lack of disaggregated data, and on what can be done to fill the gap created by not having the information available to inform interventions. It was proposed that SAPS take the initiative in this regard, with participants suggesting that SAPS needs to implement more efficient systems for recording crime reports and statistics, and making those publicly available. The National Operations Center was also mentioned in response to the question of disaggregated data, which was established for the purposes of comprehensive data collection and administration. It was resolved that while there were a plethora of challenges created by the gap in disaggregated data, it was important to find solutions and prioritise work that needs to be done based on the resources that are currently available.

SOGIE-Based Discrimination In South Africa

Pandelis Gregoriou, representing the SAHRC, opened the presentations of the day's last panel by highlighting the SAHRC's constitutional mandate to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa.The violation of the constitutional right to equality, which prohibits discrimination on the listed grounds of gender, sex and sexual orientation, comprises the highest proportion of complaints reported to the SAHRC (14%). Of these equality-related complaints, discrimination based on gender, sex, and sexual orientation seem to make up a disproportionately low number, comprising only 47 of the total (705) equality complaints received in the 2016-2017 financial year. The implication is that a number of such violations go unreported, largely due to the secondary victimisation that has characterised the handling of SOGIE-based discrimination.



While the SAHRC may, in the execution of its mandate, resolve disputes constituting a violation of a human right through conciliation, negotiation or mediation, it is also empowered to litigate on its own accord, or on behalf of a person or class of persons. One such instance involved legal proceedings initiated against Jon Qwelane, a former ambassador of South Africa to Uganda, who was accused of making derogatory statements about members of the LGBT community in an article published in a large South African newspaper. He was subsequently found guilty of hate speech, with the court ordering him to provide an unconditional and published apology to the LGBT community. It was necessary to acknowledge that while the SAHRC has made significant progress in the execution of its mandate, there have been challenges. These include limited resources and capacity in the context of executing the protection mandate of the SAHRC; the use of tools to address the systemic issues of unfair discrimination which members of the LGBT community face; as well as pervasive public prejudice against the LGBT community.

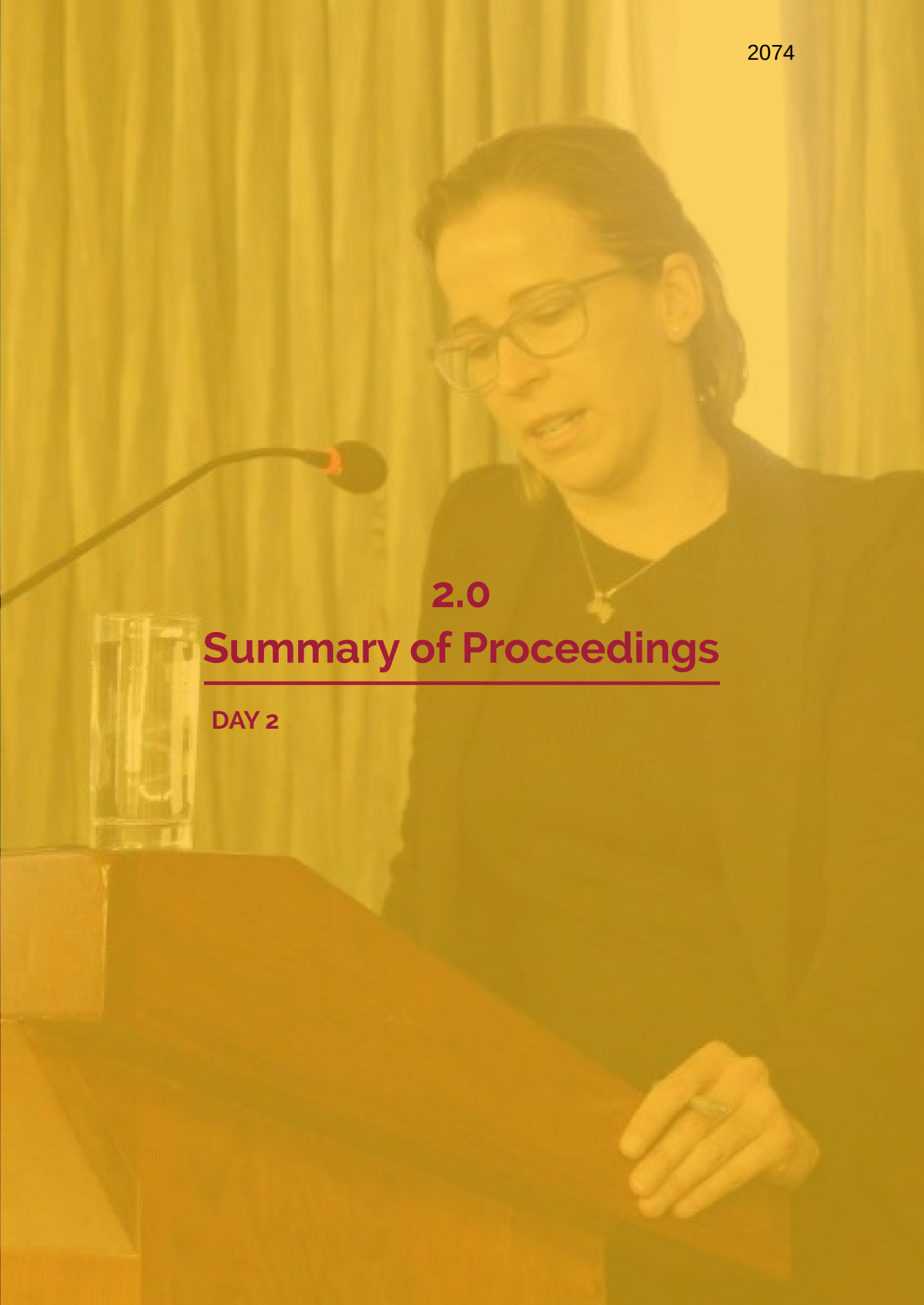
The Commission for Gender Equality (CGE), represented by Vernet Napo, highlighted some of the systemic issues undermining gender equality in South Africa, identifying patriarchy as the source of the country's fettered understanding of gender dynamics, while cultural beliefs, traditions and religious beliefs have also perpetuated patriarchal power inequalities. The CGE reported that while its SOGIE-related work has not been properly institutionalised, its programmes and interventions are directed toward the broader umbrella of promoting and protecting gender and minority rights. It is under these auspices that the CGEs Public Education and Information (PEI) department works with CSOs in each of the nine provincial offices, ensuring also that when community workshops on gender are held, officers facilitate the importance of the rights of the LGBT persons. The CGE has served as amicus curiae in a number of cases, including the Nare case against the Limpopo DOE, where the CGE worked with the SAHRC's Limpopo office to make several recommendations to the authorities regarding measures to be put in place to remedy the discrimination faced by Nare and other transgender learners. Another example of the CGE's legal contribution is the case of Laubscher N.O. v Duplan and Another regarding same-sex partners and the right to inherit.Accordingly, the CGE noted its authority to monitor the Equality Courts, established to advance substantive equality in South Africa as per the Constitution. In the course of this work it has been determined that the Equality Courts are fraught with challenges. These include the Equality Courts being inaccessible for persons seeking to lodge complaints, with challenges ranging from the Equality Courts' clerks tending to subject LGBT persons to secondary victimization, in addition to the more institutional issues of a lack of resources and appropriate expertise, such as the availability of Magistrates who have been properly trained on discrimination and the various aspects of the right to equality.

Discussion

One of the main threads to inform the discussion was around the role of the SAHRC in engaging the courts and conducting sensitivity training on SOGIE issues. There tends to be a conflation of the most basic SOGIE terminology, such as the distinction between sexual identity and sexual orientation, and courts need to be sensitive to the nuances of language in order to better understand the rights afforded to LGBT persons. The issue of LGBT refugees' rights in South Africa was also raised, with the implication being that they are targeted by the Department of Home Affairs due to their undocumented status, which consequently prevents LGBT refugees from living freely in the country that has purportedly granted them asylum status. The question thus arose of how the SAHRC may leverage its relationship with government to intervene in such cases, and partner with civil society in using advocacy to address challenges faced on the ground.

Panelists tackling the issues of SOGIE, religion and culture are:- Gift Kgomosotho (SAHRC) on the left, Reverend Nokuthula Dhladla (centre) & Keval Harie from Gay and Lesbian Memory in Action (right).

Participants:- Estian Smit (left) & George Barasa (right) interacting during question session on Day 1 of SOGIE



2.0
Summary of Proceedings

DAY 2

2.0 SUMMARY OF PROCEEDINGS – DAY 2

Recap Session

The second day of proceedings was opened by Kathleen Hardy of the SAHRC, who noted that there are important regional similarities and differences in the challenges faced by SOGIE movements. One fundamental similarity is the perception, at both a private and state level, that all rights are extended to all people to the exclusion of non-normative people. Notwithstanding these similarities, lawyers, NHRIs and activists should avoid using a "one size fits all" strategy as methodologies and narratives about SOGIE on the continent need to be challenged. Flexible, context specific and responsive strategies need to be adopted in order to advance the rights of LGBT persons. The work on SOGIE has thus far happened in silos, with NHRIs performing their mandated function while lawyers and social movements push a different agenda. It is important that synergy and collaboration happens, with a view of realising that it is important that the movement articulate its expectations of NHRIs. An emerging trend is that the most successful litigation and advocacy occurs when lawyers are embedded in the movement. However NHRIs continue to have limited engagement with social movements, which has slowed down the pace of advancing SOGIE rights because the litigation strategies pursued by NHRIs have become outdated. This is largely because NHRIs continue to work at the level of the individual and seek redress for particular people as opposed to a class of persons. Therefore the need for NHRIs to engage actively with civil society in strategic litigation becomes apparent. The SAHRC communicated its desire to become a positive ally that is both accountable to parliament and to social movements. The overwhelming response was to have increased collaboration between the SAHRC, social movements and other NHRIs on the continent.

Outcomes that should stem from this meeting include:

- The need for closer engagement, knowledge transfer and collaboration between NHRIs, social movements and lawyers.
- The need to shift litigation strategies from focusing on individuals to those that focus on classes of people and stem from social movements themselves.
- A dialogue should be held with NHRIs, key population groups and other stakeholders to establish sustainable ways of working together.

Strategies for the Legal Recognition of Gender Identity and Expression

The panel sought to share experiences on the strategies that have worked regionally in the realization of variant gender identities and expressions. One of the main objectives of this panel was to engage in a dialogue on what is expected of the SAHRC as an NHRI.

Tashwill Esterhuizen of the Southern African Litigation Centre (SALC) opened the presentations by affirming the universality and indivisibility of human rights. People of variant gender identities and expressions should therefore not be discriminated against and denied their rights arbitrarily. Notwithstanding, the issue of changing gender markers for transgender individuals remains difficult as there continues to be resistance to this form of administrative action across the continent. Transgender people struggle to get identity documents that reflect their expressed gender. This significantly impedes their right to human dignity and undermines their access to routine services and work. There is increasing evidence that suggests that transgender and gender non-conforming persons are targeted for violence because of their gender identity and/ or chosen gender expression. This violence occurs at both the social and institutional level. An example is trans women being jailed with cis men and thus being subjected to sexual assault and rape, while trans men are subjected to corrective rape. The institutional dynamics of violence are bolstered by the existence of penal codes that perpetuate and promote stereotypes that increase the vulnerability of LGBT people and form the basis on which trans people are denied the correct documentation. These laws also have the "knock on effect" of curtailing the right to freedom of association. Despite these challenges there have been several encouraging developments on the continent. In Zimbabwe a trans woman was charged with criminal nuisance for using the women's bathroom and dressing like a woman. She was subjected to humiliating examinations to verify her gender. The case against her was ultimately removed from the roll, and she has since pursued a case of damages against the State and the police service for infringement on her dignity and privacy. The court of appeal in Botswana has recognised the change in gender markers, arguing that the decision was tied to recognition of rights to dignity and freedom of expression. The court emphasised that the State and society have a duty to uphold the dignity of an individual despite the opposing views that different sectors of society have.

The presentation by Glenton Matthyse of Gender Dynamix (GDx) gave insights into the importance of using the appropriate language and understanding even the most subtle linguistic nuances within the SOGIE space. It was proposed that there needs to be a shift away from biological and socially constructed understandings of gender, to understandings based on self-construction and self-determination.

Building on this, law and policy relating to SOGIE needed to move away from cis-normative and heteronormative framing that had the propensity to conflate issues of gender identity and expression with sexual orientation.

Discussion

Many of the questions coming out of the discussion concerned the issue of language. Noting that the language used has evolved at a great pace. At times even greater than the discourse and strides being made with respect to advancing SOGIE rights. How can society remain on track with the constant linguistic evolution? There were suggestions that LGBT discourse tends to have a largely western and academic conceptualisation of SOGIE issues, which, although valid in the right contexts, has the effect of alienating many African communities who are already struggling to understand and identify with such issues. The question of introducing and using language that is inclusive of African communities was therefore recognised as critical, with the need to start off with advocacy materials that speaks to the linguistic nuances and needs of affected communities.

The importance of maintaining consistency in language for the purpose of law-making and policy formulation was emphasised. Laws and policies need to be given the scope to be reflective of the current state of affairs, and not be rendered redundant by updates in language.

Right of Access to Education for Transgender Learners

Joshua Sehoole of Iranti led the panel presentations by recounting the story of a 10 year old transgender learner in the Limpopo province who wore trousers to school. He was humiliated and given degrading punishment of walking in a jersey and underwear all day (the Nare case). Such has been the suffering of gender diverse learners, who are disproportionately impacted by school uniform codes. The Nare case is an example of what transgender learners have to endure in many South African schools. The principal in that case had orchestrated bullying, isolation, outing and discrimination against the learner, creating a dangerous learning environment for the learner. While the national guidelines do have the potential to protect LGBT learners and their rights, it tends to be ineffectively applied. Practices which relate to uniform should not impede the right to access education or impede on the constitutional rights to privacy and dignity. The discrimination is rooted in many school guidelines, which still maintain LGBT phobias in their approach to refusals by learners to abide by binary uniform standards as a disciplinary issue. Such guidelines introduce a binary from the onset, in the way they decide what clothing is "for boys and for girls". This strikes at the core of the right to freedom of expression and the principle of self-determination. It was proposed that South Africa look at the Argentinian Gender Identity Act which actively provides for the dignified treatment and special protections for children's right to dignity. South Africa needs to look at implementing strategies that ensure learners have access to a competent learning environment where their emotional and mental wellness is not compromised. To this end learners need to have access to psychosocial support from properly trained educators who are aware of the sensitivities associated with young learners' gender identity and expression.

The SAHRC, represented by Victor Mavhidula, affirmed that there remain high levels of SOGIE-based discrimination despite a strong legal framework of rights protection. Equality courts in the country are tasked with adjudicating matters relating to discrimination as defined in the Constitution. Equality Courts therefore need to take a more proactive and functional role in understanding and adjudicating SOGIE-based discrimination, especially as it relates to children, who are the most vulnerable. Institutions such as Equality Courts, Magistrates, and government departments need to undertake sensitivity training to ensure that their rulings are reflective of the discourse on discrimination on the grounds of sexual orientation and gender identity. In this regard, the SAHRC itself has played a stronger role in questioning responses from government and holding it accountable for its failures, with specific references to the Department of Basic Education and the Department of Higher Education, both of whom are charged with handling the government's education portfolios.

Glenton Matthyse of GDx reported on how LGBT youth are disproportionately prone to mental health issues, which has been shown to be a direct consequence of societal pressure and rejection. Institutional homophobia and transphobia make it increasingly difficult for LGBT learners to succeed in the classroom. Heteronormative curricula and class room settings damage trans learners, and create an environment where a learners feel invisible or silenced. While social attitudes need to be shifted, law reform and policy development, as well as a complete review of curricula are critical to improving the experience of trans learners in South African schools.

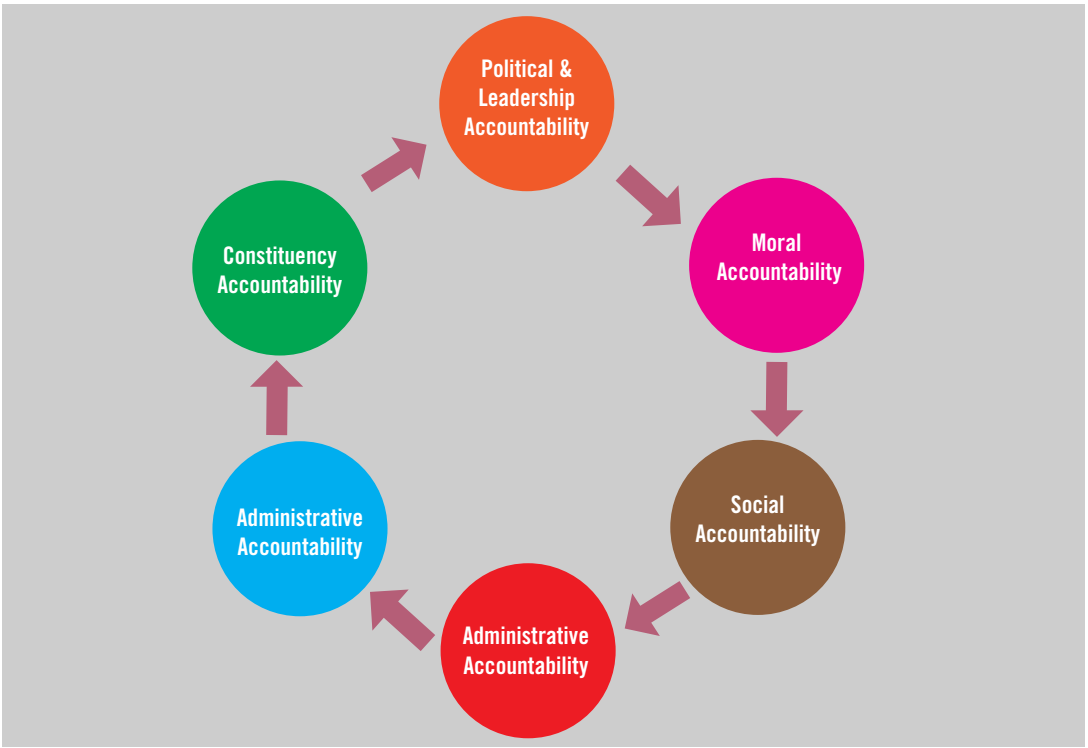


Diagram: Multiple actors are accountable for trans and gender diverse exclusion, marginalization, discrimination, harassment and violence in educational settings.

Discussion

The discussion was opened with the question on how to balance the rights to freedom of expression and self-determination for learners against the rights of educators who are tasked with the responsibility of maintaining discipline in schools. The immediate response to this was that, while educators and schools are entitled to their beliefs and have the responsibility to instill discipline within the school, uniforms should not deny learners' the right to access education. The enjoyment of learners' constitutionally entrenched rights to education and freedom of expression cannot be limited at the discretion of educators. There needs to be a diversion from considering LGBT issues in schools as disciplinary ones. These are issues that strike at the core of human rights discourse, and it is time they are considered as such.

SOGIE, Religion and Culture

The final panel at the meeting dealt with the interaction of SOGIE issues with religion and culture, focusing specifically on strategies to combat SOGIE-based religious and cultural discrimination and exclusion. Reverend Nokuthula Dhladla explained that this is an issue which churches have resolved to discuss due to the excessive violence and discrimination suffered by persons in the LGBT community. Materials have been developed on the role of churches in the context of violence against LBGT groups, with the purpose of training church leaders. While the process is ongoing and there continue to be challenges, the space for dialogue on religion and LGBT rights has been opened up, which represents significant strides compared to the previous status quo.

Keval Harie of the Gay and Lesbian Memory in Action (GALA) posed the question of how to create spaces for young, gay and black youth in African communities. These spaces need to be safe and allow for the voices of marginalised individuals to be preeminent in the narrative. While religion is deeply private and protected by the Constitution, both the State and religious institutions tend to use religion to divert attention from important conversations around SOGIE-based discrimination.

Discussion

The discussion kicked off with questions around the position of lesbians within the Muslim community. The assertion is that they are more oppressed than gay men, and are silenced due to the inherently patriarchal nature of the Islamic faith. Acknowledging that queer persons have always been able to move within their cultures and religions, the discussion moved to whether activism leaves any room for LGBT persons to be reconciled with their religious beliefs? In the context of Christianity, it was suggested that preachers need to undergo theological training to further understand the development of scriptures within their context

3.0
Annex 1 & 2

ANNEX 1 – RECOMMENDED PLAN OF ACTION

Pursuant to the Regional Seminar held in March 2016, NHRIs were requested to develop an institutional plan for activities and interventions relating to SOGIE work. The plan of action is intended to speak to the issues identified in the Ekurhuleni Declaration that require urgent attention from NHRIs and State intervention to promote and protect the rights of LGBT-GNC individuals in South Africa. These key areas of concern include: the role of State and non-State actors in addressing SOGIE-based violence and discrimination; changing perceptions and creating awareness; violence and discrimination in educational institutions and settings; economic justice; health and psychosocial support; victimisation in the criminal justice system and in border control systems; legal support for survivors of violence and discrimination, and their families; and accurate data on incidence of violence and discrimination based on sexual orientation, gender identity and expression. Based on the key areas of concern highlighted in the Ekurhuleni Declaration, the SAHRC's Plan of Action is a multi-faceted programme incorporating activities undertaken across the institution and intended to be a 'living' document and will be updated on an ongoing basis.

Current strategies/actions that are being employed within the SAHRC to respond to SOGIE-related violence and discrimination

1. Selected staff have been sensitised on SOGIE-related issues, and an in-country meeting has been hosted to further understand contemporary issues affecting the LGBT / GNC community.
2. The SAHRC continues to participate in the National Task Team on Gender and Sexual Orientation-based Violence Perpetrated against Lesbian, Gay, Bisexual, Transgender and Intersex Persons.
3. Ongoing complaints handling through Provincial Offices and the identification of potential matters for Strategic Impact Litigation.
4. Development of a school principal's guide in protecting the rights of LGBT learners and training.
5. Engagement with the Department of Basic Education (DBE) and other relevant stakeholders on school codes of conduct (including uniform regulations and the protection of privacy). Initial meetings are taking place with a view of hosting a public dialogue and identifying other strategic interventions. Further engagement with the DBE on the infusion of human rights (including SOGIE rights) into the school curriculum.
6. The production of a Thematic Concept Paper on SOGIE-based violence and discrimination, with a particular focus on transgender persons and secondary victimization of SOGIE-based violence victims.
7. Stakeholder engagement with the Centre for Human Rights about the possible inclusion of SOGIE-based theme into the National Schools Moot Court Competition and / or the African Human Rights Moot Court Competition.

8. Engagement with the Department of Justice on proposed legislation and policy relating to equality and non-discrimination.
9. Launch of the Unfair Discrimination in the Workplace Report (which includes unfair discrimination against LGBTI and gender non-conforming persons), and monitoring the implementation of recommendations emanating from the report.
10. Internal discussions on increased internal awareness to promote SOGIE rights (including inter alia Women's Day and Movember for men celebrations).

Innovative suggestions emanating from the in-country meeting

1. **Regional Interventions** – The SAHRC should engage more robustly with regional bodies, including the ACHPR, African Union and NHRIs on the continent to further promote and protect the rights of LGBT individuals on the continent.
2. **Strategic Litigation and Complaints Handling** – Beyond using litigation as a means of resolving individual complaints, the SAHRC should work closely with lawyers, social movements and civil society actors, working in both the domestic and regional contexts, to ensure that litigation interventions build on existing jurisprudence to further expand SOGIE rights. Similarly, and where appropriate, all complaints handling mechanisms available to the SAHRC, such as alternative dispute resolution, should be utilised in a manner that advances SOGIE rights beyond the individual complainant.
3. **Advocacy Materials** – The SAHRC should work in partnership with civil society actors to ensure that all advocacy materials aiming to promote SOGIE rights, and reduce stigma and discrimination, is presented in a manner that contains SOGIE-appropriate language and is relevant to the lived experiences of LGBT / GNC persons and the communities in which they live.
4. **Policy Interventions and Research Outputs** – Noting the constrained resource environment that exists within State institutions, the SAHRC should collaborate with civil society actors to ensure that a streamlined approach is adopted regarding policy interventions impacting on SOGIE rights. In addition, the SAHRC should proactively engage with civil society actors and academics to ensure that all SOGIE-related research reports and recommendations emanating therefrom are relevant and impactful toward the advancement of SOGIE rights.
5. **Criminal Justice** – In light of the existing Memorandum of Understanding (MOU) between the SAHRC and the South African Police Service (SAPS), the SAHRC should actively engage with SAPS to fast-track the development of systems to disaggregate data required to monitor the investigation and resolution of SOGIE-based hate crimes. The SAHRC should further incorporate sensitization training within the MOU with a view of addressing the occurrence of secondary victimization which frequently occurs when victims report crimes to the SAPS.
6. **Sensitization Training** – the SAHRC should actively engage in sensitization training with relevant State departments, including members of the judiciary, particularly with respect to how the use of language in behavior, policies and judgments can perpetuate the marginalisation and exclusion of LGBT / GNC persons.

Propose strategies/actions that the SAHRC can undertake to increase/improve the response to SOGIE-related violence and discrimination. Outline objectives, activities, identify other actors and timelines.

Objective	Activities	Actors	Timeline (monitoring)
Objective 1 Establish a committee of experts comprising lawyers, civil society actors, activists and academics to advise the SAHRC Deputy Chairperson, Commissioner Priscilla Jana on the Equality Portfolio and SOGIE related work.	Host one Section 11 Committee meeting, as provided for in the SAHRC Act, 2013.	SAHRC Commissioners' Programme Civil Society Actors Academics Lawyers	January - March 2018
Objective 2 Promote SOGIE rights at a regional level.	Engage with the existing network of Southern African Development Community (SADC) NHRIs to promote SOGIE rights within their respective jurisdictions, ACHPR and the AU.	SAHRC Commissioners' Programme DOJ&CD Department of International Relations and Cooperation (DIRCO) SADC NHRIs ACHPR AU	Ongoing
	Robustly engage with the AU in particular concerning its approach to SOGIE-related issues.	SAHRC Commissioners' Programme DOJ&CD; DIRCO AU NANHRI	Ongoing

Objective	Activities	Actors	Timeline (monitoring)
Objective 3 Impactful strategic litigation and complaints handling.	Actively engage with relevant civil society actors, Chapter 9 institutions and social movements regarding all SOGIE-related complaints lodged with the SAHRC.	SAHRC Legal Services at Head and Provincial Offices CGE	Ongoing
Objective 4 Advocacy Materials.	Develop advocacy materials in consultation with relevant civil society actors, Chapter 9 institutions and social movements to promote the advancement and protection of SOGIE rights.	SAHRC Advocacy and Communications Unit CGE DoJ&CD	January – March 2018
Objective 5 Strategic Policy Intervention and Research Outputs.	Actively engage with relevant civil society actors, Chapter 9 institutions, social movements, lawyers and academics regarding all SOGIE-related policy interventions and research.	SAHRC Research Unit SAHRC Commissioners' Programme CGE	Ongoing
Objective 6 Criminal Justice.	Settle terms of MOU with the SAPS and advocate for the establishment of disaggregated data systems and SOGIE sensitization training.	SAHRC Commissioners' Programme SAPS	Ongoing
Objective 7 Sensitization Training.	Develop training materials for State and non-State actors regarding SOGIE rights.	SAHRC Advocacy and Communications Unit DOJ&CD CGE DBE	Ongoing

Outline steps to have the proposed plan adopted and implemented by the SAHRC.

1. Debriefing session with the Commissioners
2. Approval by Commissioners
3. Include in Strategic planning and development of Annual Work plan
4. Allocation of funds

ANNEX 2 – PROGRAM

DAY 1: Violence and Discrimination based on SOGIE	
08:30	**Registration**
09:00	Welcome and Opening Remarks, Adv. Priscilla Jana – SAHRC Deputy Chairperson
09:15	Keynote Address, Adv. Pansy Tlakula - former Chairperson of the African Commission on Human and People's Rights
09:30	Overview and objectives, Marie Ramtu - NANHRI Program Officer
09:45	**Panel 1:** Regional strategies to tackle SOGIE-based violence and discrimination • Comm. Lawrence Mute, Deputy Chairperson of the African Commission on Human and People's Rights • Sibongile Ndashe, The Initiative for Strategic Litigation in Africa • Wendy Isaack, Human Rights Watch • Carrie Shelver, Coalition of African Lesbians • Moderator: Thandiwe Matthews, SAHRC
10:45	**Discussion**
11:15	**Tea**
11:30	**Panel 2:** Tackling SOGIE-based violence in South Africa • Matthew Clayton, Triangle Project • Busisiwe Dhlamini, Department of Justice • Moderator: Dr. Shanelle van der Berg, SAHRC
12:30	**Discussion**
13:00	**LUNCH**
14:00	**Panel 3:** SOGIE-based discrimination in South Africa • Pandelis Gregoriou, SAHRC • Vernet Napo, Commission for Gender Equality • Moderator: Dr. Shanelle van der Berg, SAHRC
14:45	**Discussion**
15:15	**Tea**
15:30	Wrap Up & Way Forward – Thandiwe Matthews & Gift Kgomosotho, SAHRC
16:30	**END**

DAY 2: Promoting, Advancing and Expanding SOGIE rights	
09:00	**Welcome Remarks and Recap, Kathleen Hardy, SAHRC**
09:30	**Panel 1:** Strategies for legal recognition of gender identity • Tashwill Esterhuizen, Southern African Litigation Centre • Glenton Matthyse, Gender Dynamix • Moderator: Thandiwe Matthews, SAHRC
10:30	**Discussion**
11:00	**Tea**
11:15	**Right of access to education for transgender learners** **Panel 2:** Transforming school admissions policies, codes of conduct and curricula • Joshua Sehoole, Iranti • Victor Mavhidula, SAHRC • Glenton Matthyse, Gender Dynamix • Moderator: Eden Esterhuizen, SAHRC
12:15	**Discussion**
12:45	**LUNCH**
13:30	**SOGIE, religion and culture** **Panel 3:** Strategies to combat SOGIE-based religious and cultural discrimination and exclusion • Reverend Nokuthula Dhladla • Keval Harie, Gay and Lesbian Memory in Action • Moderator: Gift Kgomosotho, SAHRC
14:30	**Discussion**
15:00	Wrap Up & Way Forward – Thandiwe Matthews, SAHRC
16:00	**END**

Network of African National Human Rights Institutions
NANHRI RINADH
Réseau des Institutions Nationales Africaines des Droits de l'Homme

south african human rights commission

NANHRI & SAHRC

IN - COUNTRY MEETING ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION

THEMATIC DISCUSSION PAPER

DISCRIMINATION AND VIOLENCE ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION (SOGIE) IN SOUTH AFRICA

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1. INTRODUCTION

Globally, South Africa is celebrated for its progressive and transformative democracy installed by the 1996 Constitution founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.[1] In relation to violence and discrimination based on sexual orientation, gender identity and expression (SOGIE-based violence and discrimination), South Africa's Constitution was indeed the first in the world to expressly prohibit discrimination on the basis of sexual orientation.[2] South Africa boasts a comprehensive and "liberal" policy framework for the promotion of equality and social justice, with generous protection for Lesbian, Gay, Bisexual, Transgender, Intersex and Queer[3] (LGBTIQ) persons.

Notwithstanding this much celebrated constitutional, legislative and policy framework, serious violations of the rights to equality and dignity of LGBTIQ persons occur much too frequently in South Africa – on the basis of their real or perceived SOGIE;[4] and the justice system in the country is unfortunately not known for its adequate response to these seemingly systematic challenges experienced by members of the LGBTIQ community.

As with other forms of violence and discrimination, SOGIE-based violence and discrimination tends to impact most severely on black, poor and rural LGBTIQ people due to race, class, level of formal education, geographical location and economic status.[5]

In 2010 the former Chairperson of the South African Human Rights Commission (Commission), Jody Kollapen, attributed violence directed against LGBTIQ persons to two factors: first, institutionalised prejudice deriving from the historical separation of people into categories with differential values;

[1]Section 1 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").
[2]Peter Fabricius, "South Africa teeters, but avoids falling, in its high-wire act of protecting LGBTIQ rights without offending its African chums" Available at https://issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights Accessed 17 October 2017.
[3]The letter "Q" is added to the traditional "LGBTI" to indicate inclusion of a category of persons who may identify as being either gender, sexually and/or bodily diverse or non-conforming. The term "Queer" was originally a term used in a derogatory sense. Many LGBTIQ movements have embraced and reclaimed this word and gave it a rebirth. It can now be understood to describe a broad category of people who are non-conforming or diverse.
[4]Studies referred to in J A Nel and M Judge, "Exploring Homophobic Victimization in Gauteng, South Africa: Issues, Impacts and Responses" Acta Criminologica 21(3) 2008. In fact, in the African Region, violence and discrimination against persons on the basis of their real or imputed sexual orientation, gender identity and expression has received the attention of the African Commission on Human and Peoples' Rights through its adoption of the Resolution 275 at the 55th Ordinary Session, on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.
[5]SAHRC 2017 Research Brief: Gender; A "socio-political" analysis would suggest it is impossible to explore violence against LGBTIQ people without factoring in race, class and poverty, discourses around culture and religion, which are arguably informed by "social panic" around sex, sexuality, sexual orientation and gender.

and second, the widespread problem of violence within South African society.[6] Indeed over time SOGIE-based violence and discrimination had become institutionalised religion, culture and tradition.

In December 2017, the Commission in partnership with the Network of African National Human Rights Institutions (NANHRI) hosted a 2-day In-country meeting on SOGIE-based violence and discrimination where a range of challenges faced by the LGBTIQ community were discussed. One of the recommendations that emerged from this meeting was the need for the Commission to prepare a thematic discussion paper on the subject of violence and discrimination that is perpetrated on the basis of SOGIE.

A further recommendation was that a stakeholder engagement should be held to explore practical solutions to these challenges at the grassroots level of South African society. While much has been said about the challenges of discrimination and violence on the basis of SOGIE, not as much has been achieved in practice to ensure the full realization of the constitutionally guaranteed rights of LGBTIQ persons. While this paper does not purport to address all the challenges faced by LGBTIQ persons, it does however highlight identified challenged experienced by LGBTIQ persons in their interaction with the justice system. The paper (1) takes forward the recommendations of the NANHRI's In-country meeting and (2) advances ways in which issues of violence and discrimination in this context can be addressed - with a focus on the relationship between the justice system and the survivor[7] of SOGIE-based violence and discrimination.

[6]See Jeremy Schaap, "Corrective Rape," ESPN, May 11, 2010, http://espn.go.com/video/clip?id=5181871. See also, the sentiments of former Justice Albie Sachs in National Coalition of Gay and Lesbian Equality and Another v Minister of Justice and Others (1998) (6) BCLR 726 at paras 127 and 128.

[7]Throughout this paper, the term 'survivor' is used instead of to 'victim'. This use of language is used to affirm the experiences of persons against whom SOGIE-based violence or discrimination was inflicted, it implies progression over stagnancy, and it serves as a term of empowerment. "Victim"-izing someone morphs one's identity into simply being a victim.

2. EMERGING AND SYSTEMATIC ISSUES ARISING

One does not need to search far for evidence that illustrates the disconnect between South Africa's policy and legislative framework on the one hand, and the actual lived experiences of LGBTIQ persons on the other. For instance, among the results of the 2015 Gauteng City-Region Observatory Quality of Life Survey,[8] 14 percent of Gauteng residents support violence against members of the LGBTIQ community.[9] This number is representative of some 1.26 million people in the province, and reportedly reflects an increase from 13 percent in 2013.[10] This is perhaps evidenced by the high prevalence of physical and sexual attacks in townships against (particularly black) lesbians, carried out under the guise of trying to 'cure' lesbians of their sexual orientation (corrective rape).[11] Equally shocking, only 56 percent of respondents felt that gays and lesbians deserve equal rights. This is a reportedly significant drop compared to 2013, when 71 percent agreed with the same statement.[12]

One of the biggest gaps is between justice system on the one hand, and the LGBTIQ person's interaction with the system on the other hand. While this gap was identified earlier, the urgency of addressing it was identified by the National Task Team on Gender and Sexual Orientation-based Violence (NTT) with its establishment of a Rapid Response Team, comprised of representatives of the Department of Justice and Constitutional Development (DoJ&CD), National Prosecuting Authority (NPA), South African Police Service (SAPS) and civil society organisations (CSO). The NTT noted that the "deprioritisation, marginalisation, exclusion and targeted victimisation by those public institutions intended to provide services and protection … for LGBTI persons … lead to a lack of resources when crimes are committed and result in victims' fear to even report crimes."[13]

[8]Available at 2015 Gauteng City-Region Observatory Quality of Life Survey http://www.gcro.ac.za/media/redactor_files/GCRO_QoL_2015_Press_pack_low_res.pdf (Accessed 02 December).
[9]This study is limited to the Province of Gauteng and is used here only for illustrative purposes.
[10]2015 Gauteng City-Region Observatory Quality of Life Survey, Figure 9, page 2.
[11]Nondumiso Tracy Hlongwane, Corrective rape as an anti-lesbian hate crime in South African law: A critique of the legal approach, Dissertation Submitted in Partial Fulfilment of the Degree Masters in Medical Law at the University of KwaZulu-Natal, College of Law And Management Studies, School of Law, Howard College Campus, 2016; Melanie Judge, violence against lesbians and (im)possibilities for identity and politics, A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Women's and Gender Studies at the University of the Western Cape, 2015.
[12]2015 Gauteng City-Region Observatory Quality of Life Survey, Figure 8, Page 6.
[13]National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector, Available at http://www.justice.gov.za/vg/lgbti/NIS-LGBTIProgramme.pdf.

This institutional violence is very often coupled with the infliction of secondary victimization of the survivors themselves. For instance, evidence was heard in *SAHRC v Qwelane*[14] that after a black lesbian woman was raped, SAPS officials responded to her attempt to lay a charge by saying that lesbians are 'boys', and 'boys cannot be raped'.

As evidenced by the recent Nare Mphela Equality Court case brought by the Commission, such victimisation takes place in all spaces including the school environment and as well as the judiciary.[15] In this case, between 2013 and 2014, Nare, a transgender girl, was the victim of ongoing discrimination by the school and the principal. This created a hostile and intimidating environment surrounding her gender identity which, among other things, led to her failing her matriculation examinations in 2014. What is important for purposes of this discussion, is the fact that even after hearing evidence of Nare's self-identification as a transgender girl, the presiding officer continued to note that "[t]he court will refer, where necessary, to [t]he Complainant in the male form." Although appearing very subtle, this is nonetheless further victimisation of Nare and is evidence that much work still needs to be done to achieve substantive equality and dignity for LGBTIQ persons, especially in their interaction with the justice system at all levels.

As there is growing confrontation of racism (as evidenced by, among others, the H&M,[16] Dove[17] or Panny Sparrow[18] incidents), it appears that increasing levels of homophobia are not being addressed by our society with the same rigour as racism. For instance, very little was reported in the mainstream media on the 2015 murder of Bobby Motlatla who was stabbed 39 times and raped for being gay; or the recent murder of Kagiso Ishmael Maema, a 25-year-old transgender woman from Rustenburg; or the brutal murder of Joey and Anisha van Niekerk who were raped and set on fire in December 2017. Even when incidents are publicised on social media, they are met with homophobic and hateful comments.

[14] *Qwelane v The South African Human Rights Commission (36314/13) [2014] ZAGPJHC 334.*
[15] Nare Phillemon Mphela and Others v Limpopo Provincial Department of Education, in the Equality Court, Seshego, 2017.
[16] http://www.bbc.com/news/world-africa-42675665
[17] https://www.news24.com/SouthAfrica/News/racist-dove-ad-causes-outrage-on-social-media-20171008
[18] https://citizen.co.za/news/south-africa/927765/kzn-estate-agent-calls-black-people-monkeys/

3. APPLICABLE LEGAL AND POLICY FRAMEWORK

A. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

South Africa is a State party to the International Covenant on Civil and Political Rights (ICCPR), which, among others, prohibits discrimination on the basis of sex (but not sexual orientation). In the case of *Toonen v Australia*, the United Nations Human Rights Committee held that, even though the ICCPR did not expressly mention sexual orientation, the ICCPR was sufficiently broad to include sexual orientation as part of the anti-discrimination provisions of the ICCPR.[19]

At a regional level, the African human rights framework imposes obligations, through the African Charter on Human and Peoples' Rights (African Charter), to protect and ensure respect for a broad range of civil, political, economic, social, and cultural rights central to the experiences of members of the LGBTIQ community. Similar to the ICCPR the Charter does not expressly prohibit discrimination on the basis of sexual orientation.

However, the question of SOGIE-based violence has, at least recently, been on the African Commission's[20] agenda, evidenced through the adoption of Resolution 275,[21] which calls on States to end all acts of violence and abuse, whether committed by State or non-State actors, including by enacting and effectively applying appropriate laws prohibiting and punishing *all* forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of survivors.

[19] *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
[20] African Commission on Human and People's Rights.
[21] African Commission on Human and People's Rights, Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.

B. SOUTH AFRICAN LEGAL AND POLICY FRAMEWORK

In the South African context, the point of departure must, of course, be the Constitution, which makes the achievement of equality a founding value of the Republic of South Africa; while Section 9 thereof, guarantees the right to equality and prohibits discrimination on the basis of sex, gender and sexual orientation respectively, and applies to the State and to private parties alike.

Various statutes were intended to give effect to the Constitutional right to equality, the most salient of which for purposes of this paper is the Equality Act,[22] which is the national legislation mandated by Section 9(4) of the Constitution, and accordingly, enjoys special constitutional status. Significantly, the Act identifies the need to address systemic discrimination and is intended for 'eradication of social and economic inequalities'.[23] The Act gives effect to the letter and spirit of the Constitution by prohibiting unfair discrimination, protecting human dignity and providing measures to eradicate unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability.[24]

While the prohibited grounds of discrimination in the Act resemble those listed in Section 9 of the Constitution, the Act seeks to provide additional grounds by including "any other ground" where discrimination on that ground causes or maintains systemic disadvantages, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination based on any traditional ground. This broad approach in the Act successfully acts as a catch-all approach, with the burden being placed on judicial officers to determine whether conduct not expressly listed as one of the prohibited grounds is, indeed, prohibited.

[22]Promotion of and Prevention of Unfair Discrimination Act, 4 of 2000 ("PEPUDA or Equality Act").
[23]See Preamble to the Equality Act.
[24]SAHRC Research Brief on Race, 2017.

In 2017 the South African Police Service (SAPS) adopted a policy aimed at the respect, protection and promotion of the rights of LGBTIQ persons – the Standard Operation Procedure.[25] This policy, which applies to all SAPS members – particularly those who provide frontline services, mandates suitable, supportive services and skilled and sensitized personnel when dealing with members of the LGBTIQ community. The policy largely prohibits secondary victimisation, which is often experiences by LGBTIQ survivors from SAPS members, through the use of language, survivor-friendly interview rooms, confidentiality, behaviour etc. The policy further mandates SAPS station lectures to include content on LGBTIQ issues for all functional SAPS members.

[25]The Standard Operating Procedure to Respect, Protect and Promote the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons, V002/2017.

4. KNOWLEDGE AND POLICY GAPS

A. SECONDARY VICTIMISATION WITHIN THE JUSTICE SYSTEM

While the legal and policy framework in respect of SOGIE-based violence and discrimination in South Africa is relatively inclusive and progressive, its existence on paper has thus far proven insufficient to reduce SOGIE-based violence and discrimination on the ground. LGBTIQ persons have to be empowered to know and use the laws and policies in order to protect themselves. A study has shown that victims of SOGIE violence and discrimination in South Africa often thought they had received sufficient service from health, police and justice service providers, until what they were in fact entitled to in terms of the law was explained to them. It is only then that participants realised that they had in fact received very poor service.[26]

A typical example is access or use of the Equality Court systems - which were meant for the achievement of individual or collective redress in cases of prejudice-based violence and discrimination. There are reports of systematic and prohibitive barriers to effective access to Equality Courts with problems including untrained or insensitive personnel or lack of awareness about these courts.[27] Another example of this is the remarks of the presiding officer in the Nare Mphela case referenced above.

This lack of appreciation of the legal framework is also evident in those officials and agencies responsible for implementing and applying the policies and laws, often resulting in secondary victimisation (and even structural violence).[28]

Often the obligation to provide basic information about rights and processes falls on the "first responders" or "[f]rontline service providers", who are, for instance, police officers in police stations, clerks of Equality Courts, health care providers or officials at other community or social service centers.

[26]Bornman S, Dey K, Meltz R, Rangasami J, Williams J (2013) Protecting Survivors of Sexual Offences - The Legal Obligations of the State With Regard to Sexual Offences in South Africa

[27]Reports were heard at the NANHRI In-Country Meeting of SOGIE-based violence and Discrimination, held in Rosebank on 29 December 2017 and hosted by the Commission.

[28]Parenzee, P (2014). A guiding document to the Shukumisa Dossier: A resource on available documents pertaining to the formulation and implementation of legislation and related policies pertaining to Sexual Offences in South Africa: 2003 – 2014. The Shukumisa Campaign; Vetten, L (2014) Domestic violence in South Africa, Policy Brief 71. The Institute for Security Studies: Pretoria.

These officials have the crucial responsibility to provide accurate information in a language and manner that the survivor in question understands, and they also serve as a survivor's first impression of the justice and or social service system.[29]

It is most often the interaction with these frontline service providers that gives rise to secondary victimisation — particularly in the case of LGBTIQ survivors, who face the personal ignorance and prejudice of officials in trying to access government and social services to which the legislative and policy framework entitle them.[30]

It was reported that by March 2015 the SAPS had established survivor friendly rooms at 897 of their 1 138 police stations across the country. In 2015 monitoring by the Civilian Secretariat for Police found that not all of these rooms were functional or resourced. This is despite the fact that the SAPS reported to parliament that 100 percent of its police stations provide "survivor friendly services".[31]

B. THE JUSTICE SYSTEM AND SURVIVORS OF SOGIE-BASED VIOLENCE AND DISCRIMINATION

While many survivors of SOGIE-based violence and discrimination do not understand and as a result cannot effectively navigate the justice system, many often seek legal assistance and/or representation. Since private legal representation is prohibitively expensive, particularly for black and/or disadvantaged survivors, a disproportionally low number of such survivors approach the Commission or civil society organisations (CSOs) for redress, while only a small minority are able to afford private legal representation. A disjuncture is created as the cost of litigation is prohibitive for the poor who as a result are unable to enjoy their constitutionally guaranteed rights.

The limited understanding of legal processes by South Africans remains an impediment to full comprehension of individual rights and how these can be realised.

[29]Thematic Report on Violence against Women and LGBTIQ Persons in South Africa, Submission to the UN Human Rights Committee in response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th session of the Human Rights Committee (Geneva, March 2016) (hereafter Thematic Report on Violence against Women and LGBTIQ Persons in South Africa) Available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23069_E.pdf page 6.
[30]Thematic Report on Violence against Women and LGBTI Persons in South Africa page 7.
[31]In a briefing of the parliamentary Portfolio Committee on Police, on 18 August 2015, available at http://pmgassets.s3-website-eu-west-1.amazonaws.com/150818saps.pdf

Victims of SOGIE-based violence and discrimination are as a result unable to understand their rights, including what they are entitled to especially in terms of service delivery or possible recourse in cases where their rights are not respected.

There is a need for a legal aid system (similar to the existing legal aid as established by the Legal Aid South Africa Act 39 of 2014) for survivors of SOGIE-based violence and discrimination. In theory, access to free legal advice and representation for SOGIE-based violence and discrimination is possible for everyone through the government system of legal aid, managed by the Legal Aid Board.[32] However, the reality is that access to a legal aid representative is only automatically and unconditionally available to those who find themselves in conflict with the law (perpetrators and accused persons) and not to those who are survivors and complainants of discrimination and violence cases.[33]

As evidenced by the Legal Aid South Africa Annual Report 2016/17[34] the bulk of the resources of Legal Aid South Africa is allocated to representation in criminal courts for those who find themselves in conflict with the law – predominantly cis-gendered men. Thus it is the latter who benefit most from the legal aid system at the expense of women and other members of the LGBTIQ community, who are more often survivors of gender-based violence and/or SOGIE-based violence and discrimination. Thus, the relevant legislation must be amended to require the Legal Aid Board to make legal representation available to survivors in certain instances.

C. THE NEED FOR DISAGGREGATED DATA

In recent years significant efforts have been made by civil society[35] and the Commission[36] to call for a reform in the manner in which data about sexual and other violence is collected and reported to the public. In 2017, the Department of Justice in partnership with European Union begun conducting a study of methods of data collection on incidents of racism, racial discrimination, xenophobia and related intolerance.

[32]As established by the Legal Aid South Africa Act 39 of 2014.
[33]Thematic Report on Violence against Women and LGBTI Persons in South Africa.
[34]Available at http://www.legal-aid.co.za/wp-content/uploads/2017/09/ANR-Legal-Aid-SA_2017.pdf (Accessed 29 November 2017).
[35]In November 2014, and again in October 2015; See also Thematic Report on Violence against Women and LGBTI Persons in South Africa page 8.

The study is aimed at providing technical assistance to the Department, and to analyse the existing data sources and methods of data collection on incidents of racism, racial discrimination, xenophobia and related intolerance in the public and private sector. This need for disaggregated data was discussed in 2016 at the Commission and Department of Justice's First Regional African Seminar on Finding Practical Solutions for Addressing Violence and Discrimination Based on Sexual Orientation, Gender Identity and Expression in Johannesburg, South Africa from 3rd to 5th March 2016. It was identified earlier, and again at this dialogue, that there is a need for adequate resourcing for the development of a system which captures and stores disaggregated data relating to SOGIE-based discrimination and violence, as well as training of officials.[37]

The SAPS routinely announces figures of reported crimes on an annual basis. For instance, it was reported that April 2014 to March 2015 a national total of 53 617 sexual offences were reported.[38] However, these figure remains largely unhelpful in the absence of disaggregation in respect of Gender, Offence and Prejudice-motivated crimes.[39]

For instance, in relation to Gender, it is not possible to tell from the lump sum figure of reported sexual offences what proportion of survivors were male (or male identified) or female (or female identified), and children, or whether the incident was motivated by hate or prejudice towards to the LGBTIQ community. This kind of disaggregated data should be the basis and should inform policy makers, government, CSO's and state institutions' interventions here. In the absence of disaggregated data, it becomes impossible to gain a comprehensive appreciation of the nature and scope of violence against LGBTIQ persons in South Africa. Moreover, it becomes difficult, if not impossible, to develop targeted and informed interventions according to real experiences of LGBTIQ persons.[40]

Further, there is a need for a shift in focus, away from the number of reported incidents, and towards the removal of barriers to reporting gender and/or SOGIE-based violence.[41]

[36]2017 Research brief on race and equality in South Africa, page 22.
[37]Ekurhuleni Declaration of 5 March 2016 on Practical Solutions on Ending Violence and Discrimination against Persons Based on Sexual Orientation and Gender Identity and Expression
[38]South African national crime statistics, available at http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php
[39]Thematic Report on Violence against Women and LGBTI Persons in South Africa page 8.
[40]Thorpe, J (2014), Financial Year Estimates for Spending on Gender-Based Violence by the South African Government at 4.
[41]Thematic Report on Violence against Women and LGBTI Persons in South Africa page 9.

To this end the Police Minister has adopted the Policy on Reducing Barriers to the Reporting of Gender Based and Domestic Violence. This policy addresses “service delivery barriers faced by vulnerable groups, including LGBTIQ persons, and persons with disabilities. It has three strategic objectives: to establish uniform norms, standards and mechanisms forthe co-ordination and implementation of the [Sexual Offences Act] of 2007; to develop and strengthen coordinated services; to provide resources for the effective implementation of [Sexual Offences Act] of 2007 and its National Policy Framework.” Although informed by a binary interpretation of gender, this policy is an overdue step in the right direction. Like with many others of its kind, serious investments must be made into its implementation and monitoring of such implementation.

5. CONCLUSIONS AND RECOMMENDATIONS

What seems clear is that even though some gaps exist, the legal and policy framework in respect of SOGIE-based violence and discrimination in South Africa is fairly inclusive and progressive. However, the policies and laws still need to be implemented consistently in order to address SOGIE-based violence and discrimination – particularly within the justice system. The following recommendations are therefore advanced by the Commission in this respect:

(1) The Department of Justice and Constitutional Development at all levels must continue to make targeted efforts to make information about the substantive content of the law available in an accessible and inclusive manner, which takes into account the social realities of South African life where people often have low levels of education, inadequate means to access legal assistance, as well as language barriers. Information must be provided in plain language and should be easily accessible in police stations, government offices, clinics, schools and other public places.

(2) The Department of Education, the Department of Arts and Culture and the Department of Justice must encourage the use of Equality Courts in local communities. All efforts must be geared towards popularisation of these courts, with a focus on rural areas and townships.

(3) The South African Police Service and Statistics South Africa must ensure that data collection relating to crimes motivated by one's actual or imputed SOGIE is accurate and disaggregated in respect of Gender, Offence and Prejudice-motivated crimes. The data should be made accessible to relevant entities including the Commission.

(4) The Department of Justice and Constitutional Development, working with the National Task Team and Civil Society Organisations must implement national training programs for all public service providers and border control officials including SAPS, legal professionals, NPA and the judiciary in order to sensitise them to the rights and needs of all survivors of crime, discrimination and violence on the basis of SOGIE. This includes the development of comprehensive education and sensitisation, including on education related to human rights, SOGIE for purposes of training SAPS and those involved in the justice system, including clerks, police, prosecutors and the judiciary.

(5) The relevant legislation must be amended to require the Legal Aid Board to make legal representation available to survivors in certain instances.

(6) The NTT must take the lead in strengthening inter-departmental and inter-sectoral collaboration for an effective approach to SOGIE-based violence and discrimination experienced by survivors in the justice system, and generally in all forms.

RESEARCH BRIEF ON

GENDER AND EQUALITY

IN SOUTH AFRICA

2013 - 2017

Research Brief on Gender and Equality in South Africa 2013 - 2017

Table of contents

Abbreviations and Acronyms

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CGE	Commission for Gender Equality
DOJCD	Department of Justice and Constitutional Development
EEA	Employment Equity Act, 55 of 1998
GBV	Gender-Based Violence
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Council
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NDP	National Development Plan 2030
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NIS	National Intervention Strategy
NPA	National Prosecuting Authority
NTT	National Task Team on Gender and Sexual Orientation-Based Violence
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SOGIE	Sexual Orientation, Gender Identity and Expression
Stats SA	Statistics South Africa
UN	United Nations

1 INTRODUCTION

South Africa remains the most unequal country in the world, measured in terms of income and wealth.[1] Inequality often overlaps with poverty, socio-economic disadvantage, and race. When inequality manifests as unfair discrimination, vulnerable groups such as women or those who do not conform to traditional gender roles, face multiple forms of discrimination in addition to suffering from societal norms and structures that perpetuate disadvantage for those who are 'different'.

Historically, in South Africa and globally, women have been marginalised and regarded as unequal compared to their male counterparts in terms of social and power relations. In response to gendered inequality, the founding provisions of the Constitution of the Republic of South Africa, 1996, explicitly provide for a democratic state based on, amongst others, the value of 'non-sexism'.[2] Nevertheless, structural gender divisions of labour, both paid and unpaid, continue to lie at the heart of many cultural and social practices in South Africa. Women are often defined in relation to motherhood, and are regarded as socially responsible for caring for others and the provision of basic services such as water, sustenance and education. As a result, women often suffer disadvantage in the formal economy and labour market, while those who perform unpaid 'women's work' bear a disproportionate – and largely unacknowledged – burden.[3] In addition, poverty remains a persistent contributing factor to gender inequality, particularly for women residing within rural areas of South Africa. This is one of the reasons why women are so often rendered vulnerable as victims of exploitation, violence, and ill health including increased susceptibility to HIV/AIDS.

However, gendered inequality does not only exist as between women and men. Currently, and despite constitutional and legislative protections, serious violations of the rights to life and dignity of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community occur frequently in South Africa. Gender Based Violence (GBV) is directed against women and girl-children as well as against persons based on their sexual orientation, gender identity and expression (SOGIE). Consequently, this research brief aims to address not only the current state of the equality rights of women in South Africa, but also – to a more limited extent[4] – that of the LGBTI community.[5]

Ultimately, this research brief does not aim to provide a comprehensive overview of gender equality in South Africa. It presents an outlook on some of the key challenges that have arisen in the period between 2013 and 2017, bearing in mind that further focus will be placed on gender equality in a separate, forthcoming research brief. In addition, selected developments and responses to these equality-related challenges are highlighted. Furthermore, the South African Human Rights Commission (SAHRC or Commission) is cognisant of the important mandate of the Commission for Gender Equality, and this research brief is consequently limited in scope to those areas that fall within the SAHRC's own mandate.

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1 Stats SA *Millennium Development Goals 1: Eradicate Extreme Poverty and Hunger 2015* (2015) x; World Bank *GINI Index* (2014) <http://data.worldbank.org/indicator/SI.POV.GINI>.

2 S 1(b) of the Constitution.

3 See generally B Goldblatt 'Gender, Poverty and the Development of the Right to Social Security' (2014) 10 *International Journal of Law in Context* 460.

4 This is due to the gender binary approach evident from the existing national and international legal framework relevant to gender equality.

5 With a focus specifically on gender identity and GBV directed against lesbian women – see section 8 below.

2 THE MANDATE OF THE SAHRC

The SAHRC is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The Commission does so through a number of means, one of which is by conducting research.[6]

3 APPLICABLE LEGAL FRAMEWORKS

3.1 South African legal and policy framework

The Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. It does so by providing for equality of all before the law, allowing for positive redress measures to advance previously disadvantaged persons, and by prohibiting unfair discrimination by the state and by individuals. In addition, the Constitution includes provisions that consider the need for the state to actively advance equitable access to land (section 25(5)); housing (section 26(2)); health care; food, water and social assistance (section 27(2)); and equity in education (sections 29(1)(b) and 29(2)(a)).

Various statutes aim to give effect to the constitutional right to equality, the most prominent of which for purposes of this research brief are the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) and the Employment Equity Act, 55 of 1998 (EEA). PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims at the 'eradication of social and economic inequalities'.[7] In terms of section 13 of PEPUDA, discrimination based on the prohibited ground of gender is considered unfair, unless it is established that the discrimination is fair. Section 8 of PEPUDA stipulates that no person may unfairly discriminate against any person on the ground of gender, and goes on to list various prohibited forms of gender-based discrimination. For purposes of this research brief, the following provisions of section 8 are pertinent:

> *(a)* gender-based violence; …
> *(d)* any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
> *(e)* any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; …
> *(g)* limiting women's access to social services or benefits, such as health, education and social security; …
> *(i)* systemic inequality of access to opportunities by women as a result of the sexual division of labour.

6 S 184(2)(c) of the Constitution.
7 See Preamble to PEPUDA.

Following a review of PEPUDA, numerous suggestions for its improvement were made. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the Department of Justice and Constitutional Development (DOJCD). The Commission, as Chair of the Equality Review Committee, will be monitoring this process closely.

Another important Act that will be referred to throughout this research brief is the Employment Equity Act. The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action to ensure redress and equitable representation in the workforce. Section 28 of the EEA established the Commission for Employment Equity (CEE) which submits an annual report and advises the Minister of Labour on matters relating to the realisation of the objectives of the EEA.

3.2 International and regional legal frameworks

As a state party to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), South Africa must take action against all forms of discrimination against women, in order to realise substantive equality.

South Africa has also ratified the African Charter on Human and Peoples' Rights (the African Charter), which contains numerous provisions directly relevant for equality and non-discrimination, including Article 2 which requires that 'every individual shall be entitled to the enjoyment of rights and freedoms… without distinction of any kind', and Article 3(1) which states that 'every individual shall be equal before the law'. Article 13(2) provides for equal access of citizens to public services, while Article 13(3) states that 'every individual shall have the right of access to public property in strict equality of all persons before the law'. The duties set out in the Charter include the duty of individuals to 'respect and consider his [sic] fellow beings without discrimination'. The equality of peoples is further recognised in Article 22 that guarantees the right to economic, social and cultural development of all peoples with due regard to their freedom and identity to 'equal enjoyment of the common heritage of mankind'. South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which provides for the protection of women and girl-children, as well as for the eradication of discrimination against women. Significant aspects of the Women's Protocol include the elimination of harmful cultural practices (Article 5), the right to peace (Article 9), and a comprehensive list of reproductive rights for women in Article 14.

Lastly, South Africa was instrumental in the drafting the Southern African Development Community's Protocol on Gender and Development, and signed the Protocol in 2008. The Protocol highlights a regional commitment to gender equality and recognises the importance of gender equality for development.

> "South Africa must take action against all forms of discrimination against women, in order to realise substantive equality."

4 CONCEPTUALISING EQUALITY

The following research brief aims to provide a facts-based account of the state of gender equality in South Africa. Nonetheless, it is useful to provide a brief overview of some key equality-related concepts that are often used in legislation and by government, judges, human rights practitioners, civil society actors and academics.

Gender equality can be thought of in a 'formal' or 'substantive' sense. *Formal gender equality* refers to laws and policies that appear gender neutral by treating everyone the same. Such laws and policies may in fact cement existing gender inequalities since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words, unequal structures, hierarchies and power relationships that underlie our society and economy and that prejudice women and persons based on their SOGIE – are therefore left unaddressed. As the Constitutional Court has stated, '[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality'.[8] The idea of formal equality remains useful in cases of *direct discrimination* based on gender or gender identity, but falls short in dealing with cases of *indirect discrimination*, where equal treatment prejudices those who are different. Formal equality is similarly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa's huge income gap and grossly unequal distribution of wealth and land.

Whereas formal equality tries to ensure equal treatment for all regardless of their identities, substantive equality aims to achieve *equal outcomes* by treating people and groups differently.[9] Different treatment is justified where some people are discriminated against on the basis of their identities or characteristics. This is reflected in the constitutional endorsement of positive redress measures, or 'affirmative action', in section 9(2). This places an obligation on the state to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education. Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the state to achieve substantive equality.

Closely related to affirmative action is the concept of *reasonable accommodation*. Reasonable accommodation is defined in the EEA as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'. In terms of PEPUDA, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on, amongst others, the ground of gender. As explained by former Chief Justice Langa:

> At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.[10]

8 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O'Regan).
9 This is supported by the definition of 'equality' in PEPUDA: '"equality" includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.
10 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 73.

However, when equality of outcomes is advocated for, it must be remembered that equal outcomes can be achieved without addressing structures of society that perpetuate discrimination.[11] For example, a woman might be employed at the same level as her male counterpart, but to procure the job in question she might have had to conform to male working patterns that do not acknowledge her unpaid work related to motherhood or other caring responsibilities.[12] In cases of gender discrimination, reasonable accommodation might require an underlying societal norm to be changed, whereas in other instances a specific adjustment may need to be made to accommodate difference in a particular instance.[13] Substantive equality should therefore encompass more than equality of outcomes.[14]

“
In cases of gender discrimination, reasonable accommodation might require an underlying societal norm to be changed ... Substantive equality should therefore encompass more than equality of outcomes.
”

Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits. For example, whereas a woman may face direct and indirect discrimination, a Black woman may be discriminated against on the bases of gender and race, whereas a Black homosexual woman faces discrimination based on gender, race and sexual orientation, and a poor Black lesbian faces additional discrimination on the ground of socio-economic disadvantage. In South Africa, poverty and socio-economic disadvantage intersect directly with race due to the legacy of apartheid, and affect women disproportionately.[15]

“
In South Africa, poverty and socio-economic disadvantage intersect directly with race due to the legacy of apartheid, and affect women disproportionately.
”

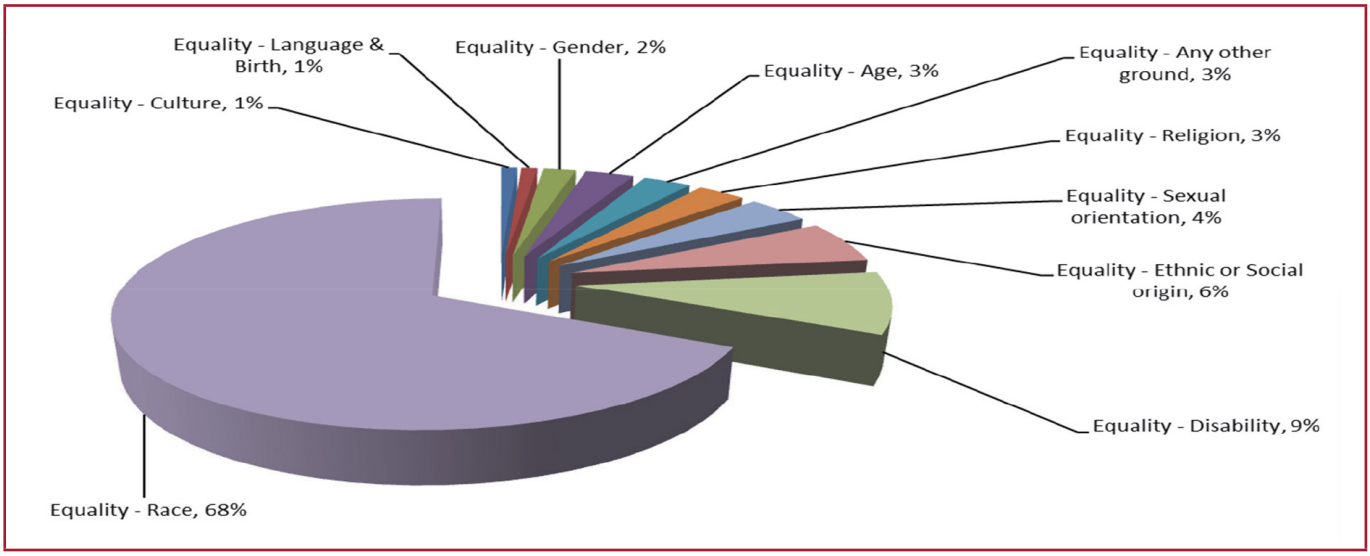
11 S Fredman ‘Substantive Equality Revisited’ (2014) *University of Oxford Legal Research Paper Series No 70* 1, 14.
12 Ibid.
13 Ibid 30.
14 Ibid in general.
15 Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56; Stats SA *Poverty Trends in South Africa An Examination of Absolute Poverty between 2006 and 2011* (2014) 27, 40; Stats SA *Quarterly Labour Force Survey: Quarter 2:* 2016 (2016) 62; Stats SA *Living Conditions Survey 2014/15* (2016) 15.

5 EMERGING TRENDS IN GENDER EQUALITY

5.1 Complaints received by the SAHRC

In terms of the complaints received by the SAHRC, violations of the right to equality continue to be the highest recorded grievance.[16] In the financial year ending 31 March 2016, 16 percent of the total complaints received alleged a violation of the right to equality. A total of 749[17] equality-related complaints were received. It is noted that gender-based complaints directed to the SAHRC are low in number because of the referral of cases to the Commission for Gender Equality (CGE).

Equality-related complaints from the public received by the SAHRC 1 April 2015 – 31 March 2016



> "...violations of the right to equality continue to be the highest recorded grievance. A total of 749 equality-related complaints were received."

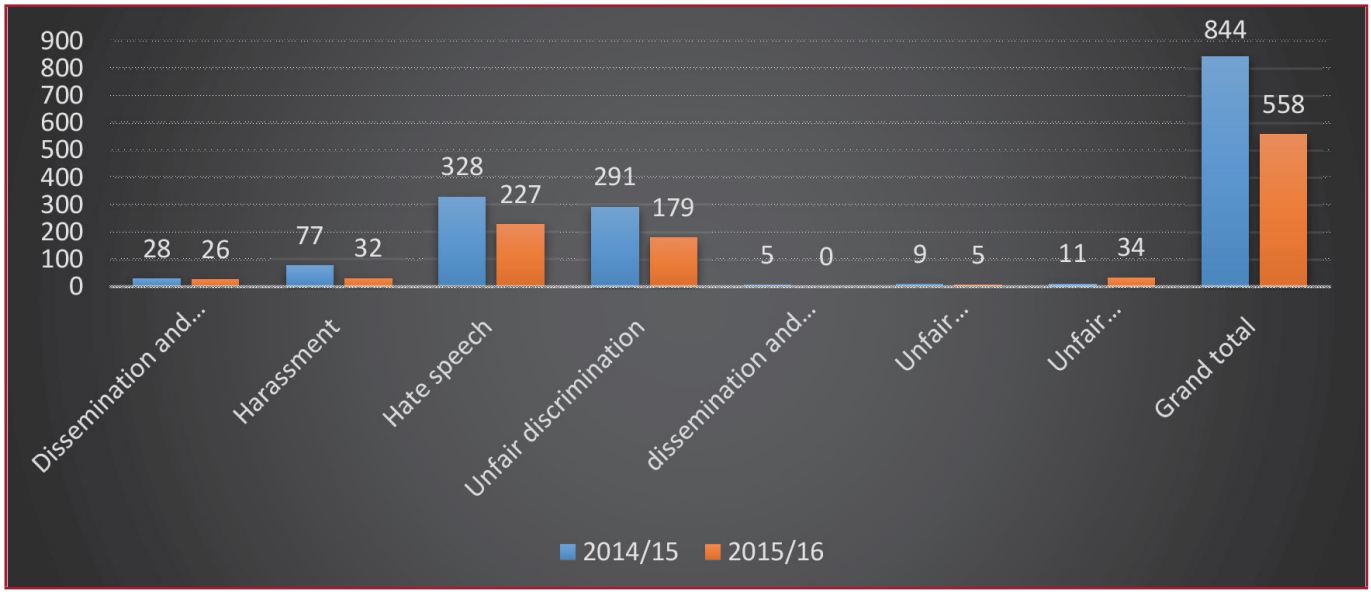
16 South African Human Rights Commission *Annual Trends Analysis Report* (2016) 31.
17 Ibid.

5.2 Equality Courts

The Equality Court was established in terms of PEPUDA to provide legal protection and recourse when violations of the right to equality occur. The Equality Courts hear matters regarding unfair discrimination on any of the prohibited grounds stipulated in PEPUDA, as well as matters concerning hate speech and harassment as prohibited by PEPUDA.[18]

In terms of the nature of complaints, it appears that complaints related to hate speech were especially prevalent, accounting for over 40 percent of overall grievances. Complaints of unfair discrimination represented the second largest proportion of Equality Court matters at 32 percent. [19] Unfortunately, disaggregated data indicating the ground on which hate speech or discrimination in Equality Court matters occurred, is not provided by the Department of Justice. Most Equality Court matters pursued by the SAHRC involved hate speech and discrimination based on race.

Department of Justice: Equality Court Complaints 2015/16[20]



> The Equality Courts hear matters regarding unfair discrimination on any of the prohibited grounds stipulated in PEPUDA, as well as matters concerning hate speech and harassment as prohibited by PEPUDA.

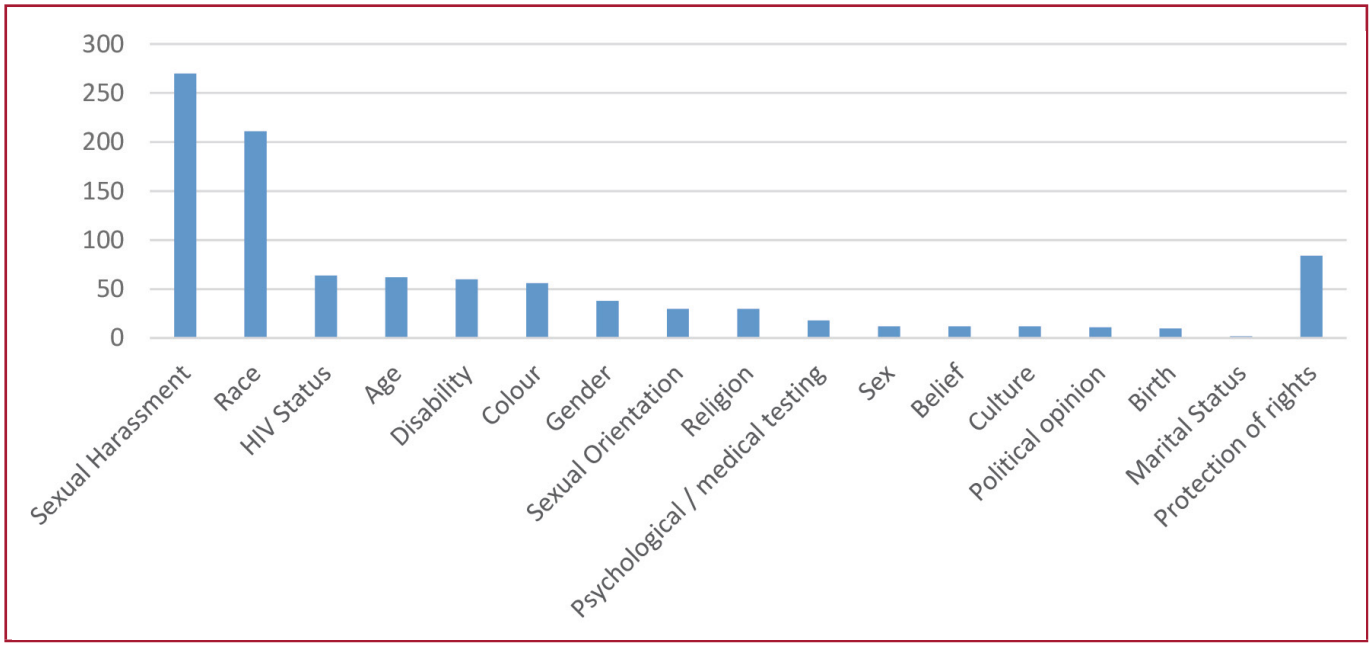
18 Ss 10 and 11 of PEPUDA.
19 Department of Justice and Constitutional Development *Annual Report* (2015/16) 34.
20 Figure reproduced from Department of Justice and Constitutional Development *Annual Report* (2015/16) 34.

5.3 Unfair discrimination in the workplace

PEPUDA defines 'harassment' as 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to… sex, gender or sexual orientation…'.

The highest recorded forms of unfair discrimination experienced in the workplace are racism and sexual harassment.[21] According to the CCMA, the prohibited grounds of sexual harassment and race have consistently been the highest, with HIV and AIDS status, age, and disability rounding up the top five grounds of violations on average over this period.[22]

Unfair discrimination complaints on listed grounds at the CCMA: August 2014 to March 2016



On an annual basis, the Public Service Commission collects information on grievances lodged by employees in the public sector, with allegations of unfair treatment forming the second highest, accounting for approximately 22 percent of all complaints lodged in the 2014/15 financial year while rising to 24.5 percent of the total number of grievances lodged for 2015/16.[23] The vast majority of grievances lodged on the basis of unfair treatment relate to sexual harassment, and although the timeline for the resolution of complaints is set for 60 days, the public service frequently lags behind in meeting this deadline.

21 Commission for Conciliation, Mediation and Arbitration *Submission to the panel for the South African Human Rights Commission National Hearing on Unfair Discrimination in the Workplace* (2016).

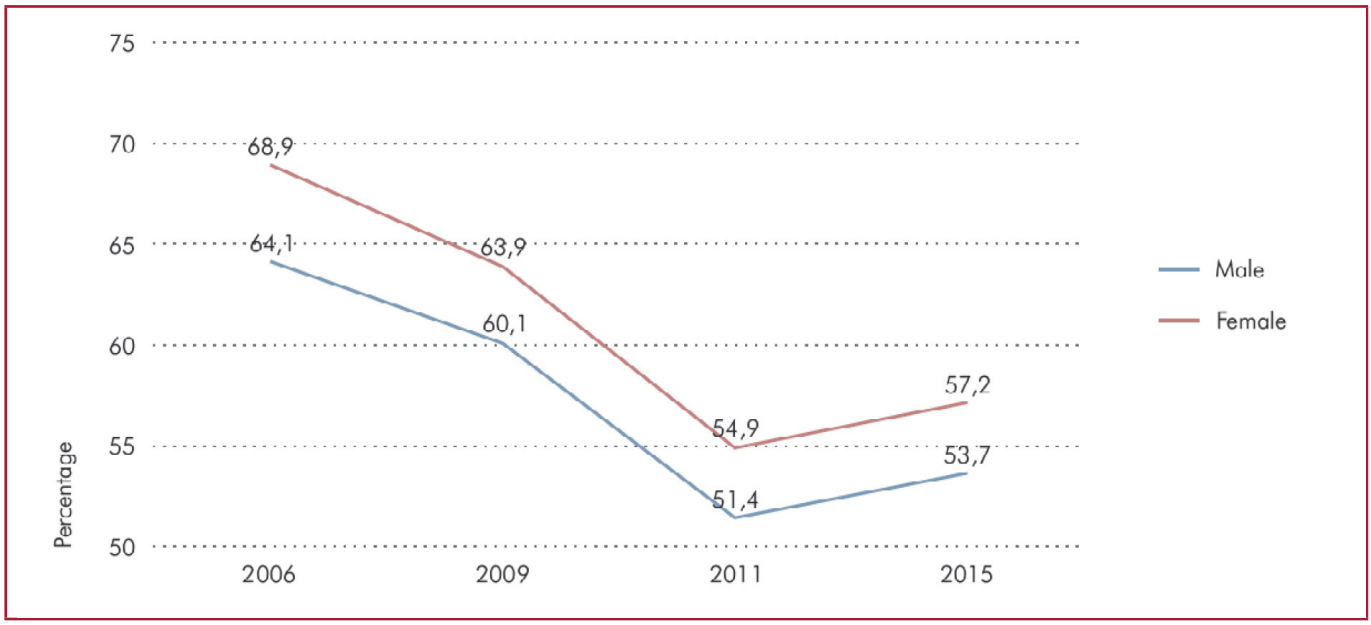
22 Ibid.

23 Public Service Commission *Fact Sheet for the Grievance Resolution in the 2015/16 Financial Year* (2016) 17. <http://www.psc.gov.za/documents/reports/2016/FACT%20SHEET%20ON%20GRIEVANCE%20RESOLUTION%20FOR%20THE%202015%20-%2016%20FY.pdf>.

6 GENDER AND ACCESS TO THE LABOUR MARKET, DIVERSE STREAMS OF INCOME AND EDUCATION

The fact that women have historically been marginalised and regarded as unequal compared to men in terms of social and power relations has given rise to significant social, cultural and economic inequalities. Women and girls from previously disadvantaged groups are today still disproportionately affected by poverty and its underlying determinants because of the legacy of apartheid:[24]

Poverty headcount based on sex[25]



In terms of household income, it is concerning that men earn almost twice what women earn on an annual basis,[26] with 56.01 percent of households in the lowest expenditure per capita quintile headed by women.[27] In terms of available data, reasons for this include under-representation of women in the workplace and a lack of access to alternative streams of income. However, it is encouraging to note that the participation rate of women in the workplace is gradually increasing, with approximately 43.8 percent[28] of South Africa's workforce now being female.[29] However, transformation is painstakingly slow, as can be seen from the data set out below.

24 Presidency of the Republic of South Africa *South African CEDAW Report* (2008) 6, 20; Government of the Republic of South Africa *CESCR State Report* (2017) 7, 21.
25 Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56.
26 Stats SA *Living Conditions Survey 2014/15* (2016) 14.
27 Ibid 20.
28 Department of Women *Report on the Status of Women in the South African Economy* (2015) 66. This figure refers to the proportion of the employed population, while women make up 45.2 percent of the 'narrow' labour force, which includes those employed as well as those actively seeking employment (52).
29 Ibid 66.

6.1 Systemic inequality as a result of the sexual division of labour

Section 8(i) of PEPUDA prohibits unfair discrimination based on gender, including systemic inequality of access to opportunities by women as a result of the sexual division of labour.

Women remain underrepresented at top and senior management levels based on CEE data. At top management level, women constitute a mere 20.7 percent in the private sector, and 30.8 percent in the public sector.[30] At the senior management level, men are similarly over represented at decision-making levels in both the public (60.7 percent) and the private sector (68.5 percent), and this is evident in all provinces.[31] Negligible increases in female representation at top management level from 2014 to 2016 indicate that there continues to be a lack of opportunities for women at the top and senior management levels, which in turn reflects systemic inequality and indirect discrimination.

Workforce profile at top management level by gender: 2014 - 2016[32]

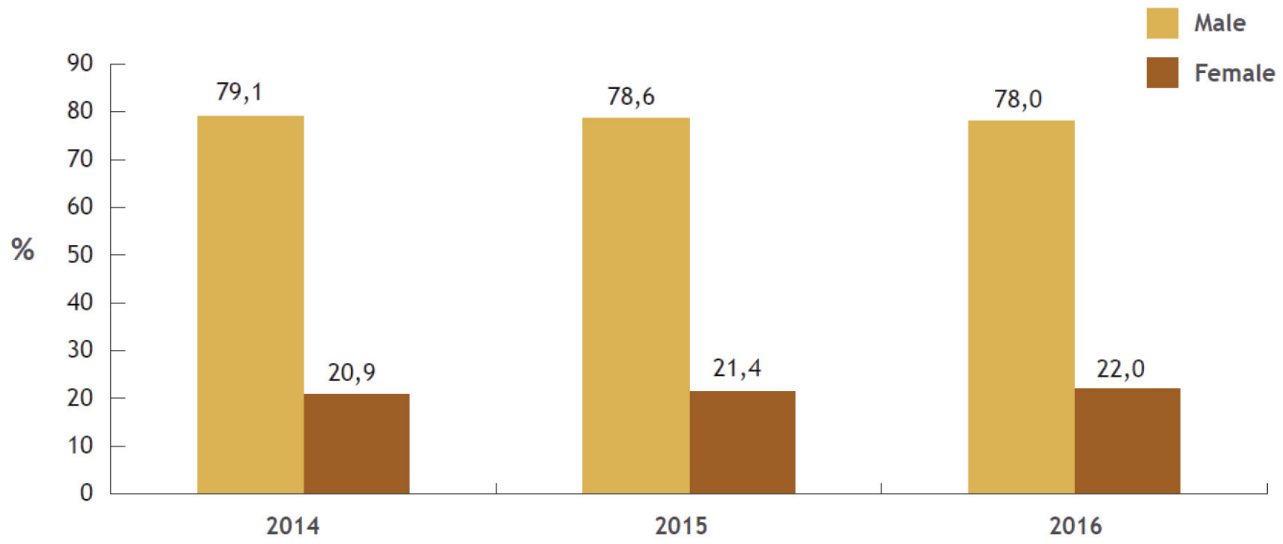


Figure 56 shows Female representation remains very low with the status static at just over 20% for the 2014 to 2016 period. Male representation on the other hand remains comparatively high with very little change in the status quo.

In addition, trends indicate that White male dominance is prevalent at the top levels across all sectors in the country, with a particular focus on the private sector.[33] According to 2016/17 CEE data, more than two-thirds majority male representation exists in the private sector (76.3 percent), as compared to 73.3 percent in local government and 62.6 percent in national government.[34] According to the same data, the sectors that are most in need of transformation by gender and race are the agricultural sector, which has an overwhelming concentration of White males at top management level (72.6 percent, increased from 72 percent in 2015/16); retail and motor trade/repair service with 62.7 percent White males at top management level (decreased from 64 percent in 2015/16); wholesale trade/commercial agents/allied services with 59 percent White males at top management level (decreased from 59.8 percent in 2015/16); and mining and quarrying at 56.3 percent (decreased from 59.9 percent in 2015/16).[35]

30 Commission for Employment Equity *Annual Report 2016/17* (2017) 14.
31 Ibid 18-19.
32 Figure reproduced from Commission for Employment Equity *Annual Report 2016/17* (2017) 55.
33 Ibid 16.
34 Ibid.
35 Ibid 14.

Slight decreases in these sectors indicate persistent inequality and reflects both systemic challenges as well as the intersection of gender and race as grounds for indirect discrimination.

The multiple forms of discrimination that women other than those from the White population group face, is again illustrated by the fact that White women have the most representation in all sectors at top management level compared with women of other race groups.[36] This is evident in several sectors including the community, social and personal services sector (15.3 percent) which predominantly comprises government, and the catering/accommodation/other trade sectors (21.8 percent).[37] Interestingly, in educational institutions, White women (34 percent) are the highest represented group at the senior management level (but not at top management level) and exceed the representation of 25.2 percent White males.[38] An increase in the number of foreign nationals is noted, especially among men within educational institutions.

6.2 Systemic inequality limiting access of women to land rights and alternative streams of income

Section 8(e) of PEPUDA prohibits unfair discrimination on the ground of gender, including 'any policy or conduct that unfairly limits access of women to land rights, finance, and other resources'. Land presents one potential alternative avenue of income to that derived from work, and an inability by women to access this stream of income due to discriminatory practices again points to systemic inequality. Furthermore, prevalence of income derived from pensions, social insurance and family allowances may indicate a systemic inability to access more mainstream sources of finance, resources and income. This is demonstrated by the fact that income from these sources represented a larger share (over 50 percent) than income from work in the three lowest income per capita deciles, whereas it accounted for less than 10 percent of income for each of the upper three deciles.[39]

Statistics South Africa's *Living Conditions Survey* indicates that men earn more income from imputed rent on an owned dwelling than women, with male-headed households earning an average of R 23 047 in this respect, compared to the average of R14 871 earned by female-headed households.[40] Additionally, in terms of complaints received by the CGE, annual trends for the financial year 2013/14 indicate that the highest identified ground for complaints received was for matters relating to estates. These complaints made up 12 percent of the 894 complaints received by the CGE.[41] Although estates do not necessarily include land and other forms of immovable property, this trend indicates that inheritance and property-related disputes are among the highest structural issues affecting women.

Due to the lack of avenues for income, it is found that female-headed households are more dependent on social grants since income from pensions, social insurance and family allowances make up 14 percent of income of female-headed households, compared to 5.8 percent of income for male-headed households.[42] Consequently, the prospect for those living in female-headed households of accessing opportunities such as education, or basic services, remains slim. This trend is also contrary to section 8(g) and (h) of PEPUDA, which prohibits unfair discrimination on the ground of gender in the forms of, amongst others, the denial of access to opportunities for women, including access to services, and the limitation of women's access to social services or benefits.

36 Ibid 15.
37 Ibid.
38 Ibid 20.
39 Stats SA *Living Conditions Survey 2014/15* (2016) 18.
40 Ibid 14.
41 Commission for Gender Equality *Annual Report 2013/14* (2014) 49.
42 Stats SA *Living Conditions Survey 2014/15* (2016) 14.

6.3 Equal access to education

Section 29 of the Constitution guarantees the rights to basic and further education. The importance of quality education to unlock the potential of people and to provide economic opportunities cannot be overstated. Therefore, the state's obligation to provide access to quality education is an exceptionally important one. Furthermore, section 8(g) of PEPUDA specifically prohibits unfair discrimination based on gender in the form of limiting women's access to education.

> "The importance of quality education to unlock the potential of people and to provide economic opportunities cannot be overstated ... However, in South Africa, the education system is subject to significant challenges..."

However, in South Africa, the education system is subject to significant challenges, including, but not limited to, education of a poor quality, a lack of access to adequate infrastructure (including water and sanitation), a high ratio of learners to educators, strikes by educators, protest action by communities that result in malicious damage to school property and prevents learners from attending school, a lack of access to learning materials and a low number of learners that pass grade 12 and are able to study further in either technical colleges or a university.[43]

6.3.1 Equality in accessing education

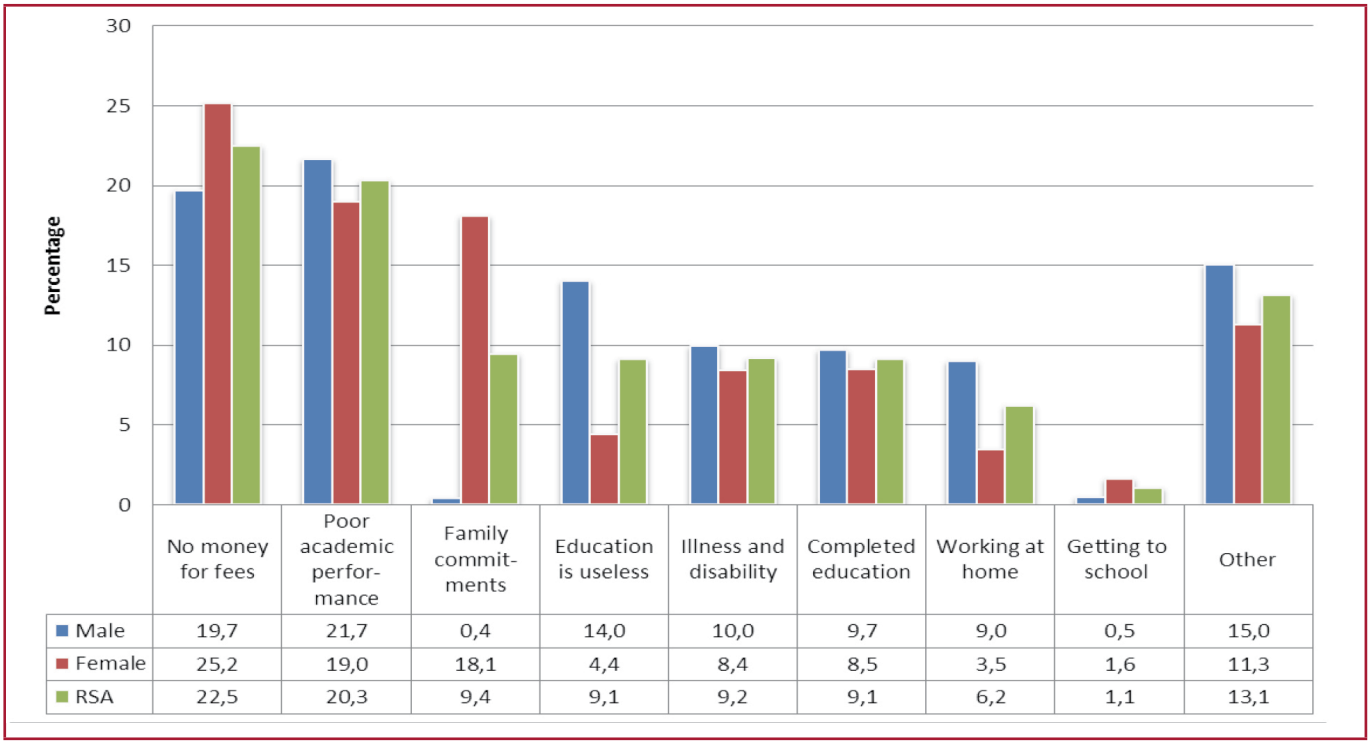
Although access to basic education is relatively high for most South Africans,[44] fees constitute a significant barrier to education. Section 5 of the South African Schools Act, 84 of 1996 states that no learner may be refused admission into a public school due to the inability to pay school fees. In addition, government has compiled a list of no-fee schools, where students who are unable to afford any form of school fees can access education. The number of learners attending no-fee schools is unequally distributed provincially, with 92.5 percent of learners in Limpopo and 79.1 percent of learners in Eastern Cape attending no-fee schools, contrasted with 41.6 percent of learners in Gauteng and 43 percent of learners attending no-fee schools in the Western Cape.[45]

> "Although access to basic education is relatively high for most South Africans, fees constitute a significant barrier to education."

43 S Franklin & D McLaren (Studies in Poverty and Inequality Institute) *Realising the Right to a Basic Education In South Africa* (2015) 126-144; 146.
44 Ibid 117.
45 Stats SA *General Household Survey 2015* (2016) 2.

At the peak schooling years of 7-15 years, 22 percent of learners who left school prematurely, the majority of whom is female, cited a lack of money as the reason for doing so.[46] Significantly, 9.4 percent of those who prematurely left school, cited family commitments, such as getting married, minding children or pregnancy, as the reason for doing so. Of these, the vast majority is female:[47]

Percentage distribution of main reasons given by persons aged 7 to 18 years for not attending an educational institution, by sex, 2015[48]



	No money for fees	Poor academic perfor-mance	Family commit-ments	Education is useless	Illness and disability	Completed education	Working at home	Getting to school	Other
Male	19,7	21,7	0,4	14,0	10,0	9,7	9,0	0,5	15,0
Female	25,2	19,0	18,1	4,4	8,4	8,5	3,5	1,6	11,3
RSA	22,5	20,3	9,4	9,1	9,2	9,1	6,2	1,1	13,1

Unintended teenage pregnancy remains a serious challenge that hampers access to education for teenage learners.[49] Although most young fathers expressed feeling a sense of responsibility towards their child and a willingness to be involved in the child's life, young fathers are generally unable to provide financial assistance.[50] As a result, unintended teenage pregnancies place additional burdens on the female learner, over and above the physiological and biological burdens that pregnancy imposes. This explains why a much larger percentage (18.1 percent) of female learners leave their studies on the grounds of family commitments compared with 0.4 percent of male learners.[51]

In a survey prepared by Stats SA on educational levels in South Africa, just over 1 million (1 023 000) women who are Black aged 20 years and older answered that their education was 'none' compared to 528 000 Black men and just 8 000 White women.[52] Overall, over 1 million women compared to 635 000 men have received no education.

46 Ibid.
47 Ibid.
48 Figure reproduced from Stats SA *General Household Survey 2015* (2016) 11.
49 Department of Basic Education *Teenage Pregnancy in South Africa - With a Specific Focus on School-Going Learners* (2009) <http://www.education.gov.za/Port als/0/Documents/Reports/Teenage%20Pregnancy%20Report,%2028%20August%202009.pdf?ver=2011-01-18-113756-500>.
50 Ibid.
51 Stats SA *General Household Survey* 2015 (2016) 2.
52 Ibid 78.

Those who have received no education are primarily constituted by the Black population group, which again indicates the intersectionality of systemic discrimination on multiple grounds (in this case, sex and race). Approximately 17 percent of Black women aged 15 years and over do not have an education level over Grade 7, compared to almost 12 percent of Coloured women, seven percent of Indian women and less than two percent of White women.[53] The above figures clearly show the racial legacy of apartheid, but also indicate that increased access to education since 1994 has not ensured equal access to education.

6.3.2 Equality in education

Even where education is accessed, discrimination on the ground of gender and gender identity persists. For instance, the SAHRC instituted proceedings in the Seshego Equality Court (Limpopo) on behalf of a transgendered secondary school learner.[54] The case arises from allegations of humiliation and harassment based on the gender identity of the learner, which created a hostile and intimidating environment for her. The proceedings were instituted to procure relief for alleged unfair discrimination, harassment, and hurtful speech and the court found in favour of the Commission. In a landmark ruling, the Seshego Equality Court ordered the Limpopo Department of Education to pay R60 000 in personal compensation to the learner in question. Of concern is the fact that the Equality Court, referring to itself as a forum that 'deals with facts', referred the complainant 'in the male form', despite the fact that she identified as a woman.[55] Whereas the transgender learner was directly discriminated against based on her gender identity, the inability to understand or reasonably accommodate non-binary gender identities, as displayed by both the school authorities and the Equality Court itself, reflects indirect discrimination and systemic inequality in the form of a hierarchy of social norms that do not fully recognise those who do not conform to traditional gender identities.[56]

Codes of conduct are important mechanisms through which learning institutions can create a learning environment consonant with constitutional values, and should cater for the reasonable accommodation of difference on gender, racial, religious or cultural grounds.[57] In 2016, considerable attention was given to dress code policies at schools that unfairly discriminate against students on multiple grounds of race and sex. The Commission noted with concern the allegations of marginalisation and discriminatory treatment of Black female learners at Pretoria High School for Girls, the Sans Souci High School in Cape Town, Saint Michael's School for Girls in Bloemfontein, as well as other incidents and allegations emanating from other schools.[58]

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53 Ibid.

54 *Mphela and Others v Manamela and Limpopo Department of Education* (unreported case), Seshego Equality Court.

55 Ibid.

56 In a context other than education, the Legal Resources Centre launched an application in the Western Cape High Court seeking to compel the Department of Home Affairs to amend the sex description of three transgender women on the national population register and on their birth certificates, and issue them with new identity numbers in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003. The Department refused to do so as the women were married in terms of the Marriage Act 25 of 1961, which only recognises heterosexual marriages. In a significant judgment, the Western Cape High Court held that the Department's conduct infringed the applicants' constitutional rights to administrative justice, equality and dignity, and was inconsistent with the state's obligations as set out in s 7(2) of the Constitution. The Department was accordingly ordered to reconsider the applications in terms of the Alteration Act in the light of the High Court's finding that the solemnization of marriages under the Marriage Act had no bearing on the matter. See *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90 (6 September 2017).

57 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

58 SAHRC *Media Statement: Difference, diversity & reasonable accommodation of difference in South African Schools* (7-09-2016); SAHRC *Media Statement: School rules and codes of conduct are subject to the supremacy of the Constitution* (26-07-2017). More instances of racism in language and dress code policies, as well as in racist statements made by teaching staff, have emerged since the last media release by the SAHRC. See, for example, Times Live 'St John's College: Teacher Found Guilty of Making Racist Remarks has Resigned' (27-07-2017) *Times Live*.

Indirect discrimination and systemic inequality also persist in higher education. In 2014, the Commission convened a National Hearing on transformation in South African public universities. The decision was taken following the receipt of a number of complaints on transformation issues in universities, which in the Commission's view required a holistic examination of transformation in institutions of higher learning in South Africa. The Commission found that discrimination on the grounds of gender, race, disability and socio-economic status continues, and that unsatisfactory transformation has occurred at the management, staff and student levels.[59]

If operationalised, Chapter 5 of PEPUDA could contribute to addressing indirect discrimination and systemic inequality in education, through the obligation it lays upon all sectors of society to promote equality. This would, in turn, help prevent systemic inequality and discrimination from leading to instances of direct discrimination in education, as occurred in the case of the transgender learner as well as various incidents in higher education.[60]

7 GENDER AND DISCRIMINATORY CULTURAL PRACTICES

Section 8(d) of PEPUDA prohibits 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'. This provision highlights the tension that often exists between the cultural rights recognised in the Constitution,[61] and the right to equality, particularly in the context of gender.

7.1 Maiden bursaries, *ukuhlolwa* and virginity testing

Some interpretations of traditional culture and religious morals strongly link female value to virginity, with the implication that the inherent value of women is perceived as irrevocably diminished after certain forms of sexual activity. An additional erroneous belief is that virginity testing decreases HIV/AIDS transmission and teenage pregnancy. The above beliefs are clear indications of patriarchy and are often based on the belief that pregnancy is the sole responsibility of a female engaging in sexual activity, rather than a responsibility equally shared between women and men.[62]

Linked to the above beliefs are the invasive and discriminatory practices and 'inspections' (such as *ukuhlolwa*) where a young woman is required to 'prove' her virginity.[63] The recent linking of virginity to access to education through so-called 'maiden bursaries' was considered in 2016 by the CGE. The CGE investigated the award of bursaries in the uThukela district by the district council in KwaZulu-Natal. These bursaries included the requirement that recipients be 'proven' to be virgins; the bursary would be withdrawn on the 'failure' of such 'tests'.[64]

59 SAHRC *Transformation at Public Universities in South Africa* (2016) viii.
60 Ibid viii. Highly publicised incidents in higher education are based on race, but given the intersectionality of race and gender, a duty to promote equality could help address systemic inequality and discrimination on multiple grounds.
61 Ss 30-31 of the Constitution.
62 SAHRC *Harmful Social and Cultural Practices – Virginity Testing? Children's Bill [B70 – B2003] Submission to the Select Committee on Social Services (NCOP)* (2005) 6-7.
63 Ibid 7-10.
64 Commission for Gender Equality *The Maiden Bursary Investigative Report* (2016) 21.

The CGE concluded that such tests were unconstitutional in violating the rights to equality, dignity and privacy, and that 'any funding by an organ of state based on a woman's sexuality perpetuates patriarchy and inequality in South Africa'.[65]

7.2 *Ukuthwala*

Ukuthwala is a traditional form of marriage involving the abduction of young girls with the intention of making the girl a wife. Traditionally, the practice involves negotiations between the man and the girl's family in the form of an arranged marriage and does not include violence or rape.

However, the meaning of 'consent' – and whether the ability to consent rests with the girl or her family – remains uncertain.[66] The traditional form of *ukuthwala* can also be used as a means by which two consenting individuals can force their families to accept their relationship through culturally legitimised customary marriage. In addition, communities that practice *ukuthwala* value the custom for cultivating social cohesion, leading to longevity of marriages, and preventing girls from having children out of wedlock.[67] However, the DOJCD notes that the abuse of this practice 'increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years'.[68] Rights that may be potentially violated include those to equality; human dignity; freedom and security of the person; as well as the rights of access to health care services and justice. In addition, where *ukuthwala* is directed against girl-children under 18 years of age, children's rights are violated. In *Jezile v S and Others,*[69] the Western Cape High Court confirmed a conviction of one count of human trafficking and three counts of rape related to the abuse of *ukuthwala*. The SAHRC has likewise strongly condemned the abuse of the practice of *ukuthwala*,[70] and has held that it should not apply to children.

8 GENDER-BASED VIOLENCE

Gender Based Violence (GBV) is explicitly prohibited as a form of gender-based discrimination by section 8(a) of PEPUDA. GBV remains a persistent problem in South Africa, with Stats SA estimating that 21 percent of women over the age of 18 years have experienced violence by a partner.[71] The high levels of GBV that women face are also reflected in violence directed against sexual and gender minorities and people with non-normative bodies. In particular, 'corrective rape' results in significant harm to lesbian, gay and transgender persons.[72] In March 2011, the Minister of Justice and Constitutional Development mandated the establishment of a National Task Team (NTT) to develop a National Intervention Strategy to address the issue of corrective rape.[73]

65 Ibid 22.
66 L Mwambene & H Kruuse 'The Thin Edge of the Wedge: ukutwhala, alienation and consent' (2017) 33 *South African Journal on Human Rights* 25 42-43.
67 Ibid 41.
68 Department of Justice and Constitutional Development *What is Ukuthwala?* (2015) <http://www.justice.gov.za/brochure/ukuthwala/2015-Ukuthwala_leaflet-Eng.pdf>.
69 *Jezile v S and Others* 2015 (2) SACR 452 (WCC).
70 SAHRC *South African Human Rights Commission (SAHRC) NHRI written submission to the Universal Periodic Review (UPR) Mechanism* (2011) <http://www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20UPR%20Submission%20FINAL%202011.pdf>.
71 Stats SA *South Africa Demographic and Health Survey* (2016) 54.
72 K Thomas *Homophobia, Injustice and 'Corrective Rape' in Post-Apartheid South Africa* (2013) 3; P Strudwick 'Crisis in South Africa: The Shocking Practice of "Corrective Rape" - Aimed at "Curing Lesbians"' (4-01-2014) *The Independent*; K Nandipha '"Corrective rape": Lesbians at the Mercy of Powerless Men' (15-07-2013) *Mail & Guardian*.
73 Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual,*

Hate speech on the prohibited grounds, including gender and sexual orientation, is likewise prohibited by section 10 of PEPUDA. Hate speech includes speech that is harmful or which can potentially incite harm, and which propagates hatred. The recent Equality Court case of *SAHRC v Qwelane*[74] dealt with hate speech after a 2008 newspaper column written by Qwelane, in which he stated, amongst other things, that being gay was not 'ok' and compared homosexuality to bestiality. The SAHRC received around 350 complaints following the publication.[75]

The Equality Court heard comprehensive evidence regarding widespread instances of violence directed at the LGBTI community, including in the form of hate speech, assault, corrective rape (especially of lesbian women), murder and secondary victimisation by SAPS.[76] Although witnesses admitted that such instances of violence were not directly linked to Qwelane's statements, he occupied a position of power and influence (as a former ambassador for South Africa, coupled with the readership of the newspaper largely being Black residents of traditional informal settlements) and his hateful comments could thus fuel violence against an already vulnerable community.[77] The Equality Court agreed that the column constituted hate speech, and could potentially incite harm against the LGBTI community[78] (especially poor Black lesbian women who were most often victims of corrective rape). Importantly, the Equality Court noted that freedom of expression cannot protect speech which can itself be harmful to a pluralist society, and that the use of the word 'hurtful' in PEPUDA,[79] should be construed as meaning severe psychological harm.[80]

Crimes against sexual and gender minorities, people with bodily variation and women have a low rate of reporting according to the 2010 Gauteng Gender Violence Prevalence Study, with only 3.9 percent of women reporting domestic violence, while only 'one in 25 rapes has been reported to the police'.[81] Victims of GBV and SOGIE-based violence also face secondary victimisation when reporting these crimes, with some government officials (especially SAPS and healthcare workers) showing insensitivity or failing to pursue prosecutions.[82] For example, evidence was heard in *SAHRC v Qwelane* that after a Black lesbian woman was raped, SAPS responded to her attempt to lay a charge by saying that lesbians are 'boys', and 'boys cannot be raped'.[83] Gender discrimination of this severity cannot be tolerated in a democratic and constitutional society based on equality.

Prevention and prosecution of GBV are significantly hampered by a lack of accurate disaggregated data. Although the SAHRC has welcomed the creation of a hate crime in terms of the Combatting of Hate Crimes and Hate Speech Bill 2016, the absence of disaggregated data regarding GBV directed at women and persons based on their SOGIE, and a database dedicated to the collection of such data, reduces policy effectiveness and hampers the protection of women and gender minorities from GBV.[84]

Transgender and Intersex (LGBTI) Sector (2014).

74 *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017).

75 Ibid para 10.

76 Ibid paras 26, 29-34.

77 Ibid para 34.

78 Ibid para 53.

79 Which was challenged as overbroad and thus unconstitutional, ibid para 62.

80 Ibid paras 45, 65.

81 Gender Links and the Medical Research Council *The War at Home: Preliminary findings of the Gauteng Gender Violence Prevalence Study* (2015) <http://www.mrc.ac.za/gender/gbvthewar.pdf>.

82 Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector* (2014) 3; Centre for the Study of Violence and Reconciliation *Gender-Based Violence (GBV) in South Africa: A Brief Review* (2016) 13-14. See also *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017), where secondary victimisation was recognised, and referred to the Commissioner of Police by the Equality Court.

83 *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017) para 29.

84 SAHRC *Comments on the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill* (2017) 5.

The need to gather disaggregated data is supported by the opinions of those interviewed by the SAHRC, by the NTT,[85] and also internationally through CEDAW General Recommendation 28, which calls for the accurate and efficient capturing of information about GBV.[86]

9 SAHRC RESPONSES TO GENDER-BASED DISCRIMINATION AND SYSTEMIC INEQUALITY

9.1 Seminars and hearings

In considering the far-reaching implications and the prevalence of substantive inequality in South Africa, the SAHRC hosted a National Investigative Hearing on Unfair Discrimination in the Workplace between March and April 2016. The aim of the hearing was to generate a deeper understanding and awareness of the trends of discrimination in the workplace; the form and inter-relatedness of types of discrimination; as well as the challenges and barriers to equality faced by all stakeholders, including employees, public and private sector employers, trade union bodies and government departments. Essentially, the inquiry found that unfair discrimination in the workplace remains pervasive in South Africa and includes both barriers to entry as well as discriminatory practices within the workplace itself. Although long-standing grounds of discrimination such as race, gender and disability persist, the changing nature of the workforce and social relations over time have given rise to newer forms of discrimination, including on the basis of HIV and AIDS status, age, sexual orientation and gender identity, language, religion and culture. Discrimination, in this way, is a moving target and requires constant attention and evaluation to ensure that no one is left behind in efforts to combat discriminatory practices and achieve the goals of equality and dignity for all.

In addition, the Commission hosted an African Regional Seminar on Sexual Orientation, Gender Identity and Gender Expression in 2016 to discuss the significant challenges still facing gender minorities in the region. The seminar served as a follow-up to the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity[87] and the African Commission on Human and Peoples' Rights' Resolution 275 on the Protection against Violence and other Human Rights, Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.[88]

9.2 Promoting equality

Chapter 5 of PEPUDA, which is not yet operational, sets out a list of positive duties aimed at promoting equality. These responsibilities are placed both on the state as well as on private persons who directly or indirectly contract with the state or who exercise public power. Moreover, a social commitment by all persons to promote equality is similarly mandated.[89] However, challenges persist in respect of the full operationalisation of PEPUDA, whereby the promotional aspects of the Act have continued to be inoperative since its enactment in 2000. The Commission plans to recommend the proclamation of the commencement of this chapter in its forthcoming Equality Report.

85 Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector* (2014) 12.
86 Committee on Elimination of All Forms of Discrimination against Women *General Recommendation 28* (2010).
87 UN Human Rights Council *Resolution A/HRC/RES/17/19 - Human Rights, Sexual Orientation and Gender Identity* (17-06-2011).
88 African Commission on Human and Peoples' Rights *Resolution 275 on the Protection against Violence and other Human Rights, Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (12-05-2014).
89 See ss 25-27 of PEPUDA.

10 CONCLUSION

Gender inequality in South Africa remains rife. Substantive inequality is reflected at both a broad, structural societal level, and in instances of direct discrimination, as is regularly encountered in the workplace. GBV, which remains prevalent but is under-reported, also constitutes a form of direct discrimination. Systemic inequalities relating to the sexual division of labour, and the inaccessibility of other streams of income, resources, land and social services such as education, continue to prejudice women and gender minorities. A holistic approach is needed to combat gender inequalities in whichever sphere of society and the economy these may manifest. One practical step towards combatting gender inequality is for government to start capturing disaggregated data relating to SOGIE-based violence and GBV. In order to effect structural change in an effort to achieve substantive gender equality, it is similarly important for lawmakers to proclaim the commencement of Chapter 5 of PEPUDA, which recognises that the duty to promote equality rests on all those who inhabit South Africa.

“Systemic inequalities relating to the sexual division of labour, and the inaccessibility of other streams of income, resources, land and social services such as education, continue to prejudice women and gender minorities. A holistic approach is needed to combat gender inequalities in whichever sphere of society and the economy these may manifest.”


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