O'REGAN J and SACHS J ABRIDGED JUDGMENT (DISSENTING)

S v Jordan and Others

Introduction

[34] On 20 August 1996 a police officer entered a brothel owned by the first appellant in Pretoria, paid R250 to the second appellant, a salaried employee, and received a pelvic massage from the third appellant, a prostitute or sex worker. The three appellants admitted in the Magistrate's Court that they had contravened the Sexual Offences Act 23 of 1957, which criminalises providing sex for reward and brothel-keeping, but claimed that the relevant provisions of the Act were unconstitutional and should be declared invalid. Since the Magistrate's Court has no power to declare statutes unconstitutional, they did not resist conviction in that court. After being found guilty and sentenced by the magistrate, they appealed to the Pretoria High Court to have the provisions set aside. In a judgment handed down on 2 August 2001, the High Court held that section 20(1)(aA) of the Act, which penalised sex for reward, was unconstitutional. That section reads:

"20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. –

(1) Any person who –

. . . .

(aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward;

. . . .

shall be guilty of an offence."

[35] The High Court went on to hold that sections 2, 3(b) and 3(c) of the Act (the brothel provisions) which covered brothel-keeping were not unconstitutional. These provisions read:

"2. Keeping a brothel. – Any person who keeps a brothel shall be guilty of an offence.

3. Certain persons deemed to keep a brothel. – The following persons shall for the purposes of section two be deemed to keep a brothel:

(a) . . .
(b) any person who manages or assists in the management of any brothel;
(c) any person who knowingly receives the whole or any share of any moneys taken in a brothel".

The definition of brothel in the Act is contained in section 1 which provides as follows:
"'brothel' includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose."

"Unlawful carnal intercourse" is in turn defined in the same section as "carnal intercourse otherwise than between husband and wife". The High Court held that section 2 was a measure to restrict the commercial exploitation of prostitutes, which it described as "trading in the body of a human being", and added that a third party managing a prostitute or prostitutes with their consent amounts to trafficking in human beings. The High Court concluded that public abhorrence at this kind of exploitation permitted the state to limit the individual rights of the third parties to freedom of trade, occupation and profession, by regulating and prohibiting such practices.

[36] The declaration of invalidity of the section dealing with sex for reward was referred to this Court for confirmation. Thereafter, first and second appellants were given leave to appeal directly to this Court against the refusal of the High Court to set aside their convictions under the brothel provisions.

The parties

[37] The confirmation proceedings and the appeal were heard together in this Court. The National Director of Public Prosecutions and the Transvaal Director of Public Prosecutions (the state) contended that the order of invalidity should not be confirmed and that the appeal should be refused. The state relied on a substantial body of affidavit evidence, which included testimony by the Minister of Justice, in support of upholding the law as it stands. Much of this evidence was contested by the appellants who also filed voluminous affidavits. In addition, a number of amici curiae were admitted and

permitted to make written and oral submissions in support of confirmation of the order of invalidity and upholding the appeal. They were the Sex Worker Education and Advocacy Taskforce (SWEAT); the Centre for Applied Legal Studies (CALS) and the Reproductive Health Research Unit (RHRU) w,ho made joint submissions; the Commission for Gender Equality (the Gender Commission); brothel-owners Pieter Crous and Menelaos Gemeliaris (who made a joint submission) and Andrew Lionel Phillips (also a brothel owner) who made submissions only with regard to whether the interim or final Constitution was applicable. SWEAT and Crous and Gemeliaris submitted evidence on affidavit, which was challenged by further affidavits from the state. Although the affidavits were replete with denials and counter-denials, the differences in position adopted by the experts and other deponents related not so much to empirical facts as to how to characterise the activities concerned and what conclusions should be drawn from them. Little of the argument accordingly turned on disputed questions of fact.

The issues

[38] There are two separate constitutional issues before the Court:

(a) whether the Court should confirm the order made by the High Court declaring section 20(1)(aA) to be inconsistent with the Constitution; and

(b) whether the Court should uphold the appeal and find sections 2, 3(b) and 3(c) of the Act, as read with section 1, to be inconsistent with the Constitution.

These issues will be dealt with separately. We agree with Ngcobo J for the reasons he gives that the applicable Constitution in this case is the interim Constitution.

The proper interpretation of section 20(1)(aA)

[39] Before turning to an analysis of section 20(1)(aA), it is necessary to consider its proper interpretation. The High Court held that to the extent that section 20(1)(aA) criminalised only the prostitute or sex worker and not the client, it amounted to unfair discrimination. The High Court also held that to the extent that the provision criminalised any sexual intercourse between consenting adults where some favour or consideration was given by one party to the other, it was in breach of the Constitution.

[40] Counsel for the state argued that the High Court interpretation was constitutionally incorrect and suggested that the section bore an extended meaning which included customers within the criminal prohibition. The question then is whether the High Court's interpretation of the section is correct. In particular, we must decide whether it was correct in concluding that the provision criminalised only the prostitute and not the client, and that it criminalised any non-marital sexual intercourse, where one party gives another party a present or benefit that could be construed as "for reward" in the context of the section and not only commercial sex. In considering whether the High Court's interpretation is correct, the question that we must consider is whether there is a constitutionally compatible interpretation of the section. Such an interpretation should not be unduly strained, but must be one which the provision is reasonably capable of bearing.

[41] It has generally been accepted in our law that section 20(1)(aA) criminalises only the conduct of the prostitute and not that of the client. So Burchell and Milton state:

"It is noteworthy that the section does not penalize the person who gives the reward in return for the sexual intercourse. In short, the prohibition is directed only at prostitutes and not their customers. This feature of the section reflects a form of discrimination against prostitutes. The discrimination lies in the fact that the customer's role in the act is not penalized while that of the prostitute is."

[42] It is worth noting, although not relevant to the proper interpretation of the section, that not only academic commentators have given it this meaning but law enforcement officers appear generally to have done so as well. Not a single case of a prosecution of a customer since 1988 (when section 20(1)(aA) was introduced into the statute) was brought to our attention, and the state did not seek to challenge the assertion that in practice only the prostitutes were charged in terms of the section.

[43] The natural reading of the section strikes at the prostitute who engages in sexual intercourse for reward which is provided by the client. The customer does not engage in sexual intercourse for any reward, on the ordinary understanding of that term. He (rarely she) engages in it for sexual gratification and to receive that gratification he furnishes the reward to the prostitute. It is this ordinary meaning of the provision which has been taken for granted until argument was presented in this case.

[44] It should be recalled that until 1988 the law in South Africa, like that in many other Commonwealth countries, such as the United Kingdom, India, Australia and Canada, did not penalise prostitution as such, but only activities associated with it, such as pimping, soliciting and brothel-keeping. Clearly, in 1988 the Legislature intended to criminalise the conduct of the prostitute. Had it, however, intended to penalise the conduct of patronising a prostitute as well, it could have done so in appropriate language.

[45] Counsel for the state argued that the broader interpretation of the section should be preferred because if the section criminalises both the conduct of the prostitute and the client, it would have no discriminatory effect. However, extending the definition of a crime, even to avoid what may otherwise constitute unfair discrimination, is something that a Court should only do, if ever, in exceptional circumstances. Where a criminal offence does result in unfair discrimination, there will generally be two ways in which the discrimination can be avoided – abolition of the criminal prohibition, on the one hand, and extension of its scope to the otherwise excluded class on the other. The choice between these is one which is ordinarily appropriate for the Legislature only. In the circumstances of the criminal prohibition in question here, it is peculiarly one for the Legislature, given the wide range of potential legislative responses to the social problems related to prostitution. There are many reasons why the Legislature may choose not to criminalise prostitution at all including the following: criminalisation of prostitution may be seen not adequately to deter prostitution; that criminalisation of prostitution may render the prostitute more a victim than a criminal; that there is a need to regulate prostitution to limit its social harm rather than prohibit it.

[46] In the circumstances, we cannot accept that it is in accord with our constitutional values for an extended definition to be given to section 20(1)(aA). Indeed, in our respectful view, to do so would be contrary to constitutional values. First, it would be destructive of the principle of legality which requires certainty as to the definition of crimes, and secondly, it would intrude on the legitimate sphere of the Legislature in an area of considerable public controversy.

[47] The second question relating to the interpretation of the clause raises the question of what range of conduct falls within the scope of section 20(1)(aA). One of the grounds

given by the High Court for invalidating section 20(1)(aA) was that its terms were too wide:

"In principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*."

In support of its contention, the Court referred to the case of *S v C* where Van Dijkhorst J expressly rejected the contention that section 20(1)(aA) ought to be limited to acts committed by professional prostitutes. Dealing with the argument that the section should be strictly construed so as to be confined to those who habitually and indiscriminately engage in sexual relations for reward the learned judge said:
"The wording of section 20(1)(aA) does not limit its offenders to the category of professional prostitutes. It clearly includes all who for reward have unlawful carnal intercourse or commit acts of indecency, the novice as well as the hardened street-walker."

[48] The question in the present matter, then, is whether the section is reasonably capable of a restrictive interpretation which would narrow its ambit and bring it within constitutional limits, such interpretation being achieved without undue strain. The question is whether the phrase "unlawful sexual intercourse or indecent act for reward" is capable of being read to include only activity ordinarily understood as prostitution. In other words, is the phrase reasonably capable of being read so as to cover only commercial sex, that is, sex where the body is made available for sexual stimulation on a paid basis? We think there are strong contextual pointers in favour of the more restrictive reading.

[49] The heading to the section includes the words: "persons living on the earnings of prostitution". In *President of the Republic of South Africa v Hugo*, this Court held that it was legitimate for a court interpreting a statute to have regard to the heading of a legislative provision. In this case, the heading of section 20 makes it clear that the section is dealing with persons living on the earnings of prostitution. This suggests that a narrow meaning related to the heading should be given to section 20. If one reads the criminal prohibition contained in section 20(1)(aA) in the light of the heading, one would attribute a meaning to the section which renders criminal the conduct of those

who earn their living from prostitution, or commercial sex. It may be difficult in some circumstances to apply this rule and to determine whether or not the conduct concerned is sufficiently commercialised and indiscriminate as to qualify as prostitution. This remains a matter of application, however, not one of definition and is best undertaken on a case-by-case basis by the courts. We accordingly hold that in this respect the section is reasonably capable of a restrictive interpretation.

[50] In our view, therefore, the proper interpretation of section 20(1)(aA) is that the provision criminalises the conduct of prostitutes but not that of customers. However, it does not criminalise sexual intercourse between consenting adults which does not constitute prostitution or commercial sex. It is on this basis that the constitutionality of the provision should be considered.

The constitutionality of section 20(1)(aA)

[51] Counsel for the appellants and the amici contended that the criminalisation of prostitution limits the following fundamental constitutional rights of those concerned:

"8. Equality

(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."

"10. Human dignity

Every person shall have the right to respect for and protection of his or her dignity."

"11. Freedom and security of the person

(1) Every person shall have the right to freedom and security of person, which shall include the right not to be detained without trial."

"13. Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

"26. Economic activity

(1) Every person shall have the right to freely engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

[52] There was considerable overlap in the challenges. Thus, counsel for the appellants argued that the structure of the Constitution makes it necessary to cluster the rights to dignity, privacy, and freedom of the person under the global concept of autonomy. In the first place, he argued, it is a matter of extreme significance for all persons to be able to determine how to live their lives. It is the experience of autonomy that matters, the right to make decisions rather than the content of these decisions. Secondly, the state should not be empowered to make judgments concerning the good or bad life, provided that the conduct in question does not harm others. Such conduct might be unworthy or risky, but if it is not harmful to others then the state can not interfere.

[53] While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution. Accordingly, we will deal in turn with each of the rights said to be infringed.

The right freely to engage in economic activity

[54] We deal first with the alleged infringement of the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. In *Lawrence*,[1][7] this Court identified two possible interpretations for section 26 of the interim Constitution as follows:

"The meaning of s 26 is, however, by no means clear. There seem to be two possible approaches to its interpretation. The first focuses on the meaning of free participation in

economic activity and in pursuing a livelihood. In a modern democratic society a right 'freely' to engage in economic activity and to earn a livelihood does not imply a right to do so without any constraints whatsoever

. . . .

On this approach to the interpretation of s 26 the right to engage in economic activity and to pursue a livelihood anywhere in the national territory would entail a right to do so freely with others. Implicit in this is that the participation should be in accordance with law.

. . . .

The alternative approach is to read s 26(1) and (2) together as indicating that all constraints upon economic activity and the earning of a livelihood which fall outside the purview of s 26(2) will be in breach of s 26."

[55] The Court thus expressly left open the question whether this right could be claimed only in respect of lawful economic activity. For the purposes of the present matter, we do not consider it necessary to resolve that question. On the first meaning, given that prostitution is clearly an unlawful economic activity, the appellants could not succeed. Once again, as in *Lawrence*, we are prepared to assume in favour of the appellants that the second meaning which confers a broader right is the proper meaning of section 26. On that approach, the state is not precluded from taking measures under section 26(2) of the Constitution "designed to promote the protection or the improvement of the quality of life". The only proviso is that such measures be justifiable in an open and democratic society based on freedom and equality. In determining whether a particular measure is "designed to promote" one of the purposes of section 26(2), leeway must be afforded the Legislature to determine which measures will achieve the desired purposes.

[56] The state argued that section 20(1)(aA) is aimed at improving the quality of life. In our view, whether one considers that prostitution should be tolerated, regulated or prohibited, there can be no doubt that it does have an impact on the quality of life. The Legislature is therefore entitled to take the steps it considers appropriate to regulate prostitution in terms of section 26(2) so long as it does not limit other fundamental rights in a way that would not be justifiable in an open and democratic society. As we shall see later, open and democratic societies adopt a variety of different ways of responding to prostitution, including outright prohibition. The European Court recently

underlined the wide discretion that states have in relation to prostitution as an economic activity. In the circumstances, therefore, we are satisfied that section 20(1)(aA) constitutes a measure designed to promote or protect the quality of life as contemplated by section 26(2) and that it is a measure considered justifiable in open and democratic societies based on freedom and equality. It is therefore not inconsistent with the right in section 26 of the interim Constitution. The challenge based on the right to freely engage in economic activity must therefore fail.

Discrimination

[57] The appellants argued that to the extent that section 20(1)(aA) criminalises only the conduct of the prostitutes and not that of the client, it is in breach of section 8 of the Constitution. The proper approach to section 8 of the interim Constitution was confirmed and summarised in *Harksen v Lane NO and Others*. There are two enquiries: the first is to consider whether the impugned provision differentiates between people or categories of people and if it does, whether it does so rationally. The second is to consider whether a differentiation is made, directly or indirectly on a ground which could be said to have the potential to impair human dignity or to affect people adversely in a comparably serious manner. If the differentiation is on such a ground, the question that then arises is whether it is unfair or not.

[58] The differentiation in this case is between prostitutes and patrons. The conduct of one group is rendered criminal by the section, that of the other, not. It cannot be said that it is irrational for the Legislature to criminalise the conduct of only one group and not the other. The legislative purpose may be to target the purveyors of sex for reward, rather than the purchasers. In each case the question at this stage is the narrow one of whether it is rational for the law to punish only one side of the bargain. In our view, in this case it cannot be said that rendering criminal the conduct of the prostitute and not that of the client is so lacking in any plausible foundation as to be irrational.

[59] The second question that arises then is whether the differentiation contained in section 20(1)(aA) is nevertheless discriminatory as contemplated by section 8(2) of the interim Constitution. It is clear that the ground for differentiation, between those who provide sex for reward as opposed to those who purchase it, is not a ground specified in section

8(2). However, the appellants and counsel for the Gender Commission argued that the differentiation discriminated indirectly on one such ground, namely, gender or sex. In support of the High Court's finding of unfair discrimination, counsel for the Gender Commission referred to the case of *Walker* where Langa DP held that:

"The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2). The emphasis which this Court has placed on the impact of discrimination in deciding whether or not s 8(2) has been infringed is consistent with this concern."

Dealing with differential treatment of payment defaults by the Pretoria City Council, he went on to say:

"It is not necessary in the present case to formulate a precise definition of indirect discrimination. . . . It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a 'black area' and another known to be overwhelmingly a 'white area', on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this."

It was accordingly submitted that because prostitutes are overwhelmingly (though not

exclusively) female, and patrons are overwhelmingly (though not exclusively) male, the effect of section 20(1)(aA), to the extent that it criminalises only the conduct of prostitutes and not that of patrons, is indirectly discriminatory on the grounds of sex.

[60] Counsel for the state did not deny that if only the prostitute were penalised by the section and not the customer, this would be a case of indirect discrimination because overwhelmingly prostitutes were women and customers men. There was thus no factual dispute between the parties as to whether the effect of the provision fell disproportionately on women. Prostitutes and their customers engage in sexual activity, which is one of the constitutive elements of the relationship between men and women in all societies. As partners in sexual intercourse, they both consent to and participate in the action which lies at the heart of the criminal prohibition. There are only three differences between them. The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one's actions are rendered criminal by section 20(1)(aA) but the other's actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which our Constitution is committed to eradicating. In all these circumstances, we are satisfied that, as in *Walker's* case, this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground results in indirect discrimination on that ground.

[61] Before proceeding further, it should be noted that it was suggested that even if the provisions of section 20(1)(aA) did not criminalise the conduct of customers, that conduct could be considered criminal in terms of two other legal provisions. First, the common law provisions relating to accessories would criminalise their conduct; and secondly, the provisions of the Riotous Assemblies Act 17 of 1956 could permit the prosecution of the customer. If the conduct of the client were criminalised through either of these techniques, it was submitted this would mean that even though section 20(1)(aA) does not render the client's conduct criminal, the fact that it is rendered criminal by other provisions would mean that there is no discrimination.

[62] Section 18(2) of the Riotous Assemblies Act provides:

"Any person who –

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

We will assume that both this statutory provision and the common law render a client who employs the services of a prostitute to be guilty of an offence as a co-conspirator, or as an accomplice, respectively.

[63] Even on that assumption, however, it seems to us that the effect of section 20(1)(aA) remains discriminatory. For, as counsel for the Gender Commission cogently argued, the section brands the prostitute as the primary offender of the actual offence. The offence of the customer becomes an offence of conspiracy or complicity. The difference between being a principal offender and an accomplice or co-conspirator may have little impact in formal legal terms. It does, however, carry a difference in social stigma and impact. In imposing a direct criminal liability for the prostitute, the law chooses to censure and castigate the conduct of the prostitute directly. The indirect criminal liability on the client, assuming there is such, flows only from the crime committed by the prostitute who remains the primary offender. The primary crime and the primary stigma lie in offering sexual intercourse for reward, not in purchasing it.

[64] This distinction is, indeed, one which for years has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.

[65] In the present case, the stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. To the extent therefore that prostitutes are directly criminally liable in terms of section 20(1)(aA) while customers, if liable at all, are only indirectly criminally liable as accomplices or co-conspirators, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference of form, it is in our view a difference of substance, that stems from and perpetuates gender stereotypes in a manner which causes discrimination. The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.

[66] The question that next arises is whether section 20(1)(aA), to the extent that it constitutes indirect discrimination, is unfair or not. In determining whether a discriminatory provision or conduct is unfair, one must look at the nature of the group discriminated against, the nature of the discriminatory provision or conduct, as well as the impact of the discrimination on those who complain of it. It is women and, in particular, prostitutes who suffer the discrimination in this case. There can be no doubt that they are a marginalised group to whom significant social stigma is attached. Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable. On the other hand, we cannot ignore the fact that many female prostitutes become involved in prostitution because they have few or no alternatives. Accordingly, we cannot exclude from the constitutional enquiry into fairness the fact that although prostitutes do constitute a vulnerable group, this is due in some part to their own conduct.

[67] It might well be that in many situations it will be easier to establish the fairness of indirect discrimination than that of direct discrimination. Thus, the injury to the dignity of members of a group on whom the measure happens to target differentially might be less severe than if they had been targeted by direct discrimination. The fact that in theory if not in practice the male customers are equally liable for prosecution as

accomplices could also attenuate the differential impact, and hence limit the extent of the unfairness. On the other hand, the salient feature of the differentiation in the present matter is that it tracks and reinforces in a profound way double standards regarding the expression of male and female sexuality. The differential impact is accordingly not accidental, just as the failure of the authorities to prosecute male customers as accomplices is entirely unsurprising. They both stem from the same defect in our justice system which hold women to one standard of conduct and men to another.

[68] In determining what is fair, we cannot look at section 20(1)(aA) in isolation, abstracted from its social setting. As Wilson J reasoned in the Canadian Supreme Court:

> "it is important to look not only at the impugned legislation which has created a distinction . . . but also to the larger social, political and legal context . . . [I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality . . . . 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."

We see no reason why the plier of sex for money should be treated as more blameworthy than the client. If anything, the fact that the male customers will generally come from a class that is more economically powerful might suggest the reverse. To suggest, as the law (and Ngcobo J) do, that women may be targeted for prosecution because they are merchants of sex and not patrons is to turn the real-life sociological situation upside-down. The evidence suggests that many women turn to prostitution because of dire financial need and that they use their earnings to support their families and pay for their children's food and education. As we have stated, we do not regard this as an excuse or a justification. However, to suggest that male patrons who are able to use their economic means to obtain sexual gratification are somehow the less blameworthy partners in the eyes of the criminal law, appears to us to be markedly unfair.

[69] Parliament may decide to render criminal sexual intercourse where a reward is paid, but their decision to make only purveyors of sexual intercourse and not purchasers primarily liable, entrenches the deep patterns of gender inequality which exist in our society and which our Constitution is committed to eradicating. In this regard, section 20(1)(aA) is different from the presidential pardon at issue in *Hugo's* case, which

afforded a benefit to single mothers of children, admittedly on the stereotyped basis that it is mothers who bear the primary responsibility for children in our society. In that case, we held that because the impact was to reduce the burden borne by mothers, it did not constitute unfair discrimination. In this case, the impact exacerbates the burden of sexual stereotyping borne by women and in particular sex workers.

[70] In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that section 20(1)(aA) is unfairly discriminatory on grounds of gender reinforces our conclusion.

[71] In the light of all these considerations, we conclude that section 20(1)(aA), to the extent that it renders criminal the conduct of prostitutes, but not that of customers, constitutes unfair discrimination.

[72] We do not agree with Ngcobo J that the stigma attaching to prostitutes arises not from the law but only from social attitudes. It is our view that by criminalising primarily the prostitute, the law reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client, if it does so at all. The law is thus partly constitutive of invidious social standards which are in conflict with our Constitution. The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values, when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge.

[73] Moreover, we wish to make clear that our reasoning would not permit a man convicted of robbery to argue that the offence of robbery was unfairly discriminatory on the grounds of sex because more robbers are male than female, as Ngcobo J's judgment

suggests. The distinguishing characteristic of the criminal prohibition in question is that sexual intercourse for reward is intimate, shared conduct engaged in by two people, yet both are not punished by the criminal law in the same way. This does not apply to robbery or other crimes. It is the fact that the crime cannot be committed at all without the participation of another who is not rendered criminally liable in the same way by the impugned section, that gives rise to the constitutional complaint we uphold. Secondly, the crime itself is all about regulating sex and the expression of sexuality. The element of gender is not just happenstance, but integral to the prohibited conduct and constitutive of the way it is treated by the law, enforcement agents and society. The question of whether such discrimination can be justified or not is something to which we return later in this judgment.

The right to human dignity

[74] Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers. All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge, that occurs in the course of arrest or incarceration cannot be attributed to section 20(1)(aA), but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute.

The right to freedom of the person

[75] Similarly we do not feel that it has been established that section 20(1)(aA) constitutes a limitation of the right to freedom as entrenched in section 11 of the interim Constitution. Most of the argument addressed to us on this topic was based on the 1996 Constitution, which includes the rights not to be deprived of freedom without just cause, and the right to bodily integrity. The formulation of section 12 is, however, different to section 11(1) of the interim Constitution, which simply protects the right to freedom and personal security. In this respect the prostitute makes herself liable for arrest and imprisonment by violating the law. Provided that the law passes the test of constitutionality, any invasion of her freedom and personal security follows from her breach of the law, and not from any intrusion on her right by the state. In the light of the approach taken by the majority of this Court to section 11(1) of the interim Constitution, there can be no complaint in terms of that section by a person who has been convicted and sentenced in terms of a duly enacted criminal prohibition.

The right to privacy

[76] In our view, the other area where the rights of the sex worker appear to have been limited by section 20(1)(aA), is in respect of her right of personal privacy. The concept of privacy has been much debated in recent times.In *Bernstein*,Ackermann J held that the right to privacy in the interim Constitution must be understood as recognising a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated, if at all.

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. 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. This 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 such as business and social interaction, the scope of personal space shrinks accordingly."

At the very least, as the interim Constitution itself makes clear, it includes protection against search and seizure and the violation of private communications. There can be no doubt that autonomy to make decisions in relation to intensely significant aspects of one's personal life are encompassed by the term. As Ackermann J held in the *Gay and Lesbian Coalition* (Sodomy) case:

"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."

[77] Counsel for the appellants argued that prostitutes are not blocks of wood without rights, incapable of taking meaningful decisions about deeply personal and intimate aspects of their life. The fact that their work is commercial does not exclude it from the scope of the right to privacy. It was argued that as conduct becomes more public so it becomes increasingly intrusive and offensive as far as others were concerned, but prostitution, insofar as it takes place outside of the public gaze, engages privacy. Counsel for the amici supported these contentions, arguing that even if the sexual activity is done purely for commercial reasons, this should not take it outside the realm of privacy. The commercial aspect might remove it from the inner core of privacy and make it easier to justify prohibition, but does not remove it from the scope of privacy altogether. So, it was argued, the fact that you pay a doctor or psychiatrist does not denude your relationship with him or her of its privacy interest. Even if the expression of sexuality is loveless, it is still very personal. The intrusion on two people engaging in sex is qualitatively different from the search and seizure of documents, he said, but at least as worthy of requiring constitutional justification.

[78] Counsel for the state, on the other hand, contended that the prohibition of sex work does not preclude prostitutes from giving expression to their sexuality but does impact on their receiving payment for sex. In this sense, the only interest for which a prostitute can claim protection is a commercial one, since her cluster of personality rights are not

trenched upon. It is not the intimate expression of sexuality that is inhibited but only its commercial aspect. The prostitute makes her sexual services available to all and sundry for reward, depriving the sexual act of its intimate and private character. No invasion of privacy takes place at all.

[79] Counsel for the appellants relied heavily on the jurisprudence of the United States Supreme Court which pioneered legal thinking in this area. Nevertheless, its jurisprudence on the question has to be handled with circumspection; there are differences in constitutional text and context. It is of interest to note that attempts to strike down anti-prostitution laws in the United States on the grounds of invasions of liberty or privacy have generally failed. The relationship of the prostitute and client simply do not fall within the range of those intimate human relationships that need to be secured against undue intrusion by the state. As Brennan J said in *Roberts v United States Jaycees*, only intimate and meaningful human relationships which safeguard individual freedom are protected by their Constitution. O'Connor J too distinguished in a similar manner between zones of protected activity and others. Central to the reasoning of both Brennan J and O'Connor J is the concept of a zone of privacy that diminishes as the activity becomes more public in character. This notion has been foundational to this Court's jurisprudence on privacy.

[80] The problem in the present matter is where to place commercial sex on the continuum described by Ackermann J in *Bernstein.* In doing so, it is necessary to realise that there are a range of factors relevant to distinguishing the core of privacy from its penumbra. One of the considerations is the nature of the relationship concerned: an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy. Another consideration is the extent to which the body of a person is invaded: physical searches or examinations are often invasive of privacy as section 13 of the interim Constitution suggests.

[81] As we observed before, the constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body. The right to privacy, therefore, serves to protect and foster that dignity. Commercial sex involves the most

intimate of activity taking place in the most impersonal and public of realms, the market place; it is simultaneously all about sex and all about money. Selling sex represents an opportunity for women to earn money but within the framework of deeply structured sexist and patriarchal patterns of social life. A prohibition on commercial sex, therefore, will not ordinarily encroach upon intimate or meaningful human relationships. Yet it will intrude upon the intensely personal sphere of sexual intercourse, albeit intercourse for reward.

[82] In arguing that prostitution involves private consensual sexual activity and should be located at the most protected end of the continuum, counsel for the appellants relied heavily on this Court's decision in the *Gay and Lesbian Coalition* (Sodomy) case. To our mind, however, that case highlights points of contrast rather than of correspondence. In the first place, what was at stake in that matter was not just a privacy interest, but an equality one. Indeed, the principal complaint of the gay community was that they were being subjected by the law to unfair discrimination on the grounds of sexual orientation, in violation of the express protection offered by section 8(2) of the Constitution. It was in this context that Ackermann J stated:

"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 s 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and

independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair."

The judgment accordingly emphasises the interaction between equality, dignity and privacy in relation to a community that had been discriminated against on the basis of closely-held personal characteristics. Furthermore, it stresses that the protected sphere of private intimacy and autonomy relates to establishing and nurturing human relationships.

[83] Prostitution is quite different; the equality interest works the other way inasmuch as it is the very institution of commercial sex that serves to reinforce patterns of inequality. Moreover, central to the character of prostitution is that it is indiscriminate and loveless. It is accordingly not the form of intimate sexual expression that is penalised, nor the fact that the parties possess a certain identity. It is that the sex is both indiscriminate and for reward. The privacy element falls far short of "deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life". By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. Although counsel for the appellants was undoubtedly correct in pointing out that this does not strip her of her right to be treated with dignity as a human being and to have respect shown to her as a person, it does place her far away from the inner sanctum of protected privacy rights. We accordingly conclude that her expectations of privacy are relatively attenuated. Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.

[84] We conclude that section 20(1)(aA) does amount to an infringement of privacy and we cannot agree with the proposition that prostitutes surrender all their rights to privacy in relation to the use of their bodies simply because they receive money for their sexual services. However, we conclude that the invasion of privacy thus caused is not extensive. The question to be asked is whether such intrusion is justifiable, a question to which we now turn.

Limitation of rights

[85] The limitation of rights is provided for in the interim Constitution as follows:

> "33. Limitation. –
>
> (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".

In *S v Makwanyane*, Chaskalson P held:

> "[T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

We have concluded that section 20(1)(aA) limits both section 8 and section 13 of the interim Constitution. To determine whether either of these limitations are justifiable, we will look at each separately. In doing so, we shall consider, first, the nature and extent of the invasion of the right, second, the purpose of the limitation and, finally, whether the limitations pass the test of proportionality. For purposes of convenience, we deal first with the justification advanced in respect of the limitation on the right to privacy.

The limitation of section 13 – the right to privacy

[86] It is clear from the earlier discussion in relation to the threshold question concerning privacy, that although section 20(1)(aA) breaches the right to privacy, it does not reach into the core of privacy, but only touches its penumbra. In the circumstances, therefore,

it is less difficult for the state to establish that the limitation is justifiable. Counsel for the state acknowledged that the suppression of commercial sex cannot be justified merely on the basis of enforcing a particular view of morality. He contended, however, that the prohibition seeks to curb the extent of prostitution in South Africa for eight reasons:

(a) prostitution in itself is degrading to women;

(b) it is conducive to violent abuse of prostitutes both by customers and pimps;

(c) it is associated with and encourages the international trafficking in women, which South Africa is obliged by its international law commitments to suppress;

(d) it leads to child prostitution;

(e) it carries an intensified risk of the spread of sexually transmitted diseases, especially HIV/AIDS;

(f) it goes hand in hand with high degrees of drug abuse;

(g) it has close connections with other crimes such as assault, rape and even murder; and

(h) it is a frequent and persistent cause of public nuisance.

[87] All of these contentions were challenged by the appellants and the amici. Counsel for the appellants and the amici agreed that trafficking in women and child prostitution ought to be prohibited, but contended that the general suppression of commercial sex makes it more rather than less difficult to single out these evils for focused attention. Similarly, they argued that the criminalisation of commercial sex exacerbates the links between prostitution and crime and disease, and that any public nuisance could be corrected by appropriate regulatory measures. They also indicated that the costs of law enforcement in this area are particularly high. Being a so-called victimless crime, evidence can usually only be obtained by egregious forms of entrapment, which fosters corruption.Counsel strongly criticised the proposition that the banning of prostitution was justified as a measure to reduce violence, contending that it was precisely the marginalisation of prostitutes by the law that renders them vulnerable to violence: they are forced to work in isolated circumstances, they fear reporting assaults to the police in case they are prosecuted, and, above all, they are regarded as worthless people who bring misfortune on themselves and invite disregard for their bodies.

[88] The Gender Commission, associating itself with these challenges, contested the state's contention that criminalisation of prostitution is required in order to combat social ills

"that experience has taught are as a matter of practical reality inevitably associated with prostitution". The Commission submitted that the facts, as opposed to "experience", reveals that the link between prostitution and harms to public health, nuisance and other criminal activities are more illusory than inevitable. The Commission concluded that the combination of false factual assertions concerning the ills inevitably linked to prostitution and their professed purpose of protecting prostitutes (belied by the form of protection offered) leads to the conclusion that the real purpose of prohibiting prostitution is the one purpose not encompassed within the identified "ills" – the enforcement of the moral views of a section of society.

[89] It is not possible on the papers to resolve either the disputes of fact or those of characterisation. The Court cannot decide, for example, whether criminalisation is necessary to reduce an activity that is conducive to violence, or whether it is the criminalisation itself that establishes conditions for violence. Without doubt, the relationship between cause and effect in all these matters is complex. These are contested issues throughout the globe. Moreover, they are matters upon which Legislatures in open and democratic societies may legitimately and reasonably disagree as to the most appropriate legal response in their own society.

[90] In approaching the question of proportionality, the Court is obliged to apply the standards of an open and democratic society. Open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Thus practice in such countries ranges from allowing prostitution but not brothel-keeping; to allowing both; suppressing both; to setting aside zones for prostitution; and to licensing brothels and collecting taxes from them. The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts. We are unaware of any successful constitutional challenge in domestic courts to laws prohibiting commercial sex. The matter appears to have been treated as one for legislative choice, and not one for judicial determination. The issue is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women's movement divided. In short, it is precisely the kind of issue that is invariably left to be resolved by the democratically accountable law-making bodies.

[91] We conclude, therefore, that although nearly all open and democratic societies condemn commercialised sex, they differ vastly in the way in which they regulate it. These are matters appropriately left to deliberation by the democratically elected bodies of each country. Voices such as those of the Gender Commission, SWEAT and the RHRU will help direct public and parliamentary attention to the constitutional goal of the achievement of equality between men and women.

[92] Counsel for the state contended that what is before the Court is not the wisdom of the policy of suppressing prostitution, but its constitutionality. He was not called upon to say that the policy was the wisest nor that it was the only one. Parliament could choose between prohibiting prostitution, regulating it or abstaining from addressing it at all. The Act opted for prohibition and, while this might carry with it certain problems, it is a constitutionally permissible legislative choice. We agree.

[93] What emerges from the above analysis is that because of the commercial character of the activity involved, the right to privacy of the prostitutes is attenuated. What is also clear is that there is a strong public interest in the regulation of prostitution in a manner which will foster the achievement of equality between men and women. Open and democratic societies generally denounce prostitution. Some criminalise it, others make it difficult by criminalizing activities associated with it, while others permit it with reluctance and subject it to fairly stringent conditions. We were not told of any society in which prostitution is regarded as a normal business activity just like any other, or a legitimate form of self-expression just like any other. Neither has any example been brought to our attention of international law or domestic constitutional law which has been used in any country successfully to challenge laws penalising prostitution on the grounds that such laws violated rights of autonomy or rights to pursue a livelihood.

[94] The state argued that it chose to criminalise prostitution for a series of purposes – all of which are legitimate and important. The appellants argue that the method chosen by the state is not the most appropriate to achieve those purposes. It is, however, clear that the manner in which the parliamentary purposes can best be achieved is a matter where Parliament may choose from a wide range of reasonable options. In our view, it is not for this Court in such a case to decide which is the most effective manner in which

Parliament can achieve its objectives. In circumstances where the limitation of a right is not severe, where Parliament has identified important purposes to be achieved by that limitation, and where people may reasonably disagree as to the most effective means for the achievement of those purposes, it is our view that it would be inappropriate for this Court to hold the limitation unjustifiable. We accordingly conclude that the limitation of privacy occasioned by section 20(1)(aA) is justifiable.

The limitation of section 8(2)

[95] Section 20(1)(aA), insofar as it renders criminal the conduct of the prostitute but not that of the client, constitutes a limitation of section 8(2) of the Constitution. In considering the justifiability of this limitation, we are not concerned with the justifiability of choosing to criminalise prostitution per se, as we were when considering the section 13 limitation. We are here concerned with the justifiability of the decision to criminalise primarily the conduct of the prostitute. It is the difference between the treatment of patrons and prostitutes that causes the constitutional complaint; and it is that unfair, discriminatory treatment which must be justified.

[96] It is not clear why the state should criminalise primarily the conduct of the prostitute and not that of the client. It is clear that the overall purpose of criminalising prostitution is to curtail the extent of prostitution. However, that purpose may be far more effectively achieved were the client's conduct to be rendered criminal in the same way and were customers to be prosecuted as a matter of course. The state did not seek to argue that there was a legitimate purpose for criminalising primarily the conduct of the prostitute as a matter of law, but exclusively as a matter of practice. For the reasons already advanced we do not share the view of Ngcobo J that, in this area, with its strongly gendered context, the state is justified in targeting the alleged supplier of the sexual service and not the consumer.

[97] As we have observed, democratic societies adopt a range of responses to prostitution. Wherever the conduct of prostitutes is treated as the primary criminal offence, it seems to us that patterns of gender inequality and illegitimate double standards relating to male and female sexuality will be reinforced. In our constitutional democracy which is committed to gender equality, a criminal prohibition which has the effect of furthering

patterns of gender inequality will need powerful justification to meet the test of section 33.

[98] In the light of the fact that the state did not seek to argue that there was an important purpose served by the discriminatory impact of the provision, and in the light of our conclusion that the provision furthers harmful sexual stereotypes, we are not persuaded that the discrimination is justifiable as contemplated by section 33. In our view, therefore, the provision is inconsistent with the Constitution in this respect. We shall return to the question of remedy later.

The constitutionality of sections 2 and 3(b) and (c) dealing with brothels

Interpretation

[99] Before proceeding to consider the constitutionality of sections 2 and 3(b) and (c), it is necessary to consider their meaning and ambit. In this regard, the definitions of brothel and of unlawful carnal intercourse are relevant. As indicated at paragraph 34 above, "unlawful carnal intercourse" is defined in section 1 of the Act as "carnal intercourse otherwise than between husband and wife". A brothel is defined as including "any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose". The provisions of sections 2, 3(b) and (c) must be read as incorporating these definitions, so when section 2 provides that "any person who keeps a brothel shall be guilty of an offence", it must be read to mean –

* "any person who
* keeps any house or place
* kept or used for purposes of prostitution or for persons to visit
* for the purpose of having unlawful carnal intercourse which means intercourse other than between husband and wife
* or for any other lewd or indecent purpose".

[100] Because unlawful carnal intercourse is defined as carnal intercourse other than between husband and wife, any house or residence where people who are not husband and wife may go to have sexual intercourse could, technically speaking, be considered to be a brothel. If the definition were to be read in this fashion for the purposes of

section 2, 3(b) and 3(c), the provisions would be overbroad and would constitute a clear infringement of rights of human dignity, freedom and privacy.

[101] For the reasons given earlier in this judgment, however, it is our view that sections 2, 3(b) and (c) must be read to regulate only commercial sex. The provisions are, like section 20(1)(aA), reasonably capable of being read to regulate commercial sex only. Subsections 3(b) and (c) in effect render criminally liable a person who"manages" a brothel, or a person "who receives . . . moneys . . . taken in a brothel". Both these provisions suggest that a brothel is a business or commercial enterprise whose business is concerned with sexual intercourse. In our view, because the subsections point to the business aspects of a brothel, they are capable of being read restrictively so as to criminalise only those engaged in managing or receiving money from brothels, being business premises for commercial sex. Section 2, however, is less clearly regulating the operation of a business when it speaks of "keeping a brothel". However, once again, we think it is reasonably capable of being read to mean keeping a brothel for the purposes of commercial sex and should be construed in that narrow fashion to avoid the manifest unconstitutionality which would result should it be construed to prohibit any person who "keeps" a place where "unlawful carnal intercourse" as defined in the Act takes place.

[102] It was the effect of these provisions read together which led the appellants to argue that the overall purpose of the Act is constitutionally illegitimate, in that its purpose and effect are to impose legal sanctions on any form of sexual intercourse outside of a heterosexual marriage. This, it was argued, is constitutionally impermissible in that it is an attempt to legislate for a particular moral code, inconsistently with the Constitution. It was argued that the state has no business telling people what to do in private with their bodies or with their money. It should punish crime, not sin. In support of this contention reference was made to a frequently quoted observation in the Wolfenden Report into Homosexuality and Prostitution:

"Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

Reliance was also placed on the following words by Ackermann J in the Sodomy case:

"The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose."

The argument was reinforced by reference to the observations made in Parliament in 1987 and 1988 when the Act was subjected to substantial amendment and to the Report of the Ad Hoc Committee of the President's Council on the Immorality Act.

[103] The challenge accordingly was based on two propositions: the state has no business enforcing private morality, and the purpose of the Act, as made manifest by its authors, is precisely to defend a particular concept of morality. We will consider each of these in turn.

[104] All open and democratic societies are confronted with the need to determine the scope for pluralist tolerance of unpopular forms of behaviour. To posit a pluralist constitutional democracy that is tolerant of different forms of conduct is not, however, to presuppose one without morality or without a point of view. A pluralist constitutional democracy 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 it is not neutral in its value system. Our Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality. As this Court held in *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC):

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.'

The same is true of our Constitution.

Yet, what is central to the character and functioning of the state 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.

[105] The state has accordingly not only the right but the duty to promote the foundational values of the interim Constitution. One of the most important of these is to "create a new order in which all South Africans will be entitled to citizenship in a democratic constitutional state in which there is equality between men and women."[6][1] The question of commercial sex must therefore be looked at not through the lens of certain popular conceptions of morality, but through that of constitutionally articulated values, more particularly those that concern the entitlement of all citizens to live in a state in which gender equality is increasingly made a reality. In answering the first question then, it is clear that our constitutional framework, not only permits, but requires the Legislature to enact laws which foster morality, but that morality must be one which is founded on our constitutional values.

[106] The question that next arises for consideration is whether the provisions of the Sexual Offences Act under review, have as their purpose the engendering of constitutional values. Ordinarily the purpose of legislation is relevant at the second stage of constitutional analysis to determine whether a provision which limits constitutional rights is justifiable. There may be times when a statute is manifestly in breach of constitutional rights, where the purpose of the statute is to foster a constitutionally invalid purpose. Such a case arose in Canada. In *Big M Drug Mart*, the statute in question was referred to as the Lord's Day Act. It declared its purpose in the most resolute and unambiguous of terms. As Chaskalson P said in *Lawrence*:

"The *Big M Drug Mart* case concerned the provisions of the Canadian Lord's Day Act. Its name proclaimed its purpose as did its provisions. It appears from the judgment in that case that the Act prohibited any work or commercial activity on the 'Lord's Day' – Sunday – as well as any games or performances where an admission was charged, any transportation for pleasure where a fee was charged, any advertisement of anything prohibited by the Act, the shooting of firearms and the sale or distribution of foreign newspapers.

. . . .

The Canadian Courts had previously held that the object of the Act was to compel the observance of the Christian Sabbath."

It followed that even if the Lord's Day Act had come to have the secular effect of providing a common day of rest for all Canadians, its original purpose remained manifest in the continuing signals it sent out to the effect that the Christian Sabbath was entitled to receive special recognition from the state. As such the legislation had a clearly unconstitutional purpose and the statute could not avoid constitutional invalidity.

[107] The appellants argued that the purpose of the Sexual Offences Act, as explicitly declared by those responsible for its adoption, was simply to enforce what the legislator regarded as the morality of the people, and to see to it that the law should uphold one particular moral position, namely that sex outside of marriage should be prohibited.

[108] For the purpose of argument we will accept that, given the context in which the Act was amended, the objective of Parliament in 1988 was, as the appellants contend, to enforce a particular conception of morality on the whole of society. The question then arises whether the legislation must be regarded as having been saddled once and for all with this illegitimate purpose, or whether it can be regarded as having assumed a new purpose that would be legitimate and justifiable in an open and democratic society.

[109] Counsel for the appellants argued that the purpose of the legislation is established once and for all at the time of its adoption, and that only subsequent legislative amendment can change it. He supported his argument by referring to a series of Canadian cases, starting with *Big M Drug Mart* where Dickson CJC criticised the notion that a purpose could shift:

"[T]he theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of 'Parliamentary intention'. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

. . . .

While the effect of such legislation as the *Lord's Day Act* may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the *Lord's Day Act* must be

characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance."

In *Butler*, Sopinka J qualified the Court's approach by stating that it is not necessary to resort to the "shifting purpose" doctrine to accept that if the objective of the statute was to prevent harm, then changing community values as to what was harmful could be taken into account in considering the constitutionality of a law. He observed that in proving that the original objective remained pressing and substantial, and that the measure was proportional, the government could draw on the best evidence currently available and rely on the passing of time and change of circumstances.

[110] The United States Supreme Court has accepted the doctrine of shifting purpose on the issue of Sunday closing laws. In *McGowan v Maryland*, the Court held that Sunday closing laws did not violate the Establishment Clause of the Constitution. While conceding that there was "no dispute that the original laws which dealt with Sunday labor were motivated by religious forces", Chief Justice Warren concluded such laws were constitutional.

"In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States

. . . .

The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

The Supreme Court gave weight to the disruption likely to result from the striking of

old laws having significant social value in the present, and allowed them to survive despite their constitutionally questionable origins.

[111] Similar to the United States and Canada, where social transformation has at different times rendered obsolete the motivation underlying existing legislation, South Africa is undergoing a metamorphosis. But ours is one of far greater magnitude than that ever experienced by either of our North American counterparts. As Mohamed DP said in *Shabalala*:

"It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable . . . The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'."

As part of this transformation, all legislation incompatible with our new constitutional order is invalid.

[112] If the racist and authoritarian intentions of past legislators were to be taken as paramount and invariable in determining the validity of legislation today, many statutes would not have survived the advent of constitutional democracy. In response to this problem, the interim Constitution envisaged a principle of interpretation designed to promote principled legislative continuity rather than radical legislative rupture. Section 35 provides that:

"(2) 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.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

This means that we must look at the wording of the Act in its post-1994 rather than its original 1988 setting, and see if its language is reasonably capable of bearing a meaning which is compatible with the spirit, purport and objects of the Bill of Rights. The mere

fact that the original legislative purpose of a statute might have been incompatible with current constitutional standards, does not deprive it of the capacity to serve a legitimate governmental purpose today, unless its express language and intent is, as in the *Big M Drug Mart* case in Canada, manifestly inconsistent with constitutional values.

[113] The question that needs to be considered is whether the brothel provisions of the Sexual Offences Act are reasonably capable of an interpretation that manifests a purpose consistent with the spirit, purport and objects of the Constitution. There are textual indications in the Act which make it plain that the Act was originally enacted to impose a particular view of morality – one which considered sexual intercourse other than between husband and wife to be "unlawful carnal intercourse". There are many people in our society who would support such a view today, and they remain free to conduct their lives accordingly and to urge others to do the same. At the same time, it is quite clear that for the state to impose such views on everyone in our society would conflict with the values of the Constitution, were such to be enacted in the current era.

[114] Given the importance of legal continuity, however, the question is whether an overall purpose can be ascribed to the Act which is reasonably capable of bearing a meaning consistent with our current constitutional values. In our view, the Act does overall continue to pursue an important and legitimate constitutional purpose, namely, the control of commercial sex. It is true that some of its provisions are formulated in inappropriate language reminiscent of pre-constitutional mores. However, we are not satisfied that the appellants have established that the overall purpose of the legislation is manifestly inconsistent with the values of our new order.

[115] We now turn to consider whether sections 2, 3(b) and (c) are inconsistent with the Constitution. In considering this question, we will adopt the narrow interpretation of sections 2, 3(b) and (c) discussed above. The appellants' key arguments in asserting that these provisions are unconstitutional were based first on section 26 of the interim Constitution, and secondly on the fact, as they alleged, that it is safer for prostitutes to work from brothels, rather than from the street, or on their own.

[116] To the extent that we have held that section 20(1)(aA) does not constitute a limitation of section 26, the same reasoning applies to sections 2, 3(b) and (c). If criminalising

prostitution itself has been accepted in open and democratic societies as promoting the quality of life, so too has criminalising brothels. Indeed, the suppression of brothels has far greater acceptance than the criminalisation of prostitution. Though such suppression is by no means universal, the common theme is that in open and democratic societies the question is regarded as essentially one of legislative choice. For the reasons given above in relation to section 20(1)(aA), therefore, this argument must fail.

[117] The second argument of counsel for the appellants was that if section 20(1)(aA) unjustifiably invaded fundamental rights to personal autonomy, then criminal sanctions on the activity of brothel-keeping could similarly not be justified. To the extent, however, that we have found that the limitations on privacy occasioned by section 20(1)(aA) are justified, once again any such limitations are also justified in respect of sections 2 and 3(b) and (c).

[118] Finally, it was argued that brothels could ensure that both prostitutes and customers had sex in a protected environment free from violence and in which proper health controls could be managed. Counsel who appeared on behalf of other brothel owners as well as the appellants, sought to reinforce this argument by stating that the failure of the state to enforce laws prohibiting brothels is proof that in practice the laws cannot be justified as they manifestly fail to serve the purpose for which they had been adopted. The argument on this score of counsel on behalf of SWEAT, CALS and RHRU, is that the criminalisation of brothel-keeping has the effect of weakening the fundamental rights of prostitutes to freedom and security of the person, and accordingly cannot be justified.

[119] In essence, the argument in favour of providing constitutional protection for the existence of brothels turns on the contention that the fundamental rights of prostitutes to freedom and security of the person can better be protected in brothels than out on the streets. All the reasons, however, for holding that it is open to the Legislature in its judgment to seek to suppress prostitution as an economic activity so as to improve the quality of life in South Africa, apply with equal if not stronger force to the prohibition of brothels. Similarly if the rights to dignity and freedom of individual prostitutes are

not limited by the Act, even less so are such rights challenged in the case of brothel-keepers. The same considerations apply to privacy. The reduced rights which prostitutes might have, become even more attenuated as far as brothel-keepers are concerned. Here the Legislature must have a wide discretion. The issues of controlling and regulating sexual activity are complex. Attitudes vary over time and from country to country. Competing policy considerations have to be attended to and the problems of law enforcement in this area are particularly acute. Attention has to be paid to the interest of neighbours. Many voices need to be heard. This is very much an area for legislative choice in which proposals made by the Law Commission could be particularly helpful.

[120] We conclude therefore that, in the light of the proper interpretation of the sections, the High Court was correct in concluding that sections 2, 3(b) and (c) do not infringe the Constitution.

Remedy

[121] We have concluded that section 20(1)(aA) constitutes an unjustifiable infringement of section 8(2) of the interim Constitution. As we held in the Sodomy case,[7][4] the equality jurisprudence of the interim Constitution is of equal application under section 9 of the 1996 Constitution. A conclusion, therefore, that section 20(1)(aA) is in conflict with the interim Constitution, will in the circumstances also render it in conflict with the 1996 Constitution.

[122] Section 172 of the 1996 Constitution requires a court when deciding a constitutional matter within its power, to declare any law that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. Further, it may make any order that is just and equitable, including an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[123] Counsel for the state asked us to suspend the order of invalidity for a period of between 24 and 36 months. His reasoning was the following: in determining whether to suspend an order of constitutional invalidity, the purpose which is served by the impugned legislation must be weighed against the constitutional violation which is effected by the legislation. An important consideration is whether an immediate

striking-down would cause disorder or dislocation. If an immediate striking-down would be prejudicial to good governance, the order of constitutional invalidity should be suspended and Parliament should be afforded a period of time in which to correct the defects. It would lead to highly undesirable consequences if the impugned provisions of the Sexual Offences Act were to be declared unconstitutional with immediate effect. This would create a vacuum during which there would be no regulation of sex work whatsoever. Such a free-for-all would be the worst of all possible worlds. He argued that it is necessary to regulate sex work in pursuit of several important public interests. All of these considerations of public interest would be undermined if prostitutes were allowed to ply their trade in an unregulated environment whilst Parliament attempted to draft new legislation. It would take at least 24 months to draft appropriate legislation to regulate prostitution and brothel-keeping.

[124] Counsel for the appellants, on the other hand, contended that such suspension would be neither just nor equitable nor practically necessary, whether viewed from the point of view of the interests of the sex worker or from the point of view of the interests of society generally. From the point of view of the sex worker, there is no reason why a delay is necessary to protect her interests or the interests of the group as a whole. Indeed, any delay in suspension simply denies the sex worker access to the protection of the laws already in place. An order striking down section 20(1)(aA) with immediate effect would do much to ameliorate the adverse conditions presently affecting sex workers in the same industry. The longer the delay in lifting the criminal sanction, the longer sex workers suffer the harms associated with it. Only when the criminal sanction is removed can the associated stigma and violence be mitigated. Counsel for the amici took a similar position, arguing that there were no cogent reasons as to why a declaration of invalidity should be suspended.

[125] In our view, the above arguments do not give sufficient weight to the fact that the invalidity of the section stems not from unjustifiable limitation of a fundamental right to privacy, but from the discriminatory impact of a prohibition which the Legislature may validly impose. It would accordingly be premature for prostitutes to embark on a process of attempting to normalise their work in a decriminalised atmosphere. Although decriminalisation is a valid option for Parliament, it is not one which is

constitutionally required. All that is required of Parliament is that if it chooses to criminalise prostitution it may not do so in an unfairly discriminatory fashion. At the same time we cannot accept the state argument that invalidation of the section would lead to chaos. It would in fact simply restore the position as it had long existed in South Africa prior to 1988, and as still prevails in much of the Commonwealth today: prostitution as such would not be illegal but life for the prostitute would be extremely difficult, as soliciting, pimping and brothel-keeping would continue to be prohibited by the Act.

[126] In our view, the central consideration in determining what is just and equitable in relation to a possible order suspending invalidity, is what would best promote the achievement of equality between men and women. In this respect, we have to bear in mind that the whole question of how to deal with prostitution in our society is a complex one that defies simplistic solutions. Accordingly, we feel that justice and equity would best be served by giving Parliament a fair opportunity to undertake a comprehensive review of the matter, producing a balanced and well thought-through approach to the manner in which commercial sex can and should best be regulated in contemporary South Africa, bearing in mind the principles of equality that run through our Constitution.

[127] The importance of locating changes to the law in such a broad context is well brought out in the report produced by the Canadian Commission into Pornography and Prostitution. Having made an extensive comparative survey the Commission points out that the law by itself enjoys no special claim to be a solution to prostitution within society.

"Indeed, it seems that those countries, the majority, which have ignored the importance of non-legal, social responses to prostitution have experienced less success in controlling prostitution than those . . . which have recognised the value of social strategies in changing attitudes and responding to the human problems associated with prostitution."

While there is no necessary correlation between the existence of harsh criminal law provisions and effective control of prostitution, the impact of decriminalisation depends on whether it was a random or planned process.

"Despite the romantic notion entertained in some quarters that all will be well with the world of prostitution if only the criminal law is removed, the practical truth, it seems, is that it will not. All of the opportunities for damage, abuse, and exploitation remain."

The material in the survey suggested that any system of regulation which might replace or co-exist with criminal proscription required both considerable study and careful development. A change in regulation would only be both legitimate and successful if it reflected a genuine attempt to balance all of the interests involved; that of the community in protecting itself from offensive or intrusive conduct; that of the prostitutes and customers in having a safe and healthy environment in which to conduct their liaisons; and that of the state in preserving legality and public order. The Commission concluded that it was crucial to any planned and reasoned approach that both the political will and resources be applied to allow a combination of long term social engineering and short term legal control mechanisms to work.

[128] It is our view that these considerations are as valid in South Africa as they are in Canada. In *Fose* and *National Coalition for Gay and Lesbian Equality (Immigration case)* this Court stressed the importance of forging new tools and shaping innovative remedies, if needs be, to achieve the goal of effectively vindicating entrenched rights. While as a general rule the Court would hesitate to keep alive, pending rectification by Parliament, a provision which unconstitutionally imposed penal sanctions, we believe in the present case the interests of all concerned, particularly those of the appellants who brought the present matter as a test case, would best be served by facilitating a reasoned and comprehensive regulation of the situation by Parliament, as requested by counsel for the state. The short-term price for the appellants is the continuation of the present unsatisfactory state of affairs. In the longer term, however, the goal of eliminating unfair discrimination is far more likely to be achieved in an effective manner if the Legislature is encouraged to look at the matter in a comprehensive and integrated way rather than just to tinker with one unacceptable detail. We accordingly propose that the declaration of invalidity of section 20(1)(aA) be suspended for a period of 30 months to enable Parliament to correct the defect. The effect of this would be to confirm the order of invalidity made in the High Court, but to suspend its operation for 30 months. This in turn would require that all the convictions in the Magistrates' Court stand.

The order

[129] We have read sections 20(1)(aA), 2, 3(b) and (c) of the Act purposively so that the 79 80 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC). 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). 86 O'REGAN J and SACHS J criminal prohibitions in them relate only to those engaged in the provision of commercial sex. It is not necessary to make a specific order in this regard, as this reading constitutes a purposive interpretation of the sections concerned and not a finding of invalidity coupled with an order of notional severance. In the circumstances, we would propose the following order: (1) (2) (3) (4) Section 20(1)(aA) of the Sexual Offences Act, 23 of 1957 is declared to be inconsistent with the Constitution and invalid. The order in paragraph 1 is suspended for a period of 30 months from the date of this judgment. The appeals of the first and second appellants are dismissed. The order of the High Court is set aside and replaced with the following order: The appeals of the three appellants are dismissed and their convictions and sentences confirmed.

Langa DCJ, Ackermann J and Goldstone J concur in the judgment of O'Regan J and Sachs J.