IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA

Case No. CCT/3/94

In the matter of:

THE STATE

versus

T MAKWANYANE AND M MCHUNU

Heard on: 15 February to 17 February 1995

Delivered on: 6 June 1995

JUDGMENT

---

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

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

the Constitution.

[3] The Appellate Division dismissed the appeals against the sentences on the counts of attempted murder and robbery, but postponed the further hearing of the appeals against the death sentence until the constitutional issues are decided by this Court. See: *S v Makwanyane en 'n Ander* 1994 (3) SA 868 (A). Two issues were raised: the constitutionality of *section* 277(1)(a) of the Criminal Procedure Act, and the implications of *section* 241(8) of the Constitution. Although there was no formal reference of these issues to this Court in terms of *section* 102(6) of the Constitution, that was implicit in the judgment of the Appellate Division, and was treated as such by the parties.

[4] The trial was concluded before the 1993 Constitution came into force, and so the question of the constitutionality of the death sentence did not arise at the trial. Because evidence which might possibly be relevant to that issue would not have been led, we asked counsel appearing before this Court to consider whether evidence, other than undisputed information placed before us in argument, would be relevant to the determination of the question referred to us by the Appellate Division. Apart from the issue of public opinion, with which I will deal later in this judgment, counsel were not able to point to specific material that had not already been placed before us which might be relevant to the decision on the constitutional issues raised in this case. I am satisfied that no good purpose would be served by referring the case back to the trial court for the hearing of further evidence and that we should deal with the matter on the basis of the information and arguments that have been presented to us.

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

[6] No executions have taken place in South Africa since 1989.[1] There are apparently over 300 persons, and possibly as many as 400 if persons sentenced in the former Transkei, Bophuthatswana and Venda are taken into account, who have been sentenced to death by the Courts and who are on death row waiting for this issue to be resolved. Some of these convictions date back to 1988, and approximately half of the persons on death row were sentenced more than two years ago.[2] This is an intolerable situation and it is essential that it be resolved one way or another without further delay.[3]

The Relevant Provisions of the Constitution

[7] The Constitution

[1] The last execution in South Africa occurred on 14 November 1989. *See infra* note 26.

[2] This information was contained in the written argument filed on behalf of the South African Government and was not disputed.

[3] The mental anguish suffered by convicted persons awaiting the death sentence is well documented. A prolonged delay in the execution of a death sentence may in itself be cause for the invalidation of a sentence of death that was lawfully imposed. In India, Zimbabwe and Jamaica, where the death sentence is not unconstitutional, sentences of death have been set aside on these grounds. The relevant authorities are collected and discussed by Gubbay CJ in Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe and Others 1993 (4) SA 239 (ZSC), and by Lord Griffiths in Pratt v Attorney-General for Jamaica [1993] 3 WLR 995 (JPC).

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

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

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

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

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

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

[9] In *S v Zuma and Two Others*,[6] this Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in Chapter Three of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution. Kentridge AJ, who delivered the judgment of the Court, referred with approval[7] to the following passage in the Canadian case of *R v Big M Drug Mart Ltd*:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.[8]

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

[7] Id. at para. 15.

[8] (1985) 13 CRR 64 at 103. As O'Regan J points out in her concurring judgment, there may possibly be instances where the "generous" and "purposive" interpretations do not coincide. That problem does not arise in the present case.

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

[11] Mr. Bizos, who represented the South African government at the hearing of this matter, informed us that the government accepts that the death penalty is a cruel, inhuman and degrading punishment and that it should be declared unconstitutional. The Attorney General of the Witwatersrand, whose office is independent of the government, took a different view, and contended that the death penalty is a necessary and acceptable form of punishment and that it is not cruel, inhuman or degrading within the meaning of *section* 11(2). He argued that if the framers of the Constitution had wished to make the death penalty unconstitutional they would have said so, and

[9] Jaga v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 662-663.

[10] Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC) at 328-329.

[11] In the analysis that follows *sections* 8, 9 and 10 are treated together as giving meaning to *section* 11(2), which is the provision of Chapter Three that deals specifically with punishment.

that their failure to do so indicated an intention to leave the issue open to be dealt with by Parliament in the ordinary way. It was for Parliament, and not the government, to decide whether or not the death penalty should be repealed, and Parliament had not taken such a decision.

Legislative History

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

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

> Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.[12]

[14] Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining "the mischief aimed at [by] the statutory enactment in question."[13] These principles were

[12] Per Schreiner JA in Jaga v Dönges, N.O. and Another, *supra* note 9, at 662G-H.

[13] Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 668H-669F; Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986(2) SA 555(A) at 562C-563A.

derived in part from English law. In England, the courts have recently relaxed this exclusionary rule and have held, in *Pepper (Inspector of Taxes) v Hart*[14] that, subject to the privileges of the House of Commons:

> ...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.[15]

[14] 1993 AC 593 HL (E).

[15] Per Lord Browne-Wilkinson at 634D-E, who went on to say that "as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria".

[15] As the judgment in *Pepper*'s case shows, a similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand.[16] Whether our Courts should follow these examples and extend the scope of what is admissible as background material for the purpose of interpreting statutes does not arise in the present case. We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts as well as the fundamental rights of every person which must be respected in exercising such powers.

[16] Id. at 637 F.

[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the provision was adopted.[17] The German Constitutional Court also has regard to such evidence.[18] The Canadian Supreme Court has held such evidence to be admissible, and has referred to the historical background including the pre-confederation debates for the purpose of interpreting provisions of the Canadian Constitution, although it attaches less weight to such information than the United States Supreme Court does.[19] It also has regard to ministerial statements in Parliament in regard to the purpose of particular legislation.[20] In India, whilst speeches of individual members of Parliament or the Convention are apparently not ordinarily admissible, the reports of drafting committees can, according to Seervai, "be a helpful extrinsic aid to construction."[21] Seervai cites Kania CJ in *A. K. Gopalan v The State*[22] for the proposition that whilst not taking "...into consideration the individual opinions of Members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to debates may be permitted." The European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be

---

[17] ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §23.6 (2d ed. 1992).

[18] In the decision on the constitutionality of life imprisonment, [1977] 45 BVerfGE 187, the German Federal Constitutional Court took into account that life imprisonment was seen by the framers of the constitution as the alternative to the death sentence when they decided to abolish capital punishment. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 315 (1989).

[19] Reference re s.94(2) of the Motor Vehicle Act (British Columbia) (1986) 18 CRR 30 at 47-50; United States v Cotroni (1990) 42 CRR 101 at 109; Mahe v Alberta (1990) 46 CRR 193 at 214.

[20] Irwin Toy Ltd. v Quebec (AG) (1989) 39 CRR 193 at 241.

[21] H M SEERVAI, CONSTITUTIONAL LAW OF INDIA, 3rd ed. (1983) Vol. I, para. 2.35 *et seq*.

[22] (1950) SCR 88 at 111, as cited in Seervai, id., Vol. II, para. 24.7, note 25.

informed by *travaux préparatoires*.[23]

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

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

---

[23] *Article* 32 of the Vienna Convention of Treaties 1969, 8 ILM 679 (1969) permits the use of *travaux préparatoires* for the purpose of interpreting treaties. For examples of the application of this principle, *see* Keith Cox v Canada, United Nations Committee on Human Rights, Communication No. 539/1993, 3 November 1993, at 19, stating:

> Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in *article* 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*.

Ng v Canada, United Nations Committee on Human Rights, Communication No 469/1991, 5 November 1993, at 9; Young, James and Webster v United Kingdom (1981) 3 EHRR 20, para. 166; Lithgow v United Kingdom (1986) 8 EHRR 329, para. 117; and more generally J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 481 (10th ed., Butterworths)(1989).

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

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

[19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to

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

showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case.

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

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

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

[22] In August 1991, the South African Law Commission in its Interim Report on Group and Human Rights described the imposition of the death penalty as "highly controversial".[27] A working paper of the Commission which preceded the Interim Report had proposed that the right to life be recognised in a bill of rights, subject to the proviso that the discretionary imposition of the sentence of death be allowed for the most serious crimes. As a result of the comments it received, the Law Commission decided to change the draft and to adopt a "Solomonic solution"[28] under which a constitutional court would be required to decide whether a right to life expressed in unqualified terms could be circumscribed by a limitations clause

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

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

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

contained in a bill of rights.[29] "This proposed solution" it said "naturally imposes an onerous task on the Constitutional Court. But it is a task which this Court will in future have to carry out in respect of many other laws and executive and administrative acts. The Court must not shrink from this task, otherwise we shall be back to parliamentary sovereignty."[30]

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

[29] Id. at para. 7.36.

[30] Id. at para. 7.37.

> Opinions regarding the death penalty differ substantially. There are those who feel that the death penalty is a cruel and inhuman form of punishment. Others are of the opinion that it is in some extreme cases the community's only effective safeguard against violent crime and that it gives effect in such cases to the retributive and deterrent purposes of punishment.[31]

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

> The government wishes to see a speedy settlement of the future constitutionality of this form of punishment and urges interested parties to join in the discussions on a Bill of Fundamental Rights.[32]

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

[31] South African Government Heads of Argument, Vol 1, authorities, 32-34.

[32] Id.

[25] In the constitutional negotiations which followed, the issue was not resolved. Instead, the "Solomonic solution" was adopted.[33] The death sentence was, in terms, neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with Chapter Three of the Constitution. If they are, the death sentence remains a competent sentence for murder

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

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

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

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

in cases in which those provisions are applicable, unless and until Parliament otherwise decides; if they are not, it is our duty to say so, and to declare such provisions to be unconstitutional.

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

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

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

[35] This has been the approach of certain of the justices of the United States Supreme Court. Thus, White, J., concurring, who said in Furman v. Georgia, *supra* note 34, at 312, that "[T]he imposition and execution of the death penalty are obviously cruel in the dictionary sense", was one of the justices who held in Gregg v Georgia, *infra* note 60, that capital punishment was not per se cruel and unusual punishment within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. Burger, CJ., dissenting, refers in Furman's case at 379, 380, and 382 to a punishment being cruel "in the constitutional sense". *See also*, comments by Justice Stewart, concurring in Furman's case at 309, "... the death sentences now before us are the product of a

Constitution, carry the initial onus of establishing this proposition.[36]

The Contentions of the Parties

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

The Effect of the Disparity in the Laws Governing Capital Punishment

---

legal system that brings them, I believe, within the very core of the... guarantee against cruel and unusual punishments...it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the legislatures have determined to be necessary [citing Weems v. United States, 217 U.S. 349 (1910)]...death sentences [imposed arbitrarily] are cruel and unusual in the same way that being struck by lightning is cruel and unusual".

[36] Matinkinca and Another v Council of State, Ciskei and Another 1994 (1) BCLR 17 (Ck) at 34B-D; Qozeleni v Minister of Law and Order and Another 1994 (1) BCLR 75(E) at 87D-E. *Cf.* Kindler v Canada (Minister of Justice) (1992) 6 CRR (2d) 193 at 214.

[28] One of the anomalies of the transition initiated by the Constitution is that the Criminal Procedure Act does not apply throughout South Africa. This is a consequence of *section* 229 of the Constitution which provides:

> Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.

[29] Prior to the commencement of the Constitution, the Criminal Procedure Act was in force only in the old Republic of South Africa. Its operation did not extend to the former Transkei, Bophuthatswana, Venda or Ciskei, which were then treated by South African law as independent states and had their own legislation. Although their respective Criminal Procedure statutes were based on the South African legislation, there were differences, including differences in regard to the death penalty. The most striking difference in this regard was in Ciskei, where the death sentence was abolished on June 8, 1990 by the military regime,[37] the *de facto* government of the territory, and it ceased from that date to be a competent sentence.[38] These differences still exist,[39] which means that the law governing the imposition of the death sentence in South Africa is not uniform. The greatest disparity is in the Eastern Cape Province. A person who commits murder and is brought to trial in that part of the province which was formerly Ciskei, cannot be sentenced to death, whilst a person who commits murder and is brought to trial in another part of the same province, can be sentenced to death. There is no rational reason for this distinction, which is the result

[37] The Criminal Procedure Second Amendment Decree, 1990, Decree No. 16 of 1990 of the Council of State of the Republic of Ciskei, 8 June 1990, as amended.

[38] S v Qeqe and Another 1990 (2) SACR 654 (CkAD).

[39] In the former Transkei, Bophuthatswana and Venda the death sentence was a competent verdict for murder but the provisions of the relevant statutes in Transkei and Bophuthatswana are not identical to *section* 277. For the purposes of this judgment it is not necessary to analyse the differences, which relate in the main to the procedure prescribed for appeals and the powers of the court on appeal, procedures that are now subject to the provisions of *section* 241(1) and (1A) of the Constitution, as amended by the Constitution of the Republic of South Africa Third Amendment Act No. 13 of 1994.

of history, and we asked for argument to be addressed to us on the question whether this difference has a bearing on the constitutionality of *section* 277(1)(a) of the Criminal Procedure Act.

[30] Counsel for the accused argued that it did. They contended that in the circumstances *section* 277 was not a law of general application (which is a requirement under *section* 33(1) for the validity of any law which limits a Chapter Three right), and that the disparate application of the death sentence within South Africa discriminates unfairly between those prosecuted in the former Ciskei and those prosecuted elsewhere in South Africa, and offends against the right to "equality before the law and to equal protection of the law."[40]

[31] If the disparity had been the result of legislation enacted after the Constitution had come into force the challenge to the validity of *section* 277 on these grounds may well have been tenable. Criminal law and procedure is a national competence and the national government could not without very convincing reasons have established a "safe haven" in part of one of the provinces in which the death penalty would not be enforced. The disparity is not, however, the result of the legislative policy of the new Parliament, but a consequence of the Constitution which brings together again in one country the parts that had been separated under apartheid. The purpose of *section* 229 was to ensure an orderly transition, and an inevitable consequence of its provisions is that there will be disparities in the law reflecting pre-existing regional variations, and that this will continue until a uniform system of law has been established by the national and provincial legislatures within their fields of competence as contemplated by Chapter Fifteen of the Constitution.

[40] *See section* 8 of the Constitution.

[32] The requirement of *section* 229 that existing laws shall continue to be in force *subject to the Constitution*, makes the Constitution applicable to existing laws within each of the geographic areas. These laws have to meet all the standards prescribed by Chapter Three, and this no doubt calls for consistency and parity of laws within the boundaries of each of the different geographic areas. It does not, however, mean that there has to be consistency and parity between the laws of the different geographic areas themselves.[41] Such a construction would defeat the apparent purpose of *section* 229, which is to allow different legal orders to exist side by side until a process of rationalisation has been carried out, and would inappropriately expose a substantial part if not the entire body of our statutory law to challenges under *section* 8 of the Constitution. It follows that disparities between the legal orders in different parts of the country, consequent upon the provisions of *section* 229 of the Constitution, cannot for that reason alone be said to constitute a breach of the equal protection provisions of *section* 8, or render the laws such that they are not of general application.

International and Foreign Comparative Law

[41] AK Entertainment CC v Minister of Safety and Security and Others 1995 (1) SACLR 130 (E) at 135-136.

[33] The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy.[42] As societies became more enlightened, they restricted the offences for which this penalty could be imposed.[43] The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime, its use has been restricted to extreme cases. According to Amnesty International, 1,831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China, which means that only 412 executions were carried out in the rest of the world in that year.[44] Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola.[45] In most of those countries where it is retained, as the Amnesty International statistics show, it is seldom used.

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

---

[42] An account of the history of the death sentence, the growth of the abolitionist movement, and the application of the death sentence by South African courts is given by Prof. B. van Niekerk in *Hanged by the Neck Until You Are Dead*, (1969) 86 SALJ 457; Professor E. Kahn in *The Death Penalty in South Africa*, (1970) 33 THRHR 108; and by Professor G. Devenish in *The historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform*, SACJ (1992) 1. For analysis of trends in capital punishment internationally, *see* AMNESTY INTERNATIONAL, WHEN THE STATE KILLS...THE DEATH PENALTY V. HUMAN RIGHTS (1989).

[43] *See generally*, Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (December 1, 1993), AI Index ACT 50/02/94.

[44] Amnesty International, *Update to Death Sentences and executions in 1993*, AI Index ACT 51/02/94.

[45] *Supra* note 43.

which states:

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

[35] Customary international law and the ratification and accession to international agreements is dealt with in *section* 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of *section* 35(1), public international law would include non-binding as well as binding law.[46] They may both be used under the *section* as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights,[47] the Inter-American Commission on Human Rights,[48] the Inter-American Court of Human Rights,[49] the European Commission on Human Rights,[50] and the European Court of Human Rights,[51] and in appropriate cases, reports

---

[46] J. Dugard in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 192-195 (Dawid van Wyk et al.eds., Juta & Co., Ltd., 1994). Professor Dugard suggests, at 193-194, that *section* 35 requires regard to be had to "all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, ie:

> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations; [and]
> (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[47] Established under *article* 28 of the International Covenant on Civil and Political Rights (ICCPR or International Covenant) 1966.

[48] Established in terms of *article* 33 of the American Convention on Human Rights 1969.

[49] Id.

[50] Established in terms of *article* 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ("European Convention").

[51] Id.

of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.

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

---

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

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

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

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

[37] Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by *section* 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution.[53] This has already been pointed out in a number of decisions of the Provincial and Local Divisions of the Supreme Court,[54] and is implicit in the injunction given to the Courts in *section* 35(1), which in permissive terms allows the Courts to "have regard to" such law. There is no injunction to do more than this.

[38] When challenges to the death sentence in international or foreign courts and tribunals have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions sanctioned by law. The only case to which we were referred in which there were not such express provisions in the Constitution, was the decision of the Hungarian Constitutional Court. There the challenge succeeded and the death penalty was declared to be unconstitutional.[55]

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

[54] *See, e.g.,* Qozeleni, *supra* note 36, at 80B-C; S v Botha and Others 1994 (3) BCLR 93 (W) at 110F-G.

[55] Decision No. 23/1990 (X.31.) AB of the (Hungarian) Constitutional Court (George Feher trans.).

[39] Our Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right. In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution.[56] We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

Capital Punishment in the United States of America

[56] The judgment of Kentridge AJ in S v Zuma and Two Others, *supra* note 6, discusses the relevance of foreign case law in the context of the facts of that case, and demonstrates the use that can be made of such authorities in appropriate circumstances.

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

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

---

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

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

[59] Id.

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

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

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

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

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

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

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

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

Arbitrariness and Inequality

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

[44] *Section* 277 of the Criminal Procedure Act provides:

> *Sentence of death*
>
> (1) The sentence of death may be passed by a superior court only and only in

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

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

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

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

the case of a conviction for-

(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery or attempted robbery, if the court finds aggravating circumstances to have been present;
(d) kidnapping;
(e) child-stealing;
(f) rape.

(2) The sentence of death shall be imposed-

(a) after the presiding judge conjointly with the assessors (if any), subject to the provisions of s 145(4)(a), or, in the case of a trial by a special superior court, that court, with due regard to any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and

(b) if the presiding judge or court, as the case may be, with due regard to that finding, is satisfied that the sentence of death is the proper sentence.

(3) (a) The sentence of death shall not be imposed upon an accused who was under the age of 18 years at the time of the commission of the act which constituted the offence concerned.
(b) If in the application of paragraph (a) the age of an accused is placed in issue, the onus shall be on the State to show beyond reasonable doubt that the

accused was 18 years of age or older at
the relevant time.

[45] Under our court system questions of guilt and innocence, and the proper sentence to be imposed on those found guilty of crimes, are not decided by juries. In capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. The Criminal Procedure Act allows a full right of appeal to persons sentenced to death, including a right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge. The Appellate Division is empowered to set the sentence aside if it would not have imposed such sentence itself, and it has laid down criteria for the exercise of this power by itself and other courts.[70] If the person sentenced to death does not appeal, the Appellate Division is nevertheless required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence.[71]

[70] Criminal Procedure Act No. 51 of 1977, *section* 322(2A)(as amended by *section* 13 of Act No. 107 of 1990).

[71] Id. *section* 316A(4)(a).

[46] Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused.[72] Due regard must be paid to the personal circumstances and subjective factors which might have influenced the accused person's conduct,[73] and these factors must then be weighed up with the main objects of punishment, which have been held to be: deterrence, prevention, reformation, and retribution.[74] In this process "[e]very relevant consideration should receive the most scrupulous care and reasoned attention",[75] and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.[76]

[47] There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate

---

[72] S v Nkwanyana and Others 1990 (4) SA 735 (A) at 743E-745A.

[73] S v Masina and Others 1990 (4) SA 709 (A) at 718G-H.

[74] S v J 1989 (1) SA 669 (A) at 682G. "Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment". Id. at 682I-J (cited with approval in S v P 1991 (1) SA 517 (A) at 523G-H). *Cf.* R v Swanepoel 1945 AD 444 at 453-455.

[75] Per Holmes JA in S v Letsolo 1970 (3) SA 476 (A) at 477B (cited with approval by Nicholas AJA in S v Dlamini 1992 (1) SA 18 (A) at 31I-32A in the context of the approach to sentencing under *section* 322(2A)(b) of the Criminal Procedure Act No. 51 of 1977).

[76] S v Senonohi 1990 (4) SA 727 (A) at 734F-G; S v Nkwanyana, *supra* note 72, at 749A-D.

Division for the imposition of the death sentence. The fact that the Appellate Division, a court of experienced judges, takes the final decision in all cases is, in my view, more likely to result in consistency of sentencing, than will be the case where sentencing is in the hands of jurors who are offered statutory guidance as to how that discretion should be exercised.

[48] The argument that the imposition of the death sentence under *section* 277 is arbitrary and capricious does not, however, end there. It also focuses on what is alleged to be the arbitrariness inherent in the application of *section* 277 in practice. Of the thousands of persons put on trial for murder, only a very small percentage are sentenced to death by a trial court, and of those, a large number escape the ultimate penalty on appeal.[77] At every stage of the process there is an element of chance. The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on appeal, the particular judges who are selected to hear the case. Race[78] and poverty are also alleged to be factors.

---

[77] According to the statistics referred to in the *amicus brief* of the South African Police approximately 9 000 murder cases are brought to trial each year. In the more than 40 000 cases that have been heard since the amendment to *section* 277 of the Criminal Procedure Act, only 243 persons were sentenced to death, and of these sentences, only 143 were ultimately confirmed on appeal. *See also*, Devenish, *supra* note 42, at 8 and 13.

[78] In the *amicus brief* of Lawyers for Human Rights, Centre for Applied Legal Studies and the Society for the Abolition of the Death Penalty in South Africa it is pointed out that the overwhelming majority of those

sentenced to death are poor and black. There is an enormous social and cultural divide between those sentenced to death and the judges before whom they appear, who are presently almost all white and middle class. This in itself gives rise to problems which even the most meticulous judge cannot avoid. The formal trial proceedings are recorded in English or Afrikaans, languages which the judges understand and speak, but which many of the accused may not understand, or of which they may have only an imperfect understanding. The evidence of witnesses and the discourse between the judge and the accused often has to be interpreted, and the way this is done influences the proceedings. The differences in the backgrounds and culture of the judges and the accused also comes into the picture, and is particularly relevant when the personal circumstances of the accused have to be evaluated for the purposes of deciding upon the sentence. All this is the result of our history, and with the demise of apartheid this will change. Race and class are, however, factors that run deep in our society and cannot simply be brushed aside as no longer being relevant.

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

[50] It needs to be mentioned that there are occasions when senior members of the bar act *pro deo* in particularly difficult cases - indeed the present case affords an example of that, for Mr Trengove and his juniors have acted *pro deo* in the proceedings before us, and the Legal Resources Centre who have acted as their instructing attorneys, have done so without charge. An enormous amount of research has gone into the preparation of the argument and it is highly doubtful that even the wealthiest members of our society could have secured a better service than they have provided. But this is the exception and not the rule. This may possibly change as a result of the provisions of *section* 25(3)(e) of the Constitution, but there are limits to the available financial and human resources, limits which are likely to exist for the foreseeable future, and which will continue to place poor accused at a significant disadvantage in defending themselves in capital cases.

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

[51] It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by the judges, and as far as possible, taken into account by them. But in itself this is no answer to the complaint of arbitrariness; on the contrary, it may introduce an additional factor of arbitrariness that would also have to be taken into account. Some, but not all accused persons may be acquitted because such allowances are made, and others who are convicted, but not all, may for the same reason escape the death sentence.[80]

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

[80] See the comments of Curlewis, J in [1991] SAJHR, Vol. 7, p. 229, arguing that judges who do not impose the death sentence when they should do so are not doing their duty. "Let me return to the point that troubles the authors: 'that a person's life may depend upon who sits in judgment.' Of course this happens. I do not know why the authors are so hesitant in saying so. Their own reasoning, let alone their tables, proves this". Id. at 230.

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

[53] It was contended that we should follow this approach and hold that the factors to which I have referred, make the application of *section* 277, in practice, arbitrary and capricious and, for that reason, any resulting death sentence is cruel, inhuman and degrading punishment.

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

[54] The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems. Such factors can be mitigated, but not totally avoided, by allowing convicted persons to appeal to a higher court. Appeals are decided on the record of the case and on findings made by the trial court. If the evidence on record and the findings made have been influenced by these factors, there may be nothing that can be done about that on appeal. Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is, whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable.[82]

[82] "While this court has the power to correct constitutional or other errors retroactively...it cannot, of course, raise the dead." Suffolk District v. Watson and Others, 381 Mass. 648, 663 (1980)(Hennessy, CJ.)(plurality decision holding the death penalty unconstitutionally cruel under the Massachusetts State Constitution). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, *supra* note 66, at 305 (Stewart, Powell and Stevens, JJ.).

[55] In the United States, the Supreme Court has addressed itself primarily to the requirement of due process. Statutes have to be clear and discretion curtailed without ignoring the peculiar circumstances of each accused person. Verdicts are set aside if the defence has not been adequate,[83] and persons sentenced to death are allowed wide rights of appeal and review. This attempt to ensure the utmost procedural fairness has itself led to problems. The most notorious is the "death row phenomenon" in which prisoners cling to life, exhausting every possible avenue of redress, and using every device to put off the date of execution, in the natural and understandable hope that there will be a reprieve from the Courts or the executive. It is common for prisoners in the United States to remain on death row for many years, and this dragging out of the process has been characterised as being cruel and degrading.[84] The difficulty of

[83] Voyles v. Watkins, 489 F.Supp 901 (D.D.C.: N.D.Miss. 1980). *See also*, People v. Frierson, 599 P.2d. 587 (1979). *Cf.* Powell v. Alabama, 287 U.S. 45 (1932).

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

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

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

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

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

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

The Right to Dignity

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

> The fatal constitutional infirmity in the punishment of death is that it treats

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

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

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

[58] Under our constitutional order the right to human dignity is specifically guaranteed. It can only be limited by legislation which passes the stringent test of being 'necessary'. The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.

[59] In Germany, the Federal Constitutional Court has stressed this aspect of punishment.

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

> Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.[89]

[60] That capital punishment constitutes a serious impairment of human dignity has also been recognised by judgments of the Canadian Supreme Court. *Kindler v Canada*[90] was concerned with the extradition from Canada to the United States of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States, and Ng who was facing a murder charge there and a possible death sentence. Three of the seven judges who heard the cases expressed the opinion that the death penalty was cruel and unusual:

> It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity...[91]

[61] Three other judges were of the opinion that:

---

[89] [1977] 45 BVerfGE 187, 228 (*Life Imprisonment* case)(as translated in Kommers, *supra* note 18, at 316). The statement was made in the context of a discussion on punishment to be meted out in respect of murders of wanton cruelty. It was held that a life sentence was a competent sentence as long as it allowed the possibility of parole for a reformed prisoner rehabilitated during his or her time in prison.

[90] (1992) 6 CRR (2d) 193 SC.

[91] Id. at 241 (per Cory, J, dissenting with Lamer, CJC, concurring). *See also*, Sopinka, J, dissenting (with Lamer, CJC, concurring) at 220.

> [t]here is strong ground for believing, having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders, that the death penalty cannot, except in exceptional circumstances, be justified in this country.[92]

In the result, however, the majority of the Court held that the validity of the order for extradition did not depend upon the constitutionality of the death penalty in Canada, or the guarantee in its Charter of Rights against cruel and unusual punishment. The Charter was concerned with legislative and executive acts carried out in Canada, and an order for extradition neither imposed nor authorised any punishment within the borders of Canada.

[62] The issue in *Kindler*'s case was whether the action of the Minister of Justice, who had authorised the extradition without any assurance that the death penalty would not be imposed, was constitutional. It was argued that this executive act was contrary to *section* 12 of the Charter which requires the executive to act in accordance with fundamental principles of justice. The Court decided by a majority of four to three that in the particular circumstances of the case the decision of the Minister of Justice could not be set aside on these grounds. In balancing the international obligations of Canada in respect of extradition, and another purpose of the extradition legislation - to prevent Canada from becoming a safe haven for criminals, against the likelihood that the fugitives would be executed if returned to the United States, the view of the majority was that the decision to return the fugitives to the United States could not be said to be contrary to the fundamental principles of justice. In their view, it would not shock the conscience of Canadians to permit this to be done.

The International Covenant on Civil and Political Rights

[63] *Ng* and *Kindler* took their cases to the Human Rights Committee of the United Nations, contending that Canada had breached its obligations under the International

[92] Id. at 202 (per La Forest, J)(L'Heureux-Dube and Gonthier, JJ concurring).

Covenant on Civil and Political Rights. Once again, there was a division of opinion within the tribunal. In *Ng*'s case it was said:

> The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the covenant.[93]

[93] Ng v Canada, *supra* note 23, at 21.

[64] There was no dissent from that statement. But the International Covenant contains provisions permitting, with some qualifications, the imposition of capital punishment for the most serious crimes. In view of these provisions, the majority of the Committee were of the opinion that the extradition of fugitives to a country which enforces the death sentence in accordance with the requirements of the International Covenant, should not be regarded as a breach of the obligations of the extraditing country. In *Ng*'s case, the method of execution which he faced if extradited was asphyxiation in a gas chamber. This was found by a majority of the Committee to involve unnecessary physical and mental suffering and, notwithstanding the sanction given to capital punishment, to be cruel punishment within the meaning of *article* 7 of the International Covenant. In *Kindler*'s case, in which the complaint was delivered at the same time as that in the *Ng*'s case, but the decision was given earlier, it was held that the method of execution which was by lethal injection was not a cruel method of execution, and that the extradition did not in the circumstances constitute a breach of Canada's obligations under the International Covenant.[94]

[65] The Committee also held in *Kindler*'s case that prolonged judicial proceedings giving rise to the death row phenomenon does not *per se* constitute cruel, inhuman or degrading treatment. There were dissents in both cases. Some Commissioners in *Ng*'s case held that asphyxiation was not crueller than other forms of execution. Some in *Kindler*'s case held that the provision of the International Covenant against the arbitrary deprivation of the right to life took priority over the provisions of the International Covenant which allow the death sentence, and that Canada ought not in the circumstances to have extradited Kindler without an assurance that he would not be executed.

[66] It should be mentioned here that although *articles* 6(2) to (5) of the International Covenant specifically allow the imposition of the death sentence under strict controls

[94] Joseph Kindler v Canada, United Nations Committee on Human Rights, Communication No 470/1991, 30 July 1993.

"for the most serious crimes" by those countries which have not abolished it, it provides in *article* 6(6) that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." The fact that the International Covenant sanctions capital punishment must be seen in this context. It tolerates but does not provide justification for the death penalty.

[67] Despite these differences of opinion, what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.

The European Convention on Human Rights

[68] Similar issues were debated by the European Court of Human Rights in *Soering v United Kingdom*.[95] This case was also concerned with the extradition to the United States of a fugitive to face murder charges for which capital punishment was a competent sentence. It was argued that this would expose him to inhuman and degrading treatment or punishment in breach of *article* 3 of the European Convention on Human Rights. *Article* 2 of the European Convention protects the right to life but makes an exception in the case of "the execution of a sentence of a court following [the] conviction of a crime for which this penalty is provided by law." The majority of the Court held that *article* 3 could not be construed as prohibiting all capital punishment, since to do so would nullify *article* 2. It was, however, competent to test the imposition of capital punishment in particular cases against the requirements of *article* 3 -- the manner in which it is imposed or executed, the personal circumstances of the condemned person and the disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, were capable of

[95] (1989) 11 EHRR 439 at paras. 103, 105 and 111.

bringing the treatment or punishment received by the condemned person within the proscription.

[69] On the facts, it was held that extradition to the United States to face trial in Virginia would expose the fugitive to the risk of treatment going beyond the threshold set by *article* 3. The special factors taken into account were the youth of the fugitive (he was 18 at the time of the murders), an impaired mental capacity, and the suffering on death row which could endure for up to eight years if he were convicted. Additionally, although the offence for which extradition was sought had been committed in the United States, the fugitive who was a German national was also liable to be tried for the same offence in Germany. Germany, which has abolished the death sentence, also sought his extradition for the murders. There was accordingly a choice in regard to the country to which the fugitive should be extradited, and that choice should have been exercised in a way which would not lead to a contravention of *article* 3. What weighed with the Court was the fact that the choice facing the United Kingdom was not a choice between extradition to face a possible death penalty and no punishment, but a choice between extradition to a country which allows the death penalty and one which does not. We are in a comparable position. A holding by us that the death penalty for murder is unconstitutional, does not involve a choice between freedom and death; it involves a choice between death in the very few cases which would otherwise attract that penalty under *section* 277(1)(a), and the severe penalty of life imprisonment.

Capital Punishment in India

[70] In the *amicus brief* of the South African Police, reliance was placed on decisions of the Indian Supreme Court, and it is necessary to refer briefly to the way the law has developed in that country.

[71] *Section* 302 of the Indian Penal Code authorises the imposition of the death sentence

as a penalty for murder. In *Bachan Singh v State of Punjab*,[96] the constitutionality of this provision was put in issue. *Article* 21 of the Indian Constitution provides that:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

[72] The wording of this article presented an obstacle to a challenge to the death sentence, because there was a "law" which made provision for the death sentence. Moreover, *article* 72 of the Constitution empowers the President and Governors to commute sentences of death, and *article* 134 refers to the Supreme Court's powers on appeal in cases where the death sentence has been imposed. It was clear, therefore, that capital punishment was specifically contemplated and sanctioned by the framers of the Indian Constitution, when it was adopted by them in November 1949.[97]

[73] Counsel for the accused in *Bachan Singh*'s case sought to overcome this difficulty by contending that *article* 21 had to be read with *article* 19(1), which guarantees the freedoms of speech, of assembly, of association, of movement, of residence, and the freedom to engage in any occupation. These fundamental freedoms can only be restricted under the Indian Constitution if the restrictions are reasonable for the attainment of a number of purposes defined in *sections* 19(2) to (6). It was contended that the right to life was basic to the enjoyment of these fundamental freedoms, and that the death sentence restricted them unreasonably in that it served no social purpose, its deterrent effect was unproven and it defiled the dignity of the individual.

[96] (1980) 2 SCC 684.

[97] Id. at 730, para. 136.

[74] The Supreme Court analysed the provisions of *article* 19(1) and came to the conclusion, for reasons that are not material to the present case, that the provisions of *section* 302 of the Indian Penal Code did "not have to stand the test of *article* 19(1) of the Constitution."[98] It went on, however, to consider "arguendo" what the outcome would be if the test of reasonableness and public interest under *article* 19(1) had to be satisfied.

[98] Id. at 709, para. 61.

[75] The Supreme Court had recognised in a number of cases that the death sentence served as a deterrent, and the Law Commission of India, which had conducted an investigation into capital punishment in 1967, had recommended that capital punishment be retained. The court held that in the circumstances it was "for the petitioners to prove and establish that the death sentence for murder is so outmoded, unusual or excessive as to be devoid of any rational nexus with the purpose and object of the legislation."[99]

[76] The Court then dealt with international authorities for and against the death sentence, and with the arguments concerning deterrence and retribution.[100] After reviewing the arguments for and against the death sentence, the court concluded that:

> ...the question whether or not [the] death penalty serves any penological purpose is a difficult, complex and intractable issue [which] has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provisions as to death penalty ... on the grounds of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or another, as to which of these antithetical views, held by the Abolitionists and the Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is ground among others, for rejecting the petitioners'

[99] Id. at 712, para. 71.

[100] I have not yet dealt specifically with the issues of deterrence, prevention and retribution, on which the Attorney General placed reliance in his argument. These are all factors relevant to the purpose of punishment and are present both in capital punishment, and in the alternative of imprisonment. Whether they serve to make capital punishment a more effective punishment than imprisonment is relevant to the argument on justification, and will be considered when that argument is dealt with. For the moment it is sufficient to say that they do not have a bearing on the nature of the punishment, and need not be taken into account at this stage of the enquiry.

> argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose.[101]

It accordingly held that *section* 302 of the Indian Penal Code "violates neither the letter nor the ethos of Article 19."[102]

[77] The Court then went on to deal with *article* 21. It said that if *article* 21 were to be expanded in accordance with the interpretative principle applicable to legislation limiting rights under Article 19(1), *article* 21 would have to be read as follows:

> No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law.

[101] *Supra* note 96, at 729, para. 132.

[102] Id.

And thus expanded, it was clear that the State could deprive a person of his or her life, by "fair, just and reasonable procedure." In the circumstances, and taking into account the indications that capital punishment was considered by the framers of the constitution in 1949 to be a valid penalty, it was asserted that "by no stretch of the imagination can it be said that death penalty...either per se or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment" prohibited by the Constitution.[103]

[78] The wording of the relevant provisions of our Constitution are different. The question we have to consider is not whether the imposition of the death sentence for murder is "totally devoid of reason and purpose", or whether the death sentence for murder "is devoid of any rational nexus" with the purpose and object of *section* 277(1)(a) of the Criminal Procedure Act. It is whether in the context of our Constitution, the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified in terms of *section* 33.

[103] *Supra* note 96, at 730-731, para. 136. For similar reasons, the death penalty was held not to be inconsistent with the Constitution of Botswana, or with the Constitution of the former Bophuthatswana. S v Ntesang 1995 (4) BCLR 426 (Botswana); S v Chabalala 1986 (3) SA 623 (B AD).

[79] The Indian Penal Code leaves the imposition of the death sentence to the trial judge's discretion. In *Bachan Singh*'s case there was also a challenge to the constitutionality of the legislation on the grounds of arbitrariness, along the lines of the challenges that have been successful in the United States. The majority of the Court rejected the argument that the imposition of the death sentence in such circumstances is arbitrary, holding that a discretion exercised judicially by persons of experience and standing, in accordance with principles crystallized by judicial decisions, is not an arbitrary discretion.[104] To complete the picture, it should be mentioned that long delays in carrying out the death sentence in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside.[105]

The Right to Life

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

---

[104] Id. at 740, para. 165. Bhagwati J dissented. The dissenting judgement is not available to me, but according to AMNESTY INTERNATIONAL, WHEN THE STATE KILLS, *supra* note 42, at 147, Bhagwati J asserted in his judgement that "[t]he prevailing standards of human decency are incompatible with [the] death penalty."

[105] Triveniben v State of Gujarat [1992] LRC(Const.) 425 (Sup. Ct. of India); Daya Singh v Union of India [1992] LRC(Const.) 452 (Sup. Ct. of India).

[81] In some instances the dissent focused on the right to life. In *Soering*'s case before the European Court of Human Rights, Judge de Meyer, in a concurring opinion, said that capital punishment is "not consistent with the present state of European civilisation"[106] and for that reason alone, extradition to the United States would violate the fugitive's right to life.

[82] In a dissent in the United Nations Human Rights Committee in *Kindler*'s case, Committee member B. Wennergren also stressed the importance of the right to life.

[106] *Supra* note 95, at 484.

> The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States [P]arties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of the death sentence.[107]

[83] An individual's right to life has been described as "[t]he most fundamental of all human rights",[108] and was dealt with in that way in the judgments of the Hungarian Constitutional Court declaring capital punishment to be unconstitutional.[109] The challenge to the death sentence in Hungary was based on *section* 54 of its Constitution which provides:

> (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights.
>
> (2) No one shall be subjected to torture or to cruel or inhuman or degrading punishment

[84] *Section* 8, the counterpart of *section* 33 of our Constitution, provides that laws shall not impose any limitations on the essential content of fundamental rights. According to the finding of the Court, capital punishment imposed a limitation on the essential

---

[107] Joseph Kindler v Canada, *supra* note 94, at 23.

[108] Per Lord Bridge in R v Home Secretary, Ex parte Bugdaycay (1987) AC 514 at 531G.

[109] *Supra* note 55.

content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional. Two factors are stressed in the judgment of the Court. First, the relationship between the rights of life and dignity, and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease. I will deal later with the requirement of our Constitution that a right shall not be limited in ways which negate its essential content. For the present purposes it is sufficient to point to the fact that the Hungarian Court held capital punishment to be unconstitutional on the grounds that it is inconsistent with the right to life and the right to dignity.

[85] Our Constitution does not contain the qualification found in *section* 54(1) of the Hungarian constitution, which prohibits only the *arbitrary* deprivation of life. To that extent, therefore, the right to life in *section* 9 of our Constitution is given greater protection than it is by the Hungarian Constitution.

[86] The fact that in both the United States and India, which sanction capital punishment, the highest courts have intervened on constitutional grounds in particular cases to prevent the carrying out of death sentences, because in the particular circumstances of such cases, it would have been cruel to do so, evidences the importance attached to the protection of life and the strict scrutiny to which the imposition and carrying out of death sentences are subjected when a constitutional challenge is raised. The same concern is apparent in the decisions of the European Court of Human Rights and the United Nations Committee on Human Rights. It led the Court in *Soering*'s case to order that extradition to the United States, in the circumstances of that case, would result in inhuman or degrading punishment, and the Human Rights Committee to declare in *Ng*'s case that he should not be extradited to face a possible death by asphyxiation in a gas chamber in California.

Public Opinion

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

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

[89] This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour

with the public.[110] Justice Powell's comment in his dissent in *Furman v Georgia* bears repetition:

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

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

---

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

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

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

Cruel, Inhuman and Degrading Punishment

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

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

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

[91] The California decision is *People v. Anderson*.[114] Capital punishment was held by six of the seven judges of the Californian Supreme Court to be "impermissibly cruel"[115] under the California Constitution which prohibited cruel or unusual punishment. Also,

> It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.[116]

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

---

[114] *Supra* note 62.

[115] Id. at 899. The cruelty lay "...not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out." Id. at 894 (citations omitted).

[116] Id. at 899.

[117] 381 Mass. 648 (1980).

[118] "...[T]he death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror." Id. at 664. "All murderers are extreme offenders. Fine distinctions, designed to select a very few from the many, are inescapably capricious when applied to murders and murderers." Id. at 665. "...[A]rbitrariness and

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

---

discrimination...inevitably persist even under a statute which meets the demands of *Furman*." Id. at 670. "...[T]he supreme punishment of death, inflicted as it is by chance and caprice, may not stand." Id. at 671. "The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live. But that negation of his personality carries through the entire period between sentence and execution." Id. at 683 (Liacos, J., concurring).

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

---

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

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

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

[95] The carrying out of the death sentence destroys life, which is protected without reservation under *section* 9 of our Constitution, it annihilates human dignity which is protected under *section* 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of *section* 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning,[122] I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.

Is capital punishment for murder justifiable?

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

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

[97] It is difficult to conceive of any circumstances in which torture, which is specifically prohibited under *section* 11(2), could ever be justified. But that does not necessarily apply to capital punishment. Capital punishment, unlike torture, has not been absolutely prohibited by public international law. It is therefore not inappropriate to consider whether the death penalty is justifiable under our Constitution as a penalty for murder. This calls for an enquiry similar to that undertaken by Brennan J in *Furman*'s case[123] in dealing with the contention that "death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment."[124] The same question is addressed and answered in the negative in the judgment of Wright CJ in *People v Anderson*.[125] Under the United States Constitution and the Californian Constitution, which have no limitation clauses, this enquiry had to be conducted within the larger question of the definition of the right. With us, however, the question has to be dealt with under *section* 33(1).

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

> The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
>
> (a) shall be permissible only to the extent that it is-
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and

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

[124] Id.

[125] "The People concede that capital punishment is cruel to the individual involved. They argue, however, that only "unnecessary" cruelty is constitutionally proscribed, and that if a cruel punishment can be justified it is not forbidden by article I, section 6, of the California Constitution." *Supra* note 62, at 895.

(b) shall not negate the essential content of the right in question.

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

The Two-Stage Approach

[100] Our Constitution deals with the limitation of rights through a general limitations clause. As was pointed out by Kentridge AJ in *Zuma*'s case,[126] this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of *section* 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the "two-stage" approach may often produce the same result as the "one-stage" approach,[127] this will not always be the case.

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

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

[127] Attorney-General of Hong Kong v Lee Kwong-Kut, (1993) AC 951 at 970-972 (PC).

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

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

The Application of Section 33

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

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

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

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

Limitation of Rights in Canada

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

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

[105] In dealing with this aspect of the case, Mr Trengove placed considerable reliance on the decision of the Canadian Supreme Court in *R v Oakes*.[132] The Canadian Charter of Rights, as our Constitution does, makes provision for the limitation of rights through a general clause. *Section* 1 of the Charter permits such reasonable limitations of Charter rights "as can be demonstrably justified in a free and democratic society." In *Oakes*' case it was held that in order to meet this requirement a limitation of a Charter right had to be directed to the achievement of an objective of sufficient importance to warrant the limitation of the right in question, and that there had also to be proportionality between the limitation and such objective. In a frequently-cited passage, Dickson CJC described the components of proportionality as follows:

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd. at p. 352. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[133]

[106] Although there is a rational connection between capital punishment and the purpose for which it is prescribed, the elements of arbitrariness, unfairness and irrationality in the imposition of the penalty, are factors that would have to be taken into account in the application of the first component of this test. As far as the second component is concerned, the fact that a severe punishment in the form of life imprisonment is available as an alternative sentence, would be relevant to the question whether the death sentence impairs the right as little as possible. And as I will show later, if all relevant considerations are taken into account, it is at least doubtful whether a

[132] (1986) 19 CRR 308.

[133] Id. at 337.

sentence of capital punishment for murder would satisfy the third component of the *Oakes* test.

[107] The second requirement of the *Oakes* test, that the limitation should impair the right "as little as possible" raises a fundamental problem of judicial review. Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature? Since the judgment in *R v Oakes*, the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy. In *Irwin Toy Ltd v Quebec (Attorney General),*[134] Dickson CJ cautioned that courts, "must be mindful of the legislature's representative function." In *Reference re ss. 193 and 195 (1)(c) of the Criminal Code (Manitoba)*,[135] it was said that "the role of the Court is not to second-guess the wisdom of policy choices made by ...legislators"; and in *R v Chaulk*, that the means must impair the right "as little as is reasonably possible".[136] Where choices have to be made between "differing reasonable policy options", the courts will allow the government the deference due to legislators, but "[will] not give them an unrestricted licence to disregard an individual's Charter Rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down."[137]

Limitation of Rights in Germany

---

[134] (1989) 39 CRR 193 at 248.

[135] (1990) 48 CRR 1 at 62.

[136] (1991) 1 CRR (2d) 1 at 30.

[137] Per La Forest J in Tetreault-Gadoury v Canada (Employment and Immigration Commission) (1991), 4 CRR(2d) 12 at 26. *See also*, Rodriquez v British Columbia (AG) (1994) 17 CRR(2d) 192 at 222 and 247.

[108] The German Constitution does not contain a general limitations clause but permits certain basic rights to be limited by law. According to Professor Grimm,[138] the Federal Constitutional Court allows such limitation "only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests...any restriction of human rights not only needs constitutionally valid reasons but also has to be proportional to the rank and importance of the right at stake." Proportionality is central to the process followed by the Federal Constitutional Court in its adjudication upon the limitation of rights. The Court has regard to the purpose of the limiting legislation, whether the legislation is suitable for the achievement of such purpose, which brings into consideration whether it in fact achieves that purpose, is necessary therefor, and whether a proper balance has been achieved between the purpose enhanced by the limitation, and the fundamental right that has been limited.[139] The German Constitution also has a provision similar to *section* 33(1)(b) of our Constitution, but the Court apparently avoids making use of this provision,[140] preferring to deal with extreme limitations of rights through the

---

[138] Dieter Grimm, *Human Rights and Judicial Review in Germany*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 267, 275 (David H. Beatty, ed., Martinus Nijhoff publ.)(1994). Prof. Grimm is presently a member of the German Federal Constitutional Court.

[139] Id. For a discussion of the application of the principle of proportionality in German Constitutional jurisprudence, see CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 18-20, 307-310 (Univ. of Chicago Press)(1994). Prof. Currie outlines the genesis of proportionality, intimated in the Magna Carta and generally described by Blackstone, and notes that it was further developed by Carl Gottleib Svarez, a celebrated thinker of the German Enlightenment. "Svarez insisted on proportionality both between ends and means and between costs and benefits; both aspects of the principle are reflected in the jurisprudence of the Constitutional Court." Currie at 307.

[140] Currie, id., at 178, note 15 and accompanying text. *See also infra* note 161.

proportionality test.

Limitation of Rights Under the European Convention

[109] The European Convention also has no general limitations clause, but makes certain rights subject to limitation according to specified criteria. The proportionality test of the European Court of Human Rights calls for a balancing of ends and means. The end must be a "pressing social need" and the means used must be proportionate to the attainment of such an end. The limitation of certain rights is conditioned upon the limitation being "necessary in a democratic society" for purposes defined in the relevant provisions of the Convention. The national authorities are allowed a discretion by the European Court of Human Rights in regard to what is necessary - a margin of appreciation - but not unlimited power. The "margin of appreciation" that is allowed varies depending upon the nature of the right and the nature and ambit of the restriction. A balance has to be achieved between the general interest, and the interest of the individual.[141] Where the limitation is to a right fundamental to democratic society, a higher standard of justification is required;[142] so too, where a law interferes with the "intimate aspects of private life."[143] On the other hand, in areas such as morals or social policy greater scope is allowed to the national authorities.[144] The jurisprudence of the European Court of Human Rights provides some guidance as to what may be considered necessary in a democratic society, but the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of the member states. It is not necessarily a safe guide as to what would be appropriate under *section* 33 of our Constitution.

---

[141] R v France (1993) 16 EHRR 1, para. 63.

[142] Handyside v United Kingdom (1979-80) 1 EHRR 737, para. 49.

[143] Dudgeon v United Kingdom (1981) 4 EHRR 149, para. 52; Norris v Ireland (1988) 13 EHRR 186, para. 46; Modinos v Cyprus (1993) 16 EHRR 485.

[144] "...[T]he margin of appreciation available to the legislature in implementing social and economic policies should be a wide one..." James v United Kingdom (1986) 8 EHRR 123, para. 46. *See also*, Lithgow v United Kingdom (1986) 8 EHRR 329, para. 122.

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

[110] In *Zuma's case*, Kentridge AJ pointed out that the criteria developed by the Canadian Courts for the interpretation of *section* 1 of the Canadian Charter of Rights may be of assistance to our Courts, but that there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which *section* 33 should be dealt with. This is equally true of the criteria developed by other courts, such as the German Constitutional Court and the European Court of Human Rights. Like Kentridge AJ, "I see no reason in this case... to attempt to fit our analysis into the Canadian pattern,"[145] or for that matter to fit it into the pattern followed by any of the other courts to which reference has been made. *Section* 33 prescribes in specific terms the criteria to be applied for the limitation of different categories of rights and it is in the light of these criteria that the death sentence for murder has to be justified.

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

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

[112] The Attorney General contended that the imposition of the death penalty for murder in the most serious cases could be justified according to the prescribed criteria. The argument went as follows. The death sentence meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do. It has a greater deterrent effect than life imprisonment; it ensures that the worst murderers will not endanger the lives of prisoners and warders who would be at risk if the "worst of the murderers" were to be imprisoned and not executed; and it also meets the need for retribution which is demanded by society as a response to the high level of crime. In the circumstances presently prevailing in the country, it is therefore a necessary component of the criminal justice system. This, he said, is recognised by the Appellate Division, which only confirms a death sentence if it is convinced that no other sentence would be a proper sentence.[146]

The Judgements of the Appellate Division

[113] The decisions of the Appellate Division to which the Attorney General referred are only of limited relevance to the questions that have to be decided in the present case. The law which the Appellate Division has applied prescribes that the death sentence is a competent sentence for murder in a proper case. The Appellate Division has reserved this sentence for extreme cases in which the maximum punishment would be the appropriate punishment. Were it to have done otherwise, and to have refused to pass death sentences, it would in effect have been saying that the death sentence is never a proper sentence, and that *section* 277(1)(a) should not be enforced. This was not within its competence. The criteria set by the Appellate Division for the passing of a death sentence for murder are relevant to the argument on arbitrariness, and also provide a basis for testing the justifiability of such a penalty. They do not, however, do more than that.

The Judgement of the Tanzanian Court of Appeal

[146] S v Senonohi, *supra* note 76, at 734F-G.

[114] There is support for part of the Attorney General's argument in the judgment of the Tanzanian Court of Appeal in *Mbushuu and Another v The Republic*.[147] It was held in this case that the death sentence amounted to cruel and degrading punishment, which is prohibited under the Tanzanian Constitution, but that despite this finding, it was not unconstitutional. The Constitution authorised derogations to be made from basic rights for legitimate purposes, and a derogation was lawful if it was not arbitrary, and was reasonably necessary for such purpose. The legitimate purposes to which the death sentence was directed was a constitutional requirement that "everyone's right to life shall be protected by law." The death sentence was a mandatory penalty for murder, but it was not considered by the Court to be arbitrary because decisions as to guilt or innocence are taken by judges. There was no proof one way or the other that the death sentence was necessarily a more effective punishment than a long period of imprisonment. In the view of the Court, however, it was for society and not the courts to decide whether the death sentence was a necessary punishment. The Court was satisfied that society favoured the death sentence, and that in the circumstances "the reasonable and necessary" standard had been met. Accordingly, it held that the death sentence was a lawful derogation from the prohibition of cruel and degrading punishment, and thus valid.

[147] Criminal Appeal No. 142 of 1994; 30 January 1995.

[115] The approach of the Tanzanian Court of Appeal to issues concerning the limitation of basic rights seems to have been influenced by the language of the Tanzanian Constitution,[148] and rules of interpretation developed by the Courts to deal with that language. The relevant provisions of our Constitution are different and the correct approach to the interpretation of the limitations clause must be found in the language of *section* 33 construed in the context of the Constitution as a whole. It is for the Court, and not society or Parliament, to decide whether the death sentence is justifiable under the provisions of *section* 33 of our Constitution.[149] In doing so we can have regard to societal attitudes in evaluating whether the legislation is reasonable and necessary, but ultimately the decision must be ours. If the decision of the Tanzanian Court of Appeal is inconsistent with this conclusion, I must express my disagreement with it.

Deterrence

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

---

[148] Id., wherein Ramadhani JA., highlights with respect to the Republic of Tanzania Constitution, that *article* 30(2) provides that laws, and actions taken in accordance with such laws, shall not be invalidated under the Constitution if such laws (or actions) make provision, *inter alia*, for "ensuring that the rights and freedom of other or the public interest are not prejudiced by the misuse of the individual rights and freedom." Id. at p. 23. The judgment refers to "derogations" and not to "limitations".

[149] See discussion on public opinion *supra* paras. 87 to 89.

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

[118] The Attorney General pointed to the substantial increase in the incidence of violent crime over the past five years during which the death sentence has not been enforced. He contended that this supported his argument that imprisonment is not a sufficient deterrent, and that we have not yet reached the stage of development where we can do without the death sentence. Throughout this period, however, the death sentence remained a lawful punishment, and was in fact imposed by the courts although the sentences were not carried out.[150] The moratorium was only announced formally on

[150] S v W 1993(2) SACR 74, at 76H-I.

27 March 1992.[151] A decision could have been taken at any time to terminate the moratorium on executions, and none of the criminals had any assurance that the moratorium would still be in place if they were to be caught, brought to trial, convicted and sentenced to death.

[151] In the Statement of Minister of Justice dated 27 March 1992, *supra* note 31, para. 22.

[119] The cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts. The upsurge in violent crime came at a time of great social change associated with political turmoil and conflict, particularly during the period 1990 to 1994. It is facile to attribute the increase in violent crime during this period to the moratorium on executions.[152] It was a progression that started before the moratorium was announced. There are many factors that have to be taken into account in looking for the cause of this phenomenon. It is a matter of common knowledge that the political conflict during this period, particularly in Natal and the Witwatersrand, resulted in violence and destruction of a kind not previously experienced. No-go areas, random killings on trains, attacks and counter attacks upon political opponents, created a violent and unstable environment, manipulated by political dissidents and criminal elements alike.

[120] Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave. And there is also the important factor that the police and prosecuting authorities have been unable to cope with this. The statistics presented in the police *amicus brief* show that most violent crime is not solved, and the Attorney General confirmed that the risk of a criminal being apprehended and convicted for such offences is somewhere between 30 and 40 per cent. Throughout the period referred to by the Attorney General the death sentence remained on the statute book and was imposed on convicted murderers when the Courts considered it appropriate to do so.

[121] We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom

[152] Indeed, such a hypothesis is not born out by the statistics analysed by Justice Didcott in his concurring opinion at para 182.

the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be more of them if imprisonment is the only sanction. No information was placed before us by the Attorney General in regard to the rising crime rate other than the bare statistics, and they alone prove nothing, other than that we are living in a violent society in which most crime goes unpunished - something that we all know.

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

[123] In the debate as to the deterrent effect of the death sentence, the issue is sometimes dealt with as if the choice to be made is between the death sentence and the murder going unpunished. That is of course not so. The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which, in an appropriate case, could be a sentence of life imprisonment.[153] Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect, and whether the Constitution sanctions the limitation of rights affected thereby.

[153] Since 1991, *section* 64 of the Correctional Service Act 8 of 1959 has provided that a person sentenced to life imprisonment may only be released from prison in the following circumstances: (a) the advisory release board "with due regard to the interest of society", recommends that the prisoner be released and (b) the Minister of Correctional Services accepts that recommendation and authorizes the release of the prisoner. This means that the Minister of Correctional Services must accept responsibility for the release of the prisoner, and can only do so if the advisory release board is in favour of the prisoner being released.

[124] In the course of his argument the Attorney General contended that if sentences imposed by the Courts on convicted criminals are too lenient, the law will be brought into disrepute, and members of society will then take the law into their own hands. Law is brought into disrepute if the justice system is ineffective and criminals are not punished. But if the justice system is effective and criminals are apprehended, brought to trial and in serious cases subjected to severe sentences, the law will not fall into disrepute. We have made the commitment to "a future founded on the recognition of human rights, democracy and peaceful co-existence...for all South Africans."[154] Respect for life and dignity lies at the heart of that commitment. One of the reasons for the prohibition of capital punishment is "that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society."[155] Our country needs such role models.

[125] The Attorney General also contended that if even one innocent life should be saved by the execution of perpetrators of vile murders, this would provide sufficient justification for the death penalty.[156] The hypothesis that innocent lives might be saved must be weighed against the values underlying the Constitution, and the ability of the State to serve "as a role model". In the long run more lives may be saved through the inculcation of a rights culture, than through the execution of murderers.

[126] The death sentence has been reserved for the most extreme cases, and the overwhelming majority of convicted murderers are not and, since extenuating circumstances became a relevant factor sixty years ago, have not been sentenced to death in South Africa. I

---

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

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

[156] This proposition is advanced in greater detail by J Price, (1995) "De Rebus" 89.

referred earlier to the figures provided by the Attorney General which show that between the amendment of the Criminal Procedure Act in 1990, and January 1995, which is the date of his written argument in the present case, 243 death sentences were imposed, of which 143 were confirmed by the Appellate Division. Yet, according to statistics placed before us by the Commissioner of Police and the Attorney General, there were on average approximately 20 000 murders committed, and 9 000 murder cases brought to trial, each year during this period. Would the carrying out of the death sentence on these 143 persons have deterred the other murderers or saved any lives?

[127] It was accepted by the Attorney General that this is a much disputed issue in the literature on the death sentence. He contended that it is common sense that the most feared penalty will provide the greatest deterrent, but accepted that there is no proof that the death sentence is in fact a greater deterrent than life imprisonment for a long period. It is, he said, a proposition that is not capable of proof, because one never knows about those who have been deterred; we know only about those who have not been deterred, and who have committed terrible crimes. This is no doubt true, and the fact that there is no proof that the death sentence is a greater deterrent than imprisonment does not necessarily mean that the requirements of *section* 33 cannot be met. It is, however, a major obstacle in the way of the Attorney General's argument, for he has to satisfy us that the penalty is reasonable and necessary, and the doubt which exists in regard to the deterrent effect of the sentence must weigh heavily against his argument. "A punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be..."[157] I should add that this obstacle would not be removed by the implementation of a suggestion in one of the *amicus briefs*, that *section* 277(1) of the Criminal Procedure Act should be made more specific, and should identify the extreme categories of murder for which the death sentence would be a permissible punishment.

Prevention

[157] Wright, CJ., in People v. Anderson, *supra* note 62, at 897.

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

Retribution

[129] Retribution is one of the objects of punishment, but it carries less weight than deterrence.[158] The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of "an eye for an eye, and a tooth for a tooth". Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in gaol. The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.

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

[158] S v P 1991 (1) SA 517 (A) at 523D-F. *See also supra* note 74.

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

Reconciliation contains the following commitment:

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

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

The Essential Content of the Right

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

[132] *Section* 33(1)(b) provides that a limitation shall not negate the essential content of the right. There is uncertainty in the literature concerning the meaning of this provision. It seems to have entered constitutional law through the provisions of the German Constitution, and in addition to the South African constitution, appears, though not precisely in the same form, in the constitutions of Namibia, Hungary, and possibly other countries as well. The difficulty of interpretation arises from the uncertainty as to what the "essential content" of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way? Professor Currie draws attention to the large number of theories which have been propounded by German scholars as to the how the "essence" of a right should be discerned and how the constitutional provision should be applied.[161] The German Federal Constitutional Court has apparently avoided to a large extent having to deal with this issue by subsuming the enquiry into the proportionality test that it applies and the precise scope and meaning of the provision is controversial.[162]

[133] If the essential content of the right not to be subjected to cruel, inhuman or degrading punishment is to be found in respect for life and dignity, the death sentence for murder, if viewed subjectively from the point of view of the convicted prisoner, clearly negates the essential content of the right. But if it is viewed objectively from

[161] Currie, *supra* note 139, refers to an analysis of the 'remarkable variety of views' on the meaning of 'essence'. Id. at 178 (citing 2 Maunz/Durig, Art. 19, Abs. II, Rdnr. 16).

[162] Grimm, *supra* note 138, at page 276 states, "operating at an earlier stage than the essential content limit in Article 19(2), the proportionality principle has rendered the former almost insignificant." Currie, *supra* note 139, notes that the German Federal Constitutional Court has remarked in at least one case that dealt with the 'essential content' question that the Court "state[d] an alternative ground that, because of its greater stringency [the proportionality test], has made it unnecessary in most cases to inquire whether a restriction invades the 'essential content' of a basic right." Currie, *supra* note 139, at 306-307 (citing 22 BVerfGE 180, 220 (1967)).

the point of view of a constitutional norm that requires life and dignity to be protected, the punishment does not necessarily negate the essential content of the right. It has been argued before this Court that one of the purposes of such punishment is to protect the life and hence the dignity of innocent members of the public, and if it in fact does so, the punishment will not negate the constitutional norm. On this analysis it would, however, have to be shown that the punishment serves its intended purpose. This would involve a consideration of the deterrent and preventative effects of the punishment and whether they add anything to the alternative of life imprisonment. If they do not, they cannot be said to serve a life protecting purpose. If the negation is viewed both objectively and subjectively, the ostensible purpose of the punishment would have to be weighed against the destruction of the individual's life. For the purpose of that analysis the element of retribution would have to be excluded and the "life saving" quality of the punishment would have to be established.

[134] It is, however, not necessary to solve this problem in the present case. At the very least the provision evinces concern that, under the guise of limitation, rights should not be taken away altogether. It was presumably the same concern that influenced Dickson CJC to say in *R v Oakes* that rights should be limited "as little as possible",[163] and the German Constitutional Court to hold in the life imprisonment case that all possibility of parole ought not to be excluded.[164]

The Balancing Process

[135] In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the

[163] R v Oakes, *supra* note 132, at 337 (citing R v Big M Drug Mart Ltd., *supra*, at 352).

[164] *See* Kommers *supra* note 18.

annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.

[136] The Attorney General argued that the right to life and the right to human dignity were not absolute concepts. Like all rights they have their limits. One of those limits is that a person who murders in circumstances where the death penalty is permitted by *section* 277, forfeits his or her right to claim protection of life and dignity. He sought to support this argument by reference to the principles of self-defence. If the law recognises the right to take the life of a wrongdoer in a situation in which self-defence is justified, then, in order to deter others, and to ensure that the wrongdoer does not again kill an innocent person, why should it not recognise the power of the state to take the life of a convicted murderer? Conversely, if the death sentence negates the essential content of the right to life, how can the taking of the life of another person in self-defence, or even to protect the State itself during war or rebellion, ever be justified.

[137] This argument is fallacious. The rights vested in every person by Chapter Three of the Constitution are subject to limitation under *section* 33. In times of emergency, some may be suspended in accordance with the provisions of *section* 34 of the Constitution.[165] But subject to this, the rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Whether or not a particular punishment is inconsistent with these rights depends upon an interpretation of the relevant provisions of the Constitution, and not upon a moral judgment that a murderer should not be allowed to claim them.

[165] Sections 9(2), 9, 10 and 11(2) are in fact non-derogable rights and in terms of section 34(5)(c) cannot be suspended during an emergency.

[138] Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with *section* 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty.[166] But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to. In any event, there are material respects in which killing in self-defence or necessity differ from the execution of a criminal by the State. Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less-severe alternative is readily available to the potential victim. Killing by the State takes place long after the crime was committed, at a time when there is no emergency and under circumstances which permit the careful consideration of alternative punishment.

[166] Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgement to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so. S v Van Wyk 1967 (1) SA 488 (A). Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.

[139] The examples of war and rebellion are also not true analogies. War and rebellion are special cases which must be dealt with in terms of the legal principles governing such situations. It is implicit in any constitutional order that the State can act to put down rebellion and to protect itself against external aggression. Where it is necessary in the pursuit of such ends to kill in the heat of battle the taking of life is sanctioned under the Constitution by necessary implication, and as such, is permissible in terms of *section* 4(1).[167] But here also there are limits. Thus prisoners of war who have been captured and who are no longer a threat to the State cannot be put to death; nor can lethal force be used against rebels when it is not necessary to do so for the purposes of putting down the rebellion.

[140] The case of a police officer shooting at an escaping criminal was also raised in argument. This is permitted under *section* 49(2) of the Criminal Procedure Act as a last resort if it is not possible to arrest the criminal in the ordinary way. Once again, there are limits. It would not, for instance, be permissible to shoot at point blank range at a criminal who has turned his or her back upon a police officer in order to abscond, when other methods of subduing and arresting the criminal are possible. We are not concerned here with the validity of *section* 49(2) of the Criminal Procedure Act, and I specifically refrain from expressing any view thereon. Greater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person's right to life. Shooting at a fleeing criminal in the heat of the moment, is not necessarily to be equated with the execution of a captured criminal. But, if one of the consequences of this judgment might be to

---

[167] "The inherent right of the State to assume extraordinary powers and to use all means at its disposal in order to defend itself when its existence is at stake is recognized by our common law as an exceptional and extreme constitutional tool." Per Selikowitz J in End Conscription Campaign v Minister of Defence 1989 (2) SA 180(C) at 199H. Here too it is not necessary to examine the limits of this "inherent right", or the limitations (if any) imposed on it by the Constitution. All that need be said is that it is of an entirely different character than the alleged "right" of the State to execute murderers, and subject to different considerations.

render the provisions of *section* 49(2) unconstitutional, the legislature will have to modify the provisions of the section in order to bring it into line with the Constitution. In any event, the constitutionality of the death sentence for murder does not depend upon whether it is permissible for life to be taken in other circumstances currently sanctioned by law. It depends upon whether it is justifiable as a penalty in terms of *section* 33 of the Constitution. In deciding this question, the fact that the person sentenced to death is denied his or her right to life is of the greatest importance.

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

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

> [Prisoners retain] those absolute natural rights relating to personality, to which every man is entitled. True [their] freedom had been greatly impaired by the legal process of imprisonment but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further legal encroachment upon it. [It was] contended that the [prisoners] once in prison could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.[168]

[168] Innes J in Whittaker v Roos and Bateman 1912 AD 92 at 122-123. *See also*, Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 14 (A) at 39H-40C; Nestor and Others v Minister of Police and Others 1984 (4) SA 230 (SWA) at 250F-251D.

[143] A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality referred to by Innes J are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three subject only to limitations imposed by the prison regime that are justifiable under *section* 33.[169] Of these, none are more important than the *section* 11(2) right not to be subjected to **"**torture of any kind...nor to cruel, inhuman or degrading treatment or punishment.**"** There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether. It is that difference with which we are concerned in the present case.

Conclusion

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

[145] In the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is

[169] *See also*, Woods v Minister of Justice, Legal and Parliamentary Affairs and Others, 1995 BCLR 56(ZSC) at 58F-G; Turner v. Safley, 482 U.S. 78, 84-85 (1987).

a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet.

[146] Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of *section* 33(1) have accordingly not been satisfied, and it follows that the provisions of *section* 277(1)(a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with *section* 11(2) of the Constitution. In the circumstances, it is not necessary for me to consider whether the section would also be inconsistent with *sections* 8, 9 or 10 of the Constitution if they had been dealt with separately and not treated together as giving meaning to *section* 11(2).

Section 241(8) of the Constitution

[147] In the present case the trial had been completed but an appeal to the Appellate Division was pending, when the 1993 Constitution came into force. The validity of the trial, and the fact that the death sentences were competent sentences at the time they were imposed, are not in issue. What is in issue before the Appellate Division is whether the death sentences can and should be confirmed. It has postponed its judgment pending the determination of the issues referred to us for our decision.

[148] It is not necessary to deal with the provisions of *section* 241(8) in the present case. The Attorney General correctly conceded that if the death penalty for murder is unconstitutional, it would not be competent to carry out the death sentences that have been imposed on the accused. The prohibition of cruel, inhuman or degrading

punishment is applicable to all punishments implemented after the 27th April, and can be invoked to prevent a punishment being carried out even if the punishment was lawful when it was imposed.[170]

The Order to be made

[149] I have dealt in this judgment only with the provisions of *section* 277(1)(a) of the Criminal Procedure Act, but it is clear that if subsection (1)(a) is inconsistent with the Constitution, subsections (1)(c) to (1)(f) must also be unconstitutional, so too must provisions of legislation corresponding to *sections* 277(1)(a), (c), (d), (e) and (f) that are in force in parts of the national territory in terms of *section* 229 of the Constitution. Different considerations arising from *section* 33(1) might possibly apply to subsection (b) which makes provision for the imposition of the death sentence for treason committed when the republic is in a state of war. No argument was addressed to us on this issue, and I refrain from expressing any views thereon.

[150] The proper sentence to be imposed on the accused is a matter for the Appellate Division and not for us to decide. This, and other capital cases which have been postponed by the Appellate Division pending the decision of this Court on the constitutionality of the death sentence, can now be dealt with in accordance with the order made in this case. Lest there be any doubt on this score, one of the effects of our judgment is to prohibit the State, or any of its organs, from executing persons whose appeals against sentences of death have been disposed of. Such persons will remain in custody under the sentences imposed on them until such sentences have been set aside in accordance with law, and substituted by appropriate and lawful punishments. This will form part of the order made.

[151] The following order is made:

---

[170] *See* Pratt v Attorney General for Jamaica; and Catholic Commission for Justice in Zimbabwe v The Attorney General, Zimbabwe, and Others, *supra* note 3.

1. In terms of *section* 98(5) of the Constitution, and with effect from the date of this order, the provisions of paragraphs (a), (c), (d), (e) and (f) of *section* 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of *section* 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

2. In terms of *section* 98(7) of the Constitution, and with effect from the date of this order:

   (a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and

   (b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.

[152] **ACKERMANN J**: I concur fully in the judgment of the President, both regarding his conclusions and his reasons therefor, save in the respects hereinafter set forth. I also agree with the order proposed by him.

[153] I place greater emphasis on the inevitably arbitrary nature of the decision involved in the imposition of the death penalty as a form of punishment in supporting the conclusion that it constitutes "cruel", "inhuman" and "degrading punishment" within the meaning of section 11(2) of the Constitution, which cannot be saved by section 33(1).

[154] In paragraphs [43] to [56] of his judgment the President deals with the arbitrariness and inequality of the death penalty. He deals (more particularly in paragraphs [55] and [56]) with the difficulties faced by the US Supreme Court in trying to eliminate the dangers of arbitrariness by employing the due process provisions of the Fifth and

Fourteenth Amendments. Such efforts cause considerable expense and interminable delays, and the President concludes by expressing the view that we should not follow the United States route. I agree, but that does not mean that we ought not to accord greater weight to considerations of arbitrariness and inequality. The US Supreme Court has been obliged to follow the route it did because, so it seems to me, their Constitution postulates (by implication) that it is possible to devise due process mechanisms which can deal with the arbitrary and unequal features of death sentence imposition. We are not so constrained. Our right to life is not qualified in the way it is qualified in the Fifth and Fourteenth Amendments of the US Constitution. We are not constitutionally constrained to accept the arbitrary consequences of the imposition of the death penalty.

[155] The preamble to the Constitution refers to the creation of a new order in a state, which, amongst other things, is described as a "constitutional state." Section 4(1) declares the Constitution to be the "supreme law of the Republic" which by virtue of section 4(2) "binds all legislative, executive and judicial organs of state at all levels of government." Every person's right to equality before the law is entrenched in section 8(1) and in section 8(2) a substantial number of different grounds of unfair discrimination are prohibited. The constitutional importance of equality is further underscored in section 35(1) which enjoins the courts to promote the values which underlie an open and democratic society based on freedom and equality in interpreting the provisions of Chapter 3.

[156] In reaction to our past, the concept and values of the constitutional state, of the "regstaat", and the constitutional right to equality before the law are deeply foundational to the creation of the "new order" referred to in the preamble. The detailed enumeration and description in section 33(1) of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the Constitution emphasises the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a

constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution[171]. Arbitrariness must also inevitably, by

[171]See in general Prof. E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 10 (1994) SAJHR 31. At 32 the learned author points out that -

> "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; ... If the Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut".

At 38 he points out that Chapter 3 of the Constitution, and in particular section 24, the administrative justice clause -

> "gives a lead which, properly followed, would put South Africa at the frontiers of the search for a culture of justification."

its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.

[157] It is in the context of our (textually) unqualified section 9 right to life that I find certain observations in the US decisions supportive on the issue and consequences of arbitrariness. We are free to look at the incidence and consequences of arbitrariness without being constrained by a constitutional authorization (whether explicit or implicit) of the death penalty. One must of course constantly bear in mind that the relevant criteria in the Eighth Amendment of the US Constituion also differ from those in section 11(2) of our Constitution. Whereas in the former they are "cruel and unusual" in the latter they are "cruel, inhuman or degrading".

[158] In Furman v. Georgia[172] the US Supreme Court had to consider a case where the determination of whether the penalty for murder and rape should be death or another punishment was left by the State of Georgia to the discretion of the judge or of the jury. In the course of his judgment[173] Douglas J referred with approval to the following comments in a journal article:

> "A penalty ... should be considered 'unusually' imposed if it is administered arbitrarily or discriminatingly ... [t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness."

He further expressed the view[174] that -

> "[t]he high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded,

[172]408 US 238 (1972).

[173]Id. at 249.

[174]Id. at 256.

non-selective, and nonarbitrary ..."

[159] On the issue of arbitrariness Brennan J observed in Furman[175] that -

> "In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the [Cruel and Unusual Punishments] Clause - that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."

[175]Id. at 274.

He also stated[176] (in a context not dissimilar to ours where a vast number of murders are committed, a large number of accused charged and convicted but relatively few ultimately executed) that -

> "No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible ..... Nor is the distinction credible in fact."

[160] Stewart J founded his judgment on the fact that the imposition of so extreme a penalty in pursuance of the Georgia statute was inevitably arbitrary. After referring to the fact that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" he concludes simply by holding that -

> "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"[177]

[176]Id. at 294.

[177]Id. at 309 - 310.

[161] In Callins v. Collins, cert. denied, 114 S.Ct. 1127, 127 L.Ed 435 (1994) Blackmun J filed a dissenting opinion. In it he observed that[178]-

> "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see Furman v. Georgia, supra, can never be achieved without compromising an equally essential component of fundamental fairness - individualized sentencing. See Lockett v. Ohio, 438 U.S. 586 (1978)."

and, commenting upon its unavoidable arbitrariness, that[179]-

> "[i]t is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question - does the system accurately and consistently determine which defendants 'deserve' to die? - cannot be answered in the affirmative."

He further expressed the view that[180]-

> "[a]lthough most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it must not be administered at all." (emphasis added)

---

[178] Callins v. Collins, supra, at 1129.

[179] Id. at 1130.

[180] Id. at 1131.

and that[181], in the aftermath of the Furman judgment -

> "[i]t soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake. Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death ... evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty ... [T]he consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness".

[162] In considering a constitutional right to life unfettered by the restraints or interpretative problems of the right in the US Constitution, I am of the view that the above dicta are appropriate to the issue of the constitutionality of the death sentence in South Africa. As general propositions, which can be applied in the context of our Constitution, I would accept and endorse the views of Blackmun J.

[163] As to the more general principle that arbitrariness conflicts with the idea of a right to equality and equality before the law I am fortified in my view by the following remarks of Bhagwati, J in Gandhi v. Union of India 1978 SC 597 at 624:

> "We must reiterate here what was pointed out by the majority in E.P. Royappa v. State of Tamil Nadu (1974) 2 SCR 348: (AIR 1974 SC 555) namely, that 'from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore violative of Article 14.'"

[164] I am mindful of the fact that it is virtually impossible (save in the case of rigidly circumscribed mandatory sentences - which present other dangers) to avoid elements of arbitrariness in the imposition of any punishment. Arbitrary elements are present in

[181] Id. at 1132.

the difficult decision to send an offender to prison for the first time, or in deciding what the appropriate length of the prison sentence should be in any case where it is imposed. However, the consequences of the death sentence, as a form of punishment, differ so radically from any other sentence that the death sentence differs not only in degree but also

in substance from any other form of punishment. A sentence which preserves life differs incomparably from one which obliterates life. The executed person has, in fact, "lost the right to have rights."[182] In this sense the death sentence is unique and

[182] Trop v. Dulles 356 US 84 (1958) at 102 quoted with approval by Brennan J in Furman, supra note 2, at 289. See also Stewart J in Furman at 306:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

the dimension and consequences of arbitrariness in its imposition differ fundamentally from the dimension and consequences of arbitrariness in the imposition of any other punishment[183].

[183]In Callins v. Collins, supra, at 1132, Blackmun J, quoting from the opinion of Stewart, Powell and Stevens JJ in Woodson v. North Carolina 428 US 280 (1976) at 305, pointed out that because of the qualitative difference of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

[165] In paragraphs [44] to [46] of his judgment the President has referred to the relevant statutory provisions prescribing the tests to be applied for the imposition of the death sentence and the guidelines laid down for their application by the Appellate Division of the Supreme Court. In the end, whatever guidelines are employed, a process of weighing up has to take place between "mitigating factors" (if any) and "aggravating factors" and thereafter a value judgment made as to whether "the sentence of death is the proper sentence." I am not suggesting that the statutory provisions could have been better formulated or that the Appellate Division guidelines could be improved upon. The fact of the matter is that they leave such a wide latitude for differences of individual assessment, evaluation and normative judgment, that they are inescapably arbitrary to a marked degree. There must be many borderline cases where two courts, with the identical accused and identical facts, would undoubtedly come to different conclusions. I have no doubt that even on a court composed of members of the genus Hercules[184] and Athena there would in many cases be differences of opinion, incapable of rational elucidation, on whether to impose the death penalty in a particular case, where its imposition was, as in the case of section 277(1) of the Criminal Procedure Act, dependant on the application of widely formulated criteria and the exercise of difficult value judgments.

[166] The conclusion which I reach is that the imposition of the death penalty is inevitably arbitrary and unequal. Whatever the scope of the right to life in section 9 of the Constitution may be, it unquestionably encompasses the right not to be deliberately put to death by the state in a way which is arbitrary and unequal. I would therefore hold that section 277(1)(a) of the Criminal Procedure Act is inconsistent with the section 9 right to life. I would moreover also hold that it is inconsistent with section

[184]Prof. Dworkin's lawyer "of superhuman skill, learning, patience and acumen"; see Taking Rights Seriously (1978) 105.

11(2). Where the arbitrary and unequal infliction of punishment occurs at the level of a punishment so unique as the death penalty, it strikes me as being cruel and inhuman. For one person to receive the death sentence, where a similarly placed person does not, is, in my assessment of values, cruel to the person receiving it. To allow chance, in this way, to determine the life or death of a person, is to reduce the person to a cypher in a sophisticated judicial lottery. This is to treat the sentenced person as inhuman. When these considerations are taken in conjunction with those set forth by the President in his judgment, they render the death penalty a cruel, inhuman and degrading punishment. For the reasons expounded by the President in his judgment, and with which I fully agree, neither the infringement of section 9 nor of section 11(2) by section 277(1)(a) of the Criminal Procedure Act, can be saved by the provisions of section 33(1) of the Constitution. Accordingly the provisions of section 277(1)(a) must be held to be inconsistent with sections 9 and 11(2) of the Constitution.

[167] In paragraphs [132] to [134] of his judgment the President alludes to the provision in section 33(1)(b) of the Constitution that a limitation "shall not negate the essential content of the right in question" but, after referring to uncertainties concerning its meaning, finds it unnecessary to resolve the issue in the present case. In paragraph [133] he postulates, however, a subjective and an objective approach to the problem. I do not necessarily agree with his formulation of the objective approach. In my view it is unnecessary in the present case to say anything at all about the meaning to be attached to this provision. It is one which the framers of our Constitution borrowed in part from article 19(2) of the German Basic Law ("Grundgesetz") which provides that -

> "In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden"
> ("In no case may the essence of a basic right be encroached upon"[15])

[15]From the official translation published by the Press and Information Office of the Federal Government, Bonn (1994).

There are obvious differences in the wording of the qualification. Nevertheless there is a wealth of German case law and scholarship on the topic[16]. Without the fullest

[16]Decisions of the Federal Constitutional Court: 2 BVerfGE 266 at 285; 6 BVerfGE 32 at 41; 7 BVerfGE 377 at 411; 13 BVerfGE 97 at 122; 15 BVerfGE 126 at 144; 16 BVerfGE 194 at 201; 21 BVerfGE 92 at 93; 22 BVerfGE 180 at 218; 27 BVerfGE 344 at 350; 30 BVerfGE 1 at 24; 30 BVerfGE 47 at 53; 31 BVerfGE 58 at 61; 32 BVerfGE 373 at 379; 34 BVerfGE 238 at 245; 58 BVerfGE 300 at 348; 61 BVerfGE 82 at 113; 80 BVerfGE 367 at 373.

Decisions of the Federal Administrative Court: 1 BVerwGE 92 at 93; 1 BVerwGE 269 at 270; 2 BVerwGE 85 at 87; BVerwGE reported in 90 Deutsches Verwaltungsblatt at 709.

Decisions of the Federal Court of Justice: 4 BGHSt 375 at 377 (also reported in 1955 Die Öffentliche Verwaltung at 176); 4 BGHSt 385; 5 BGHSt 375; 6 BGHZ 270 at 275; 22 BGHZ 168 at 176.

General academic works: Von Münch/Kunig Grundgesetz Kommentar (1992) 997-1004; Leibholz-Rinck-Hesselberger Grundgesetz Kommentar an Hand der Rechtsprechung des Bundesverfassungsgerichts (1994)(commentary on art.19) 16-18; Maunz-Dürig-Herzog Grundgesetz Kommentar (1991) (commentary on art.19II) 1-14; Jarass/Pieroth Grundgesetz für die Bundesrepublik Deutschland (1992) 336-8; J Isensee & P Kirchhof (eds) Handbuch des Staatsrechts vol 5 (1992) 795; E Denninger in Reihe Alternativkommentare Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (1984) 1179; Schmidt-Bleibtreu-Klein Kommentar zum Grundgesetz (1990) 397-9; K Hesse Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (1991) 140; Von Mangoldt/Klein Das Bonner Grundgesetz (1966) 551; K Doehring Allgemeine

exposition of, and argument on, inter alia, the German jurisprudence in this regard, I consider it undesirable to express any view on the subject.

Staatslehre (1991) 222; Maunz-Zippelius Deutsches Staatsrecht (1991) 161.

Specialist literature on art.19(2) GG: P Häberle Die Wesensgehaltgarantie des Artikels 19 Abs. 2 Grundgesetz (1983); E von Hippel Grenzen und Wesensgehalt der Grundrechte (1965); H Krüger 'Der Wesensgehalt der Grundrechte des Art.19 GG' (1955) Die Öffentliche Verwaltung 597; L Scheider Der Schutz des Wesensgehalts von Grundrechten nach Art.19 Abs.2 GG (1983); G Herbert 'Der Wesensgehalt der Grundrechte' 12 (1985) Europäische Grundrechte Zeitschrift 321; Zivier Der Wesensgehalt der Grundrechte Diss. Berlin (1960); J Chlosta Der Wesensgehalt der Eigentumsgewährleistung (1975); P Lerche Übermass und Verfassungsrecht (1961); Kaufmann 'Über den 'Wesensgehalt' der Grund- und Menschenrechte' (1984) Archiv für Rechts- und Sozialphilosophie 384; E Denninger 'Zum Begriff des 'Wesensgehaltes' in der Rechtsprechung (Art.19.Abs.II GG)' (1960) Die Öffentliche Verwaltung 812.

[168] Members of the public are understandably concerned, often frightened, for their life and safety in a society where the incidence of violent crime is high and the rate of apprehension and conviction of the perpetrators low. This is a pressing public concern. However important it undoubtedly is to emphasise the constitutional importance of individual rights, there is a danger that the other leg of the constitutional state compact may not enjoy the recognition it deserves. I refer to the fact that in a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the state, in the constitutional state compact, assumes the obligation to protect these rights. If the state fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa. "The need for a strong deterrent to violent crime" is underscored by the President in his judgment as is the duty of the state, through the criminal justice system, to ensure that offenders will be apprehended and convicted, for these steps are conditions precedent to punishment.[17]

[169] Apart from deterring others, one of the goals of punishment is to prevent the convicted prisoner from committing crimes again. Both the preventative and reformative components of punishment are directed towards this end, although reformation obviously has the further commendable aim of the betterment of the prisoner. Society as a whole is justifiably concerned that this aim of punishment should be achieved and society fears the possibility that the violent criminal, upon release from prison, will once again harm society. Society is particularly concerned with the possibility of this happening in the case of an unreformed recidivist murderer or rapist if the death penalty is abolished.

[17]Para. 117.

[170] The President has rightly pointed out in his judgment that in considering the deterrent effect of the death sentence the evaluation is not to be conducted by contrasting the death penalty with no punishment at all but between the death sentence and "severe punishment of a long term of imprisonment which, in an appropriate case, could be a sentence of life imprisonment";[18] I agree with this approach. With the abolition of the death penalty society needs the firm assurance that the unreformed recidivist murderer or rapist will not be released from prison, however long the sentence served by the prisoner may have been, if there is a reasonable possibility that the prisoner will repeat the crime. Society needs to be assured that in such cases the state will see to it that such a recidivist will remain in prison permanently.

[171] I appreciate the concern of not wishing to anticipate the issue as to whether life imprisonment, however executed and administered, is constitutional or not. At the same time I do not believe that the two issues can be kept in watertight separate juristic compartments. If the death penalty is to be abolished, as I believe it must, society is entitled to the assurance that the state will protect it from further harm from the convicted unreformed recidivist killer or rapist. If there is an individual right not to be put to death by the criminal justice system there is a correlative obligation on the state, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist. The right and the obligation are inseparably part of the same constitutional state compact.

[18]Para. 123.

[172] Article 102 of the German Basic Law declares that capital punishment is abolished. The German Federal Constitutional Court considered the constitutionality of life imprisonment in 1977[19]. The provision in the criminal code which prescribes life imprisonment for murder was challenged on the basis that it conflicted with the protection afforded to human dignity (art 1.1) and personal freedom (art 2.2) in the German Basic Law. The Court upheld the law on the basis that it was not shown that the serving of a sentence of life imprisonment leads to irreparable physical or psychological damage to the prisoner's health. The Court did however find that the right to human dignity demands a humane execution of the sentence. This meant that the existing law, which made provision for executive pardon, had to be replaced by a law laying down objective criteria for the release of prisoners serving life sentences. In the course of its judgment, the Court made clear that there is nothing constitutionally objectionable to executing a life sentence in full in cases where the prisoner does not meet the criteria. At page 242 of the judgment the Court said:

> "Die Menschenwürde wird auch dann nicht verletzt, wenn der Vollzug der Strafe wegen fortdauernder Gefährlichkeit des Gefangenen notwendig ist und sich aus diesem Grunde eine Begnadigung verbietet. Es ist der staatlichen Gemeinschaft nicht verwehrt, sich gegen einen gemeingefährlichen Straftäter durch Freiheitsentzug zu sichern."
>
> ("Human dignity is not infringed when the execution of the sentence remains necessary due to the continuing danger posed by the prisoner and clemency is for this reason precluded. The state is not prevented from protecting the community from dangerous criminals by keeping them incarcerated".)

[173] **DIDCOTT J:** I agree with Chaskalson P that our new Constitution (Act 200 of 1993)

[19] 45 BVerfGE 187.

outlaws capital punishment in South Africa for the crimes covered by his judgment, and I concur in the order giving effect to that conclusion which he proposes to make.

[174] My grounds for believing the death penalty to be unconstitutional for the crimes in question are these. Capital punishment violates the right to life of every person that is protected by section 9 of the Constitution and contravenes the prohibition pronounced in section 11(2) against cruel, inhuman or degrading punishment, both of which bind the state and its organs in terms of section 7(1). The provisions of the Criminal Procedure Act (51 of 1977) that sanction sentences of death for such crimes are not saved from nullification in their consequent clash with sections 9 and 11 (2). For they fail to satisfy the conditions which paragraph (a) of section 33(1) prescribes for their survival as exceptions to the general rule, the conditions requiring that they must be reasonable in the first place and, in a society of the sort described there, justifiable in the second. Nor do they pass the further test of necessity set by paragraph (aa) for any permissible invasion of section 11(2).

[175] Perhaps the essential content of the right to life is negated in addition, an effect not countenanced by paragraph (b) of section 33(1) which subjects the legitimacy of any encroachment on the right to the extra requirement that no such result may ever ensue. That point may be put aside, however, once the requirements of paragraphs (a) and (aa) are not met. Negating the essential content of a constitutional right is a concept less simple and clear than it may appear at first to be. Any definitive ruling on its import that was made now would have a profound bearing on other issues likely to confront us in the future, with implications for them which are difficult to foresee at so early a stage in the development of our jurisprudence. It is better, I therefore feel, not to go into the question on this occasion, but to leave that open for consideration and decision on a different one when it has to be answered.

[176] Nor, for much the same reasons, do I think it wise to venture at present a comprehensive and exact definition of what is encompassed by the constitutional right to life. It suffices for the purposes of this case to say that the proclamation of the right and the respect

for it demanded from the state must surely entitle one, at the very least, not to be put to death by the state deliberately, systematically and as an act of policy that denies in principle the value of the victim's life. Those are hardly features of deaths which the state may happen to cause in the course of waging defensive warfare, quelling an insurrection or rescuing hostages, to cite some situations debated before us in which a constitutional protection of life was said to be inconceivable. Such hallmarks do, however, characterise every execution by the state of a criminal.

[177] Whether execution ranks also as a cruel, inhuman or degrading punishment is a question that lends itself to no precise measurement. It calls for a value judgment in an area where personal opinions are prone to differ, a value judgment that can easily become entangled with or be influenced by one's own moral attitude and feelings. Judgments of that order must often be made by courts of law, however, whose training and experience warns them against the trap of undue subjectivity. Such a judgment is now required from us, at all events, and would have been inescapable whichever way the question was answered. Nor do we lack guidance on it. A provision of the Zimbabwean Constitution which banned inhuman or degrading punishment was considered by their Supreme Court in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993(4) SA 239 (ZSC). Gubbay CJ had this to say about it (at 247 I - 248 B):

> "It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment.....of the individual be exercised within the ambit of civilised standards. Any punishment.....incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances".

The same goes, I firmly believe, for our section 11(2). Gubbay CJ continued thus (at 248 B-C):

> "(A)n application of this approach to whether a form of ... punishment ... is inhuman or degrading is dependent upon the exercise of a value judgment ...; one that must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part) ..., but of contemporary norms operative in Zimbabwe and the sensitivities of its people".

I take that view here too, where such norms and sensitivities are demonstrated, above all else, by the altruistic and humanitarian philosophy which animates the Constitution enjoyed by us nowadays.

[178] Capital punishment was discussed at length in *Furman v State of Georgia*(1972) 408 US 238, a case handled by the Supreme Court of the United States of America in which a comparably liberal philosophy was expounded by a number of the judges hearing it. Stewart J described that sentence (at 306) as -

> ".....unique ...in its absolute renunciation of all that is embodied in our concept of humanity."

Brennan J agreed, declaring in the same case (at 290 and 291) that:

> "Death is truly an awesome punishment. The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident....A prisoner remains a member of the human family...In comparison to all other punishments...the deliberate extinguishment of human life by the state is uniquely degrading to human dignity".

The distinctive features of the penalty were emphasised by Brennan J elsewhere in his judgment, when he wrote (at 287 and 288) that:

> "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering... Since the discontinuance of flogging as a constitutionally permissible punishment..., death remains the only punishment that may involve the conscious infliction of physical pain. In addition, we know that

> mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death... The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."

In a Californian case, the one of *The People v Anderson* (1972) 493 P 2d 880, Wright CJ observed (at 894) that:

> "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalising to the human spirit as to constitute psychological torture."

Liacos J elaborated on that aspect of the matter in the judgment which he delivered when *District Attorney for the Suffolk District v Watson and Others* (1980) 381 Mass 648

was decided in Massachusetts. The passages that I shall quote (at 678 - 9, 681 and 683) are vivid. They went thus:

> "The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilised heart no rest... The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focussed more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The state puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement.... The death sentence itself is a declaration that society deems the prisoner a nullity, less than

> human and unworthy to live. But that negation of his personality carries through the entire period between sentence and execution."

A similar account was furnished by Gubbay CJ in the *Catholic Commission* case when he said (at 268 E-H):

> "From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead'..... He is kept only with other death sentence prisoners - with those whose appeals have been dismissed and who await death or reprieve; or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful....death is ....never far from mind."

[179] The Constitutions of California and Massachusetts forbade cruel punishments. Sentences of death were held in each state to be contraventions of the prohibition which could not stand. The decision reached in the case of the *District Attorney for Suffolk* was announced by Hennessey CJ, who said (at 664 and 665):

> "(T)he death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain. The mental agony is, simply and beyond question, a horror.... We conclude..... that the death penalty, with its full panoply of concomitant physical and mental tortures, is impermissibly cruel.....when judged by contemporary standards of decency."

Executions were not outlawed altogether, on the other hand, in either *Furman v State of Georgia* or the case of the *Catholic Commission*, despite the castigation that they then underwent. The reason lay in the special provisions of the governing charters, the Constitutions of the United States and Zimbabwe, each of which impliedly authorised the punishment, or appeared at least to do so, by protecting the right to life in terms that specifically excluded deaths thus caused. So, while executions could be and were banned in the particular circumstances of the two cases, insufficient room was visible for the total embargo which Brennan J and Gubbay CJ would no doubt have preferred to impose on them. No such obstacle was presented by the Constitution of Massachusetts or found to be raised at that time by the Californian one. None of this detracts, however, from my purpose in repeating the

harrowing descriptions given on all four occasions of the ordeal suffered by criminals awaiting and experiencing execution. I am unaware of any criticism ever levelled at those descriptions, which were not disputed before us when reliance was placed on them in argument, and I have no reason to believe that they may have been inaccurate or exaggerated in any material respect. They suffice on the whole to convince me that every sentence of death must be stamped, for the purposes of section 11(2), as an intrinsically cruel, inhuman and degrading punishment.

[180] I pass to the question whether capital punishment is nevertheless allowed by section 33(1) for the crimes that concern us now. I am not sure that a sentence with a sequel of such cruelty, inhumanity and degradation can ever be rightly regarded in a civilised society as a reasonable or justifiable measure, let alone a necessary one. But I shall assume that the penalty is not innately incapable of meeting those requirements.

[181] The most familiar argument advanced in support of capital punishment, and the main contention we have to consider under the heading of its suggested permissibility, is that executions operate as a unique deterrent against the future commission of the crimes visited with them. That proposition, if sound indeed, deserves to be taken seriously. It then provides the strongest reason, in cases of murder at all events, for rating the sentence of death as an expedient which, though regrettable, passes constitutional muster. For section 9 protects likewise the lives of the innocent, the lives of potential victims. And that is a factor which must enter the reckoning, especially at present when the crimes of violence perpetrated here have become so prevalent and reached a level so appalling that acute anxiety is felt everywhere about the danger to life lurking around the corner. Such a time was said to be hardly propitious for, such a state of affairs to be scarcely conducive to, any relaxation in the rigour of the law. We dared not exacerbate the danger, we were warned, by reducing the force of deterrence in the combat with it. I agree that the nation cannot afford our doing so, and we would not wish it anyhow. Sight must never be lost, however, of this. The question is not whether capital punishment has a deterrent effect, but whether its deterrent effect happens to be significantly greater than that of

the alternative sentence available, a suitably severe sentence of imprisonment which not only gets passed but may also be expected to run its course.

[182] The debate surrounding that question, an old one both here and elsewhere, has often been marked by the production of statistical evidence tendered to show that the death penalty either does not or does serve a uniquely deterrent purpose, as the case may be. The rate of capital crimes committed in a state performing executions is compared with that of the selfsame crimes experienced contemporaneously in some place or another where none occurs. The records of countries that executed convicts formerly, but have ceased doing so, are also examined. Comparisons are then drawn between the rates of those crimes found there before the punishment was abandoned and the ones encountered afterwards. Such statistics, when analysed, have always turned out to be inconclusive in the end. The pictures that they purport to present differ in the first place. The clarity of the sketching is impaired, in the second, by all sorts of variable factors for which no allowance is or can be made. One thinks, for instance, of differences and fluctuations in moral codes and values, in the efficiency and success of police forces in preventing and investigating crimes, in the climate for the collaboration and assistance that they need to obtain from the public and the extent of it which they manage to gain, in the organisation and skills of criminal conspirators and, above all perhaps, in the social and economic conditions that have so profound a bearing everywhere on the incidence of crimes. It therefore did not surprise me to hear that no great store was set in argument by figures of that kind. Others were drawn to our attention, which related to South Africa alone. They recorded the number of alleged murders that were reported here during every year from 1988 until 1993, inclusive of both. A globular increase emerged, the rate of which over the whole period of six years amounted approximately to 35% and accordingly to an annual average of almost 6%, calculated for convenience by means of a straight division that inflates the rate slightly, to be sure, since it disregards the effect on the percentage of the change from year to year in the figure on which it ought actually to be based. Interesting to notice, however, is this. The number of alleged murders rose by a mere 1% or thereabouts during 1993, in contrast with the

average rate of 6% postulated, and by 9% during the time from the beginning of 1992 until the end of 1993, which remained lower than the corresponding average of 12% for that period of two years. The significance of the arithmetic lies in the fact that the moratorium on executions was announced, formally and firmly, in March 1992. What the exercise appears to illustrate, if statistics prove anything in such an area, is the irrelevance of the announcement to the rate of murders alleged, which had grown steadily while executions were carried out and was not accelerated by the halt in hangings. The results of my analysis, for what they are worth, may be added to the cogent and stronger reasons which Chaskalson P has supplied in paragraphs [119] and [120] for rejecting the contention addressed to us that the moratorium had contributed materially to the increase.

[183] Without empirical proof of the extent to which capital punishment worked as a deterrent, neither side could present any argument on the point better than the appeal to common sense that tends to be lodged whenever the debate is conducted. That the extreme penalty must inevitably be more terrifying than anything else was said, on the one hand, to speak for itself. It spoke superficially, we were told on the other, and unrealistically too. What stood to reason was this instead. A very large proportion of murderers were in no mood or state of mind at the time to contemplate or care about the consequences of their killings which they might personally suffer. Those rational enough to take account of them gambled by and large on their escape from detection and arrest, where the odds in their favour were often rather high. The prospect of conviction and punishment was much less immediate and seldom entered their thinking. It was fanciful, should that happen on relatively rare occasions, to imagine their being daunted by the possibility of a journey to the gallows, a journey taken by only a small percentage of convicted murderers even at the height of executions in this country, but not by the probability of incarceration in a jail for many years and perhaps for the rest of their lives. The second school of thought is the one which gets to grips with the realities of the matter, in my opinion, appraising them with a lot more plausibility and persuasiveness than any that attaches to the stark proposition of the first school.

[184] It is unnecessary, however, to go so far. The protagonists of capital punishment bear the burden of satisfying us that it is permissible under section 33(1). To the extent that their case depends upon the uniquely deterrent effect attributed to it, they must therefore convince us that it indeed serves such a purpose. Nothing less is expected from them in any event when human lives are at stake, lives which may not continue to be destroyed on the mere possibility that some good will come of it. In that task they have failed and, as far as one can see, could never have succeeded.

[185] In his judgment Chaskalson P has discussed retribution as another goal of punishment, and the arbitrariness and inequality contaminating our processes that culminate in executions. His treatment of the first subject will be found in paragraphs [129] to [131] and of the second one in paragraphs [48] to [54]. I share the view taken by him that retribution smacks too much of vengeance to be accepted, either on its own or in combination with other aims, as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves, and that the expression of moral outrage which is its further and more defensible object can be communicated effectively by severe sentences of imprisonment. The inequality of which he has written may be curable in the long run, once it is not the result of the arbitrariness described by him. The same does not go, however, for the arbitrariness itself, a flaw in the edifice which Ackermann J has examined as well in paragraphs [158] to [165]. The problem of that is quite as intractable here as it has proved to be in the United States of America, where the courts have wrestled with it constantly and by no means to their satisfaction. For such arbitrariness is largely inherent in the nature of the proceedings from start to finish. Similar trouble may be inescapable, to be sure, in cases that are not capital ones. But in those producing sentences of death the arbitrariness is intolerable because of the irreversibility of the punishment once that gets put into force and the consequent irremediability of mistakes discovered afterwards, mistakes which do occur now and then notwithstanding the myth to the contrary. The defect then militates forcefully, I believe, against the reasonableness and justifiability of capital punishment.

[186] The conclusion to which I have thus come, echoing the one reached by Chaskalson P, is that the

death penalty cannot survive our constitutional scrunity of it. The line I have taken in arriving there differs in some parts from that preferred by him, occasionally approaching a topic from another angle and sometimes placing the emphasis elsewhere. It has also called for less elaboration in the light of his meticulous research into a mountain of material and his erudite exposition of the themes developed from that. In general, however, I agree with his judgment, a profound and monumental work with which I feel proud to associate myself.

[187] I wish before ending this judgment to add my voice to that of Chaskalson P in dealing with a couple of points raised in argument on which he has commented already but which I have not yet mentioned.

[188] Whether capital punishment ought to be abolished or retained amounted, so it was said, to a question of policy which Parliament should decide, representing as it did the citizens of the country and expressing their general will. The issue is also, however, a constitutional one. It has been put before us squarely and properly. We cannot delegate to Parliament the duty that we bear to determine it, or evade that duty otherwise, but must perform it ourselves. In doing so, we were counselled in the alternative, we had to pay great attention to public opinion, which was said to favour the retention of the death penalty. We have no means of ascertaining whether that is indeed so, but I shall assume it to be the case. One may also assume, with a fair measure of confidence, that most members of the public who support capital punishment do so primarily in the belief that, owing to its uniquely deterrent force, they and their families are safer with than without its protection. The feeling is quite understandable, given its basis. But it deserves no further homage if the premise underlying and accounting for it is fallacious or unfounded, as I consider that one to be. To allow ourselves to be influenced unduly by public opinion would, in any event, be wrong. Powell J disparaged such external pressures on constitutional adjudication when he said in *Furman v State of Georgia* (at 443):

> "(T)he weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess (the) amorphous ebb and flow of

> public opinion generally on this volatile issue, this type of enquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function."

In similar vein were these remarks passed by Jackson J on the earlier occasion of *West Virginia State Board of Education v Barnette and Others* (1942) 319 U5 624 (at 638):

> "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities... and to establish them as legal principles to be applied by the courts. One's right to life.... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[189] The other point was not so much a contention as a complaint, one registered against the sympathy with murderers, and the lack of any felt for the victims and their families, which some proponents of capital punishment have seen as the motivation behind every attack on it. It is unnecessary, I hope, for this court to answer that canard. In rebuttal of the criticism, lest it be levelled at us all the same, one can do no better than to repeat the following excerpts from the judgment which Wright CJ wrote in *The People v Anderson* (at 896 and 899):

> "We are fully aware that many condemned prisoners have committed crimes of the utmost cruelty and depravity and that such persons are not entitled to the slightest sympathy from society in the administration of justice or otherwise.... Our conclusion that the death penalty may no longer be exacted in California.... is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: 'When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect'."

[190] South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst.

[191] **KENTRIDGE AJ**: I agree with the order proposed by Chaskalson P and with the reasons for it contained in his judgment and in the judgment of Didcott J In view of the importance of the issue and in deference to the forceful submissions of Mr von Lieres SC, the Attorney-General of the Witwatersrand, I add some remarks of my own.

[192] Capital punishment is an issue on which many members of the public hold strong and conflicting views. To many of them it may seem strange that so difficult and important a public issue should be decided by the eleven appointed judges of this court. It must be understood that we undertake this task not because we claim a superior wisdom for ourselves but, as Chaskalson P has explained in his judgment, because the framers of the Constitution have imposed on us the inescapable duty of deciding whether the death penalty for murder is consistent with Chapter Three of the Constitution. It should not be overlooked that a decision holding the death penalty to be constitutional would have been just as far-reaching an exercise of judicial power as the decision to strike it down.

[193] Some public commentators on the question before this court have supposed that any doubt as to the unconstitutionality of the death penalty was foreclosed by section 9 of the Constitution, which proclaims in unqualified terms that every person shall have the right of life, read with section 33(1)(b), which provides that no statutory limitation on that or any other constitutional right shall "negate the essential content of the right in question." The execution of a condemned prisoner, it is suggested, must negate entirely his right to life and must therefore *ipso facto* be in conflict with the constitution. For my part, I do not believe that this supposedly simple solution bears examination. Although the right to life is stated in unqualified terms its full scope and implications remain to be worked out in future cases. Certainly, as the President of the Court has pointed out, the right to life must accommodate the right to kill in lawful self-defence of one's own life or the lives of others, as well as the right of the State to defend itself against insurrection. The right to life may also be seen as entailing a duty on the State to protect the lives of its citizens by ensuring, as far as it is able, that unlawful killing is visited with condign punishment. That punishment like any other, must fall within the limits imposed by section 11(2) of the Constitution. As to section 33(1)(b), I agree with Chaskalson P that our decision in

this case can be reached without requiring the Court to give an authoritative interpretation of that clause. We did, however, hear argument on the clause and I should like to state briefly why I do not think that it provides the short answer to the problem of the constitutionality of the death penalty.

[194] The source of section 33(1)(b) is presumably the similar provision in the Constitution of the Federal Republic of Germany. As far as I am aware the German Constitutional Court has never given any definite interpretation to that clause. Varying constructions of it have been suggested by the authors cited by Chaskalson P in the footnotes to paragraphs 108 and 132 of his Judgment; see also the discussion by Rautenbach in 1991 TSAR 403. For present purposes it is sufficient to mention two possible interpretations of section 33(1)(b). The first is that it requires one to consider the effect of any State action on the individual concerned - sometimes called the subjective approach. On this basis the infliction of the death penalty must conflict with section 33(1)(b) because in destroying life it must negate the essence of the right to life. I do not find this so-called subjective interpretation convincing. It cannot accommodate the many State measures which must be necessary and justifiable in any society, such as long-term imprisonment for serious crimes. It is true that a prisoner, even one held under secure conditions, retains some residual rights. See *Whittaker v Roos* 1912 A.D. 92, 122-3, per Innes J. But I find it difficult to comprehend how, on any rational use of language, it could be denied that while he is in prison the essence of the prisoner's right to freedom (section 11), of his or her right to leave the Republic (section 20) or to pursue a livelihood anywhere in the national territory (section 26) is not negated. Many other examples could be given which in my view rule out the subjective approach of the sub-section.

[195] The other approach (sometimes, not altogether appropriately, called the objective approach) is to examine the law which is sought to be justified under section 33. That section states that rights entrenched in Chapter Three may be limited by laws of general application provided that such limitation complies with the requirements of paragraph (a) of sub-section 1 and provided further that it does not negate the essential content of the right in question. What must pass scrutiny under section 33 is the limitation contained in the law

of general application. This means in my opinion that it is the law itself which must pass the test. On this basis a law providing for imprisonment for defined criminal conduct, cannot be said to negate the essential content of the right to freedom, whatever the effect on the individual prisoner serving a sentence under that law. Similarly such a law would not negate the essential content of the right of free movement. Those are general rights entrenched in the Constitution, and a law which preserves those rights for most people at most times does not negate the essential content of those rights. An example of a law which might negate the essence of the right to freedom of movement would be a law (such as the Departure from the Republic Act, 1955) under which no person may leave the Republic without the express or implied consent of the Government. Another possible example could relate to the right of freedom of speech. A law providing for general censorship of all publications would on the face of it negate the essence of the right to freedom of speech. On the other hand a law providing penalties for what is colloquially referred to as "hate speech" would not, I think, negate the essence of that right. (Whether or not it would meet the other criteria of section 33 is a different question.)

[196] It follows that in my opinion that the true issue for decision is whether or not the death penalty for murder is a "cruel, inhuman or degrading punishment", although the entrenched right to life, like the right to dignity and to equality of treatment, does illuminate the issue. As both Chaskalson P and Didcott J have emphasised, capital punishment is qualitatively something quite apart from even the longest term of imprisonment. It entails the calculated destruction of a human life. Inequalities in its incidence are probably unavoidable. In the infliction of capital punishment judicial and executive error can never be wholly excluded nor, of course, repaired. With regard to the uniquely cruel and inhuman nature of the death penalty I would refer to the ample citation of American authority by Didcott J in paragraphs 6 and 7 of his Judgment and to the various decisions of international tribunals cited by Chaskalson P. I would add to these the judgment of Blackmun J in *Callins v Collins* 114 S. Ct. 1127 (1994). The statement of Stewart J in *Furman v Georgia* 408 US 238 at 306 cited by Scalia J in *Harmelin v Michigan* 501 US 957 (1991), also deserves repetition:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

The "death row" phenomenon as a factor in the cruelty of capital punishment has been eloquently described by Lord Griffiths in *Pratt v Johnson* [1994] 2 AC 1 and by Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General Zimbabwe* 1994 (4) SA 329. Those were cases of inordinately extended delay in the carrying out of the death sentence, but the mental agony of the criminal, in its alternation of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years.

[197] It may be said that if the punishment is cruel so was the act of the murderer. That cannot and should not be denied. In the present case the Appellants committed murders of horrifying callousness motivated by nothing but greed. In some of the cases summarised in the Attorney-General's written submissions, all of them cases in which the Appellate Division had confirmed the sentence of death, the accused had, if that were possible, committed even more revolting acts of cruelty against their victims. I agree with Chaskalson P that proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. But that does not mean that the State should respond to the murderer's cruelty with a deliberate and matching cruelty of its own. As Simon Jenkins said in a recent article on the death penalty in "The Times" (London), that would imply that punishment must not merely fit the crime, but repeat the crime.

[198] Section 35 of the Constitution requires us to "promote the values which underlie an open and democratic society based on freedom and equality." We are thus entitled and obliged to consider the practices of such societies. That exercise shows us that most of the countries which we would naturally include in that category have abolished capital punishment as a penalty for murder, either by legislation or by disuse. These countries

include the neighbouring States of Namibia, Angola and Mozambique. The principal exceptions are the great democracies of India and the United States. In each of those countries the written constitution expressly contemplates the legitimacy, subject to safeguards, of the death penalty. Thus the Fifth Amendment to the Constitution of the United States begins with the words, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..." There are similar express indications of the acceptability of the death sentence in Article 21 of the Constitution of India. It is therefore understandable that the Supreme Courts of those two countries have found themselves unable to hold that the death penalty is *per se* unconstitutional. Nonetheless, in our attempt to identify objectively the values of an open and democratic society what I find impressive is that individual judges of great distinction such as Brennan J in the United States and Bhagwati J in India have held, notwithstanding those constitutional provisions, that the death penalty is impermissible when measured against the standards of humanity and decency which have evolved since the date of their respective constitutions. Similarly, courts to which considerable respect is due, such as the Supreme Court of California in *People v Anderson* 493 P.2d 880 (1972) and the Supreme Judicial Court of Massachusetts in *District Attorney for the Suffolk District v Watson* 381 Mass 648 (1980) have held the death penalty to be a "cruel and inhuman punishment" and therefore in conflict with their respective State constitutions. In the California case that decision was arrived at notwithstanding clauses in the State Constitution which, like the United States Constitution, recognised the existence of capital punishment. (See *Anderson*'s case at 886-7).

[199] The reference to "evolving standards of decency" is taken from the judgment of Warren CJ in *Trop v Dulles* 356 US 86 at 101 (1958) where, speaking for the Court, he adopted as the measure of permissible punishment under the Eighth Amendment of the United States Constitution "the evolving standards of decency that mark the progress of a maturing society." Commenting on this dictum in *Thomson v Oklahoma* 487 US 815 (1988) Scalia J (dissenting) said at 865:

> "Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views."

This is a pertinent warning which I have, I hope, kept in mind. I believe, nonetheless, that there is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies. Most democratic countries have abandoned the death penalty for murder. Even in countries which have the death penalty on the statute books there is a decline in its use. Although one cannot say that the death penalty is as yet contrary to international law, Chaskalson P has demonstrated that that is the direction in which international law is developing. I shall come later to the question of public opinion and the guidance to be obtained from it, but what is clear to my mind is that in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it. Simon Jenkins, in the article which I have already quoted, says that the State is (or should be) "institutionalised civilisation." I would agree, and add that this is especially true of the State created by our new Constitution. The deliberate execution of a human, however depraved and criminal his conduct, must degrade the new society which is coming into being.

[200] In the course of argument before us much was said about public opinion on the death penalty in South Africa. Both Chaskalson P and Didcott J have shown that public opinion, even if expressed in acts of Parliament, cannot be decisive. If we were simply to defer to public opinion we would be abdicating from our constitutional function. Yet, were public opinion on the question clear it could not be entirely ignored. The accepted mores of one's own society must have some relevance to the assessment whether a punishment is impermissibly cruel and inhuman. In *Furman v Georgia* 408 US 238 (1972) Brennan J at 277 said that one of the principles inherent in the constitutional prohibition of cruel and unusual punishments was that "a severe punishment must not be unacceptable to contemporary society." Much earlier, in *Weems v United States* 217 US 349, 378 (1910) the United States Supreme Court had held that that provision of the Constitution was "not fastened to the obsolete", but might "acquire meaning as public opinion becomes enlightened by a human justice." I would, with all respect, suggest that the principle propounded by Brennan J may give too much weight to prevailing opinion - an opinion

which may swing with public moods and varying public concerns. But in any event, whether or not a punishment is acceptable to contemporary society is not to be judged by the results of informal public opinion polls, still less by letters to the press. In *People v Anderson* (supra) Wright CJ speaking for the Supreme Court of California said at 893-4:

> "Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it even-handedly applied to a substantial proportion of the persons potentially subject to execution."

In *Gregg v Georgia* 428 US 153 (1976) a judgment given four years after *Furman v Georgia*, supra, Stewart J at 179-180 found that developments during that period had shown that "a large proportion of American society continues to regard it (capital punishment) as an appropriate and necessary criminal sanction." The principal evidence on which Stewart J based this finding was that since the *Furman* case the legislatures of 35 of the United States had enacted new death penalty statutes. Further, the Congress of the United States had enacted a statute providing the death penalty for aircraft piracy. In addition, he referred to an official State-wide referendum in the State of California adopting a constitutional amendment that authorised capital punishment.

[201] Needless to say, there was no similar evidence before us. Public opinion has not expressed itself in a referendum, nor in any recent legislation. Certainly, there is no evidence of a general social acceptance of the death penalty for murderers such as might conceivably have influenced our conclusions. On the contrary, developments in South Africa point in the opposite direction. It is to be noted that even at the time, during the previous decade, when South Africa had the unenviable reputation for carrying out more executions than any other country in the western world, only a proportion of those convicted of murder were sentenced to death, and of those many were reprieved. The amendment to the Criminal Procedure Act introduced by Act No 107 of 1990 drastically reduced the number of convicted murderers sentenced to death. The subsequent developments described by Chaskalson P including the official executive moratorium on the death

penalty announced in March 1992, while not evidence of general opinion, do cast serious doubt on the acceptability of capital punishment in South Africa. In fact, we are informed, since 1989 there has been no judicial execution in South Africa. Thus there has been in this country no indication whatsoever of what Stewart J in *Gregg*'s case referred to as "society's endorsement of the death penalty for murder." In the Constitution itself such endorsement is markedly absent. Consequently, in all the circumstances, the appeal to public opinion could not affect our decision.

[202] There is little I wish to add to what has been said by other members of the Court on the application of section 33. On the question whether a death penalty can be justified by its deterrent effect the statistical and other evidence is inconclusive, as it was bound to be. As the analysis of Chaskalson P shows the statistical evidence comes nowhere near establishing that the death penalty is an effective deterrent against murder. Nor on the other hand can it be shown that it is not a deterrent. As Mr von Lieres pointed out, only those who were not deterred enter the statistics; the number who were deterred cannot be known. In Burns' well-known lines, "What's done we often may compute/But know not what's resisted." The most impressive argument of Mr von Lieres on this aspect of the case was that, statistics aside, the awfulness of the death penalty must in its nature deter some would-be murderers. In the face of the appalling murder rates in this country, he said, we cannot afford to relinquish any possible weapon in the fight against violent crime. That is a powerful argument but, given the cruelty and inhumanity of the death penalty, it is an argument which cannot in the end prevail. It relies essentially on the mere possibility that the death sentence may deter some murderers. That is not a sufficient justification for the continued existence of such an extreme punishment.

[203] I have little to add, too, to what Chaskalson P has said on the element of retribution as an element in punishment. The Attorney-General's argument was that the criminal law including the modes of punishment must adequately reflect the moral outrage felt by society when a vicious and cold-blooded murder is committed. This too I regard as an argument of weight. One can understand in particular the reaction of the families of victims of murderers and the feeling that the culprits "deserve to die". But the choice, as Chaskalson P has pointed out, is not between death penalty on the one hand and the

condonation of the murderer's act on the other. The choice is between the death penalty and a long term of imprisonment which might in appropriate cases include life imprisonment in the fullest sense of the term. As a civilised society it is not open to us, in my opinion, to express our moral outrage by executing even the worst of murderers any more than we could do so by the public hangings or mutilations of a bygone time.

[204] In conclusion I would endorse what Didcott J has cogently stated; the striking down of the death penalty entails no sympathy whatsoever for the murderer, nor any condonation of his crime. What our decision does entail is a recognition that even the worst and most vicious criminals are not excluded from the protections of the Constitution. In 1910 Mr Winston Churchill speaking in the House of Commons said this:

> "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State - a constant heart-searching by all charged with the duty of punishment - a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it."

[205] **KRIEGLER J**: I agree with the conclusions reached by Chaskalson P, endorse the bulk of his reasoning and concur in the order he has formulated. There are just two points that I wish to add though: the first by way of additional emphasis and the second to indicate a somewhat different line of reasoning.

[206] The basic issue, as Chaskalson P points out in the opening and concluding paragraphs of the main judgment, is whether the Constitution[1] has outlawed capital punishment in South Africa.[2] The issue is not whether I favour the retention or the abolition of the death

[1]Constitution of The Republic of South Africa, Act No. 200 of 1993, as amended.

[2]As sanctioned by section 277(1) of the Criminal Procedure Act, 1977, as amended and the corresponding

penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it.

---

provisions of the former Transkei, Bophuthatswana and Venda.

[207] In answering that question the methods to be used are essentially legal, not moral or philosophical. To be true the judicial process cannot operate in an ethical vacuum. After all, concepts like "good faith", "unconscionable" or "reasonable" import value judgments into the daily grind of courts of law. And it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large. Nevertheless, the starting point, the framework and the outcome of the exercise must be legal. The foundation of our state and all its organs, the rules which govern their interaction and the entrenchment of the rights of its people are to be found in an Act of Parliament, albeit a unique one.[3] That Act entrusts the enforcement of its provisions to courts of law.[4] The "court of final instance over all matters relating to the interpretation, protection and enforcement" of those provisions is this Court,[5] appointment to which is reserved for lawyers.[6] The

[3]Section 4 of the Constitution describes it as "the supreme law of the Republic ... [which] shall bind all legislative, executive and judicial organs of state at all levels of government." Section 7 makes Chapter 3, containing fundamental rights, binding on "all legislative and executive organs of state at all levels of government" and provides that it "shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."

[4]See Chapter 7 of the Constitution.

[5]Section 98(2) of the Constitution.

[6]See section 99(2)(c) of the Constitution which requires on appointee to be a person who "(i) is a judge of the Supreme Court or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified, practised as an advocate or an attorney or lectured in law at a university; or (ii) is a person who, by reason of his or her training and experience, has expertise in the field of constitutional

incumbents are judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.

[208] The exercise is to establish whether there is an invalid infringement of a right protected by Chapter Three. This

> "calls for a 'two-stage' approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?"[7]

For the first step, one need go no further than section 9 of the Constitution, which could not possibly be plainer:

> "Every person shall have the right to life."

Whatever else section 9 may mean in other contexts, with regard to which I express no view, at the very least it indicates that the State may not deliberately deprive any person of his or her life. As against that general prohibition section 277(1) of the Criminal Procedure Act sanctions a judicial order for the deprivation of a person's life. The two provisions are clearly not reconcilable. Therefore, the latter provision is liable to be struck down under section 4(1) of the Constitution, unless it is saved by the second step of the analysis -application of the limitations clause.

---

law relevant to the application of this Constitution and the law of the Republic."

[7]Per Kentridge AJ, in S v Zuma and Others 1995 (4) BCLR 401, 414 (SA). The "limitation clause" he refers to is section 33(1) of the Constitution.

[209] During the second step of the exercise one must ask whether that infringement of the right to life is reasonable and also whether it is justifiable in an open and democratic society based on freedom and equality (sections 33(1)(a)(i) & (ii)).[8] As I am satisfied that section 277(1)(a) does not meet the threshold test of reasonableness, I find it unnecessary to ask whether it is justifiable in the kind of society postulated. Nor do I consider the meaning of section 33(1)(b), which is discussed in paragraphs 132, 133 and 134 of the main judgment and paragraphs 193, 194 and 195 of the judgment of Kentridge AJ.[9] In respect thereof I express no opinion.

[8]The questions may well be asked what the distinction is between reasonable and justifiable and whether one test can be met and not the other. Be that as it may, this case is so clear that the distinction, if any, between the two criteria need not be considered.

[9]Relating to the meaning and effect of the prohibition in section 33(1)(b) against a limitation which "negate[s] the essential content of the right in question."

[210] I also find it unnecessary to probe the outer limits of what is reasonable. At the very least the reasonableness of a provision which flies directly in the face of an entrenched right would have to be cogently established. Furthermore a provision relating to so basic and so precious a right as the right to life itself (without which all other rights are nought), would have to be manifestly reasonable.[10]

[211] We were favoured with literally thousands of pages of material in support of and opposed to the death penalty, ranging from the religious, ethical, philosophical and ideological to the mathematical and statistical. Mr Von Lieres, SC, who argued the retentionist cause with great skill, in essence sought to bring the death sentence within the protection of section 33(1) on the strength of its deterrent and retributive value. The main judgment deals with these two considerations[11] and I merely wish to make a few additional observations regarding deterrence.[12]

---

[10]The reasonableness of other limitations on the right to life does not arise here. Suffice it to say that there must always be a proportionality between any right and the limitation thereof sought to be saved under section 33(1).

[11]Paragraphs 116 to 127 on deterrence and 129 to 131 on retribution.

[12]No more need be said about retribution than has been said by my colleagues. See also paragraph 203 of the judgment of Kentridge AJ and paragraph 185 of the judgment of Didcott J.

[212] Nearly a quarter of a century ago the US Supreme Court decided the watershed case of Furman v Georgia.[13] In the course of a compendiously researched opinion, Marshall J reviewed virtually every scrap of Anglo-American evidence for and against capital punishment. In the course of his "long and tedious journey" (his own description) he made the crucial finding that 200 years of research had established

> "that capital punishment serves no purpose that life imprisonment could not serve equally well."[14]

A decade later the Indian Supreme Court surveyed the international authorities for and against the death penalty in Bachan Singh's case.[15] Since then a great deal more has been written in support of both the abolitionist and the retentionist schools. But when all is said and done the answer is still what it was to Marshall J in Furman's case: the death penalty has no demonstrable penological value over and above that of long-term imprisonment. No empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment. That is the ineluctable conclusion to be drawn from the mass of data so thoroughly canvassed in the written and oral arguments presented to us.

[213] Another equally ineluctable conclusion then is that capital punishment cannot be vindicated by the provisions of section 33(1) of the Constitution.[16] It simply cannot be reasonable to

---

[13] 408 US 238 (1972).

[14] Id. at 359.

[15] Bachan Singh v State of Punjab (1980) 2 SCC 684, quoted in paragraph 76 of the main judgment.

[16] The provisions of section 277(1)(b), which sanction the death penalty for treason committed at a time when

sanction judicial killing without knowing whether it has any marginal deterrent value.

[214] Having concluded that capital punishment is inconsistent with section 9 of the Constitution and cannot be saved by section 33(1), I find it unnecessary to consider its possible inconsistency with any other fundamental rights protected by Chapter Three. Vigilant protection of the right to human dignity (section 10) and of the immunity from cruel, inhuman or degrading punishment (section 11(2)) is undoubtedly essential. So too arbitrariness in the imposition of any sentence is fatally inconsistent with the demand for equality so emphatically mandated in sections 8(1) and (2). I do not want to be understood as disagreeing with the views expressed by any of my colleagues in regard to those rights and their importance; but in the hierarchy of values and fundamental rights guaranteed under chapter 3, I see them as ranking below the right to life. Indeed, they are subsumed by that most basic of rights. Inasmuch as capital punishment, by definition, strikes at the heart of the right to life, the debate need go no further.

[215] **LANGA J**: I agree with the conclusions reached by Chaskalson P and generally with the reasons he advances in his exhaustive and erudite judgment. I concur in the order he has proposed. I wish to put additional emphasis on some of the aspects he has dealt with.

[216] The death sentence, in terms of the provisions of section 277 of the Criminal Procedure Act, No. 51 of 1977, is unconstitutional, violating as it does:

(a) the right to life which is guaranteed to every person by section 9 of the Constitution;

---

the Republic is in a state of war, do not arise for consideration in this case. That is a wholly different situation which requires independent evaluation.

(b) the right to respect for human dignity guaranteed in section 10;

(c) the right not to be subjected to cruel, inhuman and degrading punishment as set out in section 11(2).

[217] For the reasons set out in Didcott J's judgment, I place more emphasis on the right to life. Section 9 of the Constitution proclaims it in unqualified terms. It is the most fundamental of all rights,[1] the supreme human right.[2] I do not consider it necessary or desirable to define the exact scope of the right, save to make two points, namely:

(a) It does mean that every person has the right not to be deliberately put to death by the State as punishment, as envisaged in section 277 of the Criminal Procedure Act.

(b) I do not exclude the application of the limitations clause to the right to life. Any law which seeks to limit the right will have to comply with the requirements of section 33(1) of the Constitution. For the reasons set out in Chaskalson P's judgment, the requirements have not been met; the State has been unable to justify the limitation which is imposed on the right to life by section 277 of the Criminal Procedure Act. I cannot accept that it is "reasonable," as required by section 33(1) of the Constitution, to override what is the most fundamental of all rights, without clear proof that the deterrence value of the penalty is substantially higher than that which the imposition of a suitably long period of imprisonment has. This has not been proved. Because of the view I take, I find it unnecessary

[1] See the remarks of Lord Bridge in Bugdaycay v Secretary of State 1987(1) All ER 940 at 952b.

[2] See paragraph 82 of Chaskalson P's judgment.

to deal with the other requirements of section 33(1) of the Constitution.

[218] The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life.

[219] The primacy of the right to life and its relationship to punishment needs to be emphasized also in view of our constitutional history. The doctrine of parliamentary sovereignty meant, virtually, that the State could do anything, enact any law, subject only to procedural correctness.[3]

[220] When the Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state in which the rights of individuals are guaranteed by the Constitution. It also signalled a new dispensation, as it were, where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.

[221] It may well be that for millions in this country, the effect of the change has yet to be felt in a material sense. For all of us though, a framework has been created in which a new culture must take root and develop.

---

[3] S v Tuhadeleni and Others 1969(1) SA 153 (A) at 172D - 173F; Baxter, Administrative Law, page 30 (1984).

[222] Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society.[4] A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well. As pointed out by Mr Justice Schaefer of the Supreme Court of Illinois:[5]

> "The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilisation may be judged."

---

[4] Brandeis J in his dissenting opinion in Olmstead v United States, 277 US 438, 485 (1928) put it succinctly: "Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole of our people by its example."

[5] In his Oliver Wendell Holmes lecture at the Harvard Law School, reprinted under the heading Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956). The passage was referred to with approval in Coppedge v United States, 369 US 438, 449 (1962).

[223] The ethos of the new culture is expressed in the much-quoted provision on National Unity and Reconciliation which forms part of the Constitution. Chaskalson P quotes the various components of it in paragraphs 7 and 130 of his judgment. It describes the Constitution as a "bridge" between the past and the future; from "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, ... for all South Africans ..."; and finally, it suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *ubuntu*. The Constitution does not define this last-mentioned concept.

[224] The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. It is perhaps best illustrated in the following remarks in the judgment of the Court of Appeal of the Republic of Tanzania in *DPP v Pete*,[6]

> "The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa."

[225] An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of

[6] [1991] LRC (Const) 553 at 566b-d, per Nyalali CJ, Makame and Ramadhani JJA.

society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu.*

[226] We have all been affected, in some way or other, by the "strife, conflict, untold suffering and injustice" of the recent past. Some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or who has not lost a close relative in senseless violence. Some of the violence has been perpetrated through the machinery of the State, in order to ensure the perpetuation of a *status quo* that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless.

[227] It was against a background of the loss of respect for human life and the inherent dignity with attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu.* A number of references to *ubuntu* have already been made in various texts but largely without explanation of the concept.[7] It has however always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for.

[228] At first blush, it may sound odd that the issue of the right to life is being decided on the basis of persons condemned to death for killing other human beings. In this regard, it is relevant to note that there are some 400 people presently under sentence of death for acts of violence. That in itself means that there are probably an equivalent number of victims whose lives have been prematurely, violently, terminated. They died without having had any recourse to law. For them there was no "due process."

[229] That is why, during argument, a tentative proposition was made that a person who has killed another has forfeited the right to life. Although the precise implications of this suggestion were not thoroughly canvassed, this cannot be so. The test of our

[7] See paragraphs 130 and 131 of Chaskalson P's judgment. The concept has been referred to also by Madala J, Mahomed J and Mokgoro J in their separate concurring judgments in this matter.

commitment to a culture of rights lies in our ability to respect the rights not only of the weakest, but also of the worst among us. A person does not become "fair game" to be killed at the behest of the State, because he has killed.

[230] The protection afforded by the Constitution is applicable to every person. That includes the weak, the poor and the vulnerable. It includes others as well who might appear not to need special protection; it includes criminals and all those who have placed themselves on the wrong side of the law. The Constitution guarantees them their right, as persons, to life, to dignity and to protection against torture or cruel, inhuman or degrading punishment or treatment.

[231] The violent acts of those who destroy life cannot be condoned, neither should anyone think that the abolition of the sentence of death means that the crime is regarded as anything but one of extreme seriousness. The sentence itself was an indication of society's abhorrence for the cruel and inhuman treatment of others. That moral outrage has been expressed in the strongest terms that society could muster.

[232] Severe punishments must be meted out where deserved, but they should never be excessive. As Brennan J observed in his concurring judgment in *Furman v Georgia,*[8]

> ". . . a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary . . . [i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive."

[8] 408 US 238, 279 (1972).

Righteous anger against those who destroy the human life and dignity of others must be appropriately expressed by the Courts;[9] but in doing so, the State must not send the wrong message, namely, that the value of human life is variable.[10] Society cannot now succumb to the doctrine of "an eye for an eye." Its actions must be informed by the high values which reflect the quality of this nation's civilization.

[233] The Constitution constrains society to express its condemnation and its justifiable anger in a manner which preserves society's own morality. The State should not make itself guilty of conduct which violates that which it is in the community's interests to nurture. The Constitution, in deference to our humanity and sense of dignity, does not allow us to kill in cold blood in order to deter others from killing. Nor does it allow us to "kill criminals simply to get even with them."[11] We are not to stoop to the level of the criminal.

[234] It follows from the remarks above that as a 'punishment' the death penalty is a violation of the right to life. It is cruel, inhuman and degrading. It is also a severe affront to human dignity. The 'death row phenomenon' merely aggravates the position. Section 277 of the Criminal Procedure Act cannot be saved by the provisions of section 33(1) of the Constitution in respect of any of the rights affected. The punishment is not reasonable on any basis. In view of the available alternative sentence of a long term of

[9] See R v Karg 1961(1) SA 231(A) at 236A.

[10] Brennan J in *Furman v Georgia*, *supra*, at 273 expressed himself thus: ". . . even the vilest criminal remains a human being possessed of common human dignity."

[11] Per Brennan J in Furman v Georgia, supra, at 305.

imprisonment, it is also unnecessary.

[235] **MADALA J**: I am in agreement with the views expressed in the judgment of Chaskalson P and with his decision on the unconstitutionality of the death penalty. The punishment, is in my view, clearly offensive to the cardinal principles for which our Constitution stands.

However, while I concur, as aforesaid, I believe that there are some additional matters that need to be mentioned and aspects that should be emphasised, and I proceed to do so briefly.

[236] The death penalty is unique. As stated by Stewart J in *Furman v Georgia* 408 US at 306:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

This statement was more recently (1991) re-affirmed by Scalia J, who delivered the judgment of the court in *Harmelin v Michigan* 501 US 957, and noted that even the most severe sentence of life imprisonment cannot compare with death.

[237] The Constitution in its post-amble declares:

> "... there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for ubuntu but not victimisation."

The concept "ubuntu" appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness.

[238] It was argued by Mr Bizos, on behalf of the Government, that the post-amble enjoins the people of South Africa to open a new chapter which envisages the country playing a leading role

in the upholding of human rights. He submitted further, that the Government favoured the abolition of the death penalty because it believed that such punishment could not be reconciled with the fundamental rights contained in the Constitution, and that its application diminished the dignity of our society as a whole.

[239] In my rejection of the death penalty as a form of punishment, I do not intend, nor do my colleagues, to condone murder, rape, armed robbery with aggravating circumstances and those other crimes which are punishable by a sentence of death in terms of Section 277 of the Criminal Procedure Act 51 of 1977. These criminal acts are, and remain, as heinous, vicious and as reprehensible as they ever were, and do not belong in civilised society. The death penalty is a punishment which involves so much pain and suffering that civilised society ought not to tolerate it even in spite of the present high rate of crime. And society ought to tolerate the death penalty even less when considering that it has not been proved that it has any greater deterrent effect on would-be murderers than life imprisonment.

[240] The aspect of irrevocability of the death penalty has been canvassed adequately in the judgment of Chaskalson P and I propose to say no more on that score (See paragraphs 26 and 54).

[241] As observed before, the death penalty rejects the possibility of rehabilitation of the convicted persons, condemning them as "no good", once and for all, and drafting them to the death row and the gallows. One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of *ubuntu*.

[242] One of the relative theories of punishment (the so-called purposive theories) is the reformative theory, which considers punishment to be a means to an end, and not an end in itself - that end being the reformation of the criminal as a person, so that the person may, at a certain stage, become a normal law-abiding and useful member of the community once again. The person and the personality of the offender are the point of focus rather than the crime, although the crime is, however, not forgotten. And in terms of this theory of punishment and as a necessary consequence of its application, the offender has to be

imprisoned for a long period for the purpose of rehabilitation. By treatment and training the offender is rehabilitated, or, at the very least, ceases to be a danger to society.

[243] This, in my view, accords fully with the concept of *ubuntu* which is so well enunciated in the Constitution.

[244] Our courts have found room for the exercise of *ubuntu*, as appears from the many cases where they have found that despite the heinousness of the offence and the brutality with which it was perpetrated, there were factors in the offenders' favour, indicating that they were, in spite of the criminal conduct of which they were convicted, responsible members of society, and were worthy and capable of rehabilitation. (See *S v Mbotshwa* 1993(2) SACR 468(A) at 468J-469F; *S v Ramba* 1990(2) SACR 334(A) at 335H-336E; *S v Ngcobo* 1992(2) SACR 515(A) at 515H-516A; Contra: *S v Bosman* 1992(1) SACR 115(A) at 116G-117F)

[245] Against *ubuntu* must be seen the other side, the inhuman side of mankind, in terms of which the death penalty violates Section 11(2) of the Constitution in that it is "cruel, inhuman or degrading treatment or punishment".

[246] In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe* 1993(4) SA 239(ZSC) at 268E-H, Gubbay CJ, observed:

> "From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead' ... He is kept only with other death sentenced prisoners - with those whose appeals have been dismissed and who await death or reprieve; or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from mind. Grim accounts exist of hangings not properly performed."

[247] Convicted persons in death row invariably find themselves there for a long time as they make

every effort to exhaust all possible review avenues open to them. All this time they are subjected to a fate of ever increasing fear and distress. They know not what their future is and whether their efforts will come to nought; they live under the sword of Damocles - they will be advised any day about their appointment with the hangman. It is true that they might have shown no mercy at all to their victims, but we do not and should not take our standards and values from the murderer. We must, on the other hand, impose our standards and values on the murderer.

[248] In the aforementioned Zimbabwe case, the court concluded that the incarceration of the condemned person under those conditions was in conflict with the provisions of Section 15(1) of the Zimbabwe Constitution, which like our Constitution, has entrenched guarantees against torture or inhuman and degrading punishment.

[249] The so-called "death row phenomenon" also came under attack in the case of *Soering v United Kingdom* (1989) 11 EHRR 439.

From the statistics supplied by the Attorney-General and from what one gleans daily from the newspapers and other media, we live at a time when the high crime rate is unprecedented, when the streets of our cities and towns rouse fear and despair in the heart, rather than pride and hope, and this in turn, robs us of objectivity and personal concern for our brethren. But, as Marshall J put it in *Furman v Georgia* (*supra*) at 371:

> "The measure of a country's greatness is its ability to retain compassion in time of crisis."

[250] This, in my view, also accords with *ubuntu* - and calls for a balancing of the interest of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual.

[251] We must stand tallest in these troubled times and realise that every accused person who is sent to jail is not beyond being rehabilitated - properly counselled - or, at the very least,

beyond losing the will and capacity to do evil.

[252] A further aspect which I wish to mention is the question of traditional African jurisprudence, and the degree to which such values have not been researched for the purposes of the determination of the issue of capital punishment.

[253] Ms Davids, who appeared on behalf of the Black Advocates Forum, in its capacity as *amicus curiae*, touched on but did not fully argue this matter.

[254] She submitted that we could not determine the question of the constitutionality or otherwise of the death sentence without reference to further evidence which would include the views, aspirations and opinions of the historically disadvantaged and previously oppressed people of South Africa, who also constitute the majority of our society.

[255] As I understood her argument, the issue of capital punishment could not be determined in an open and democratic society without the active participation of the black majority. This, in my view, would be tantamount to canvassing public opinion among the black population for the decisions of our courts. I do not agree with this submission, if it implies that this Court or any other court must function according to public opinion.

[256] In order to arrive at an answer as to the constitutionality or otherwise of the death penalty or any enactment, we do not have to canvass the opinions and attitudes of the public. Ours is to interpret the provisions of the Constitution as they stand and if any matter is in conflict with the Constitution, we have to strike it down.

[257] We, as judges, are oath bound to defend the Constitution. This obligation, in turn, requires that any enactment of Parliament should be judged by standards laid down by the Constitution. The judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the State seeks to take away the individual fundamental right to life, the safeguards of the Constitution should be examined with special diligence. When it appears that an act of Parliament conflicts with the provisions of the Constitution, we have no choice but to enforce the paramount commands of the

Constitution. We are sworn to do no less.

[258] I agree with Ms Davids' submission about the need to bring in the traditional African jurisprudence to these matters, to the extent that such is applicable, and would not confine such research to South Africa only, but to Africa in general.

[259] For purposes of the determination of the question of the constitutionality of the death penalty, however, it is, in my view, not necessary or even desirable that public opinion should be sought on the matter in the manner she suggests.

[260] In my view, the death penalty does not belong to the society envisaged in the Constitution, is clearly in conflict with the Constitution generally and runs counter to the concept of *ubuntu*; additionally and just as importantly, it violates the provisions of Section 11(2) of the Constitution and, for those reasons, should be declared unconstitutional and of no force and effect.

[261] **MAHOMED J:** I have had the privilege of reading the full and erudite judgment of Chaskalson P in this matter. I agree with the order proposed by him and in general with the reasons given by him for that order. Regard being had, however, to the crucial consequences of the debate on capital punishment, and the multiplicity of potential constitutional factors and nuances which impact on its resolution, I think it is desirable for me to set out briefly some of my responses to this debate in order to explain why I have come to the conclusion that capital punishment is prohibited by the Constitution.

[262] All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal

instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a "new order .. in which there is equality between ... people of all races". Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour (subject only to the obvious limitations of section 33). The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; section 11(1) prohibits it. The past permitted degrading treatment of persons; section 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; sections 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; section 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property; section 26 expressly secures it. Such a jurisprudential past created what the postamble to the Constitution recognizes as a society "characterized by strife, conflict, untold suffering and injustice". What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting

> "future founded on the recognition of human rights, democracy and

> peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

[263] The postamble to the Constitution gives expression to the new ethos of the nation by a commitment to "open a new chapter in the history of our country", by lamenting the transgressions of "human rights" and "humanitarian principles" in the past, and articulating a

> "need for understanding, but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimization".

"The need for *ubuntu*" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

[264] It is against this historical background and ethos that the constitutionality of capital punishment must be determined.

[265] The death penalty sanctions the deliberate annihilation of life. As I have previously said it

> "is the ultimate and the most incomparably extreme form of punishment... It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind" (*S v Mhlongo 1994 (1) SACR 584(A) at 587 e-g).*

This "planned and calculated termination of life itself" was permitted in the past which preceded the Constitution. Is it <u>now</u> permissible? Those responsible for the enactment

of the Constitution, could, if they had so wished, have treated the issue as a substantially political and moral issue justifying a political choice, clearly expressed in the Constitution, either retaining or prohibiting the death sentence. They elected not to do so, leaving it to this Court to resolve the issue, as a constitutional issue.

[266] The difference between a political election made by a legislative organ and decisions reached by a judicial organ, like the Constitutional Court, is crucial. The legislative organ exercises a political discretion, taking into account the *political preferences* of the electorate which votes political decision-makers into office. Public opinion therefore legitimately plays a significant, sometimes even decisive, role in the resolution of a public issue such as the death penalty. The judicial process is entirely different. What the Constitutional Court is required to do in order to resolve an issue, is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.

[267] Adopting that approach, I am satisfied that the death penalty as a form of punishment violates crucial sections of the Constitution and that it is not saved by the limitations permitted in terms of section 33. I wish briefly to set out my reasons for that conclusion.

[268] In the first place, it offends section 9 of the Constitution which prescribes in peremptory terms that "every person shall have the right to life". What does that mean? What is a "person"? When does "personhood" and "life" begin? Can there be a conflict between the "right to life" in section 9 and the right of a mother to "personal privacy" in terms of section 13 and her possible right to the freedom and control of her body? Does the "right

to life", within the meaning of section 9, preclude the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enable physical breathing in a terminal patient to continue, long beyond the point, when the "brain is dead" and beyond the point when a human being ceases to be "human" although some unfocussed claim to qualify as a "being" is still retained? If not, can such a practitioner go beyond the point of passive withdrawal into the area of active intervention? When? Under what circumstances?

[269] It is, for the purposes of the present case, unnecessary to give to the word "life" in section 9 a comprehensive legal definition, which will accommodate the answer to these and other complex questions. Whatever be the proper resolution of such issues, should they arise in the future, it is possible to approach the constitutionality of the death sentence by a question with a sharper and narrower focus, thus:

> "Does the right to life guaranteed by section 9, include the right of every person, not to be deliberately killed by the State, through a systematically planned act of execution sanctioned by the State as a mode of punishment and performed by an executioner remunerated for this purpose from public funds?"

The answer to that question, is in my view: "Yes, every person has that right". It immediately distinguishes that right from some other obvious rights referred to in argument, such as for example the right of a person in life-threatening circumstances to take the life of the aggressor in self-defence or even the acts of the State, in confronting an insurrection or in the course of War.

[270] The deliberate annihilation of the life of a person, systematically planned by the State, as a mode of punishment, is wholly and qualitatively different. It is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the State defends itself during War. It is systematically planned long after - sometimes years after - the offender has committed the offence for which he is to be punished, and whilst

he waits impotently in custody, for his date with the hangman. In its obvious and awesome finality, it makes every other right, so vigorously and eloquently guaranteed by Chapter 3 of the Constitution, permanently impossible to enjoy. Its inherently irreversible consequence, makes any reparation or correction impossible, if subsequent events establish, as they have sometimes done, the innocence of the executed or circumstances which demonstrate manifestly that he did not deserve the sentence of death.

[271] The death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit of no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in Chapter 3 of the Constitution, the exercise of which is possible only if the "right to life" is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence. Moreover, it cannot accomplish its objective without invading in a very deep and distressing way, the guarantee of human dignity afforded by section 10 of the Constitution, as the person sought to be executed spends long periods in custody, anguished by the prospect of being "hanged by the neck until he is dead" in the language of section 279(4) of Act 51 of 1977. The invasion of his dignity is inherent. He is effectively told: "You are beyond the pale of humanity. You are not fit to live among humankind. You are not entitled to life. You are not entitled to dignity. You are not human. We will therefore annihilate your life". (See the observations of *Brennan J in Trop v Dulles 356 US 84 at 100*).

[272] It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place (see *Furman v Georgia 408 US 238 at 273* (1972)(Brennan J, concurring)).

[273] I also have very considerable difficulty in reconciling the guarantee of the right to equality which is protected by section 8 of the Constitution, with the death penalty. I have no doubt whatever that Judges seek conscientiously and sedulously to avoid, any impermissibly unequal treatment between different accused whom they are required to sentence, but there is an inherent risk of arbitrariness in the process, which makes it impossible to determine and predict which accused person guilty of a capital offence will escape the death penalty and which will not. The fault is not of the sentencing Court, but in the process itself. The ultimate result depends not on the predictable application of objective criteria, but on a vast network of variable factors which include, the poverty or affluence of the accused and his ability to afford experienced and skillful counsel and expert testimony; his resources in pursuing potential avenues of investigation, tracing and procuring witnesses and establishing facts relevant to his defence and credibility; the temperament and sometimes unarticulated but perfectly *bona fide* values of the sentencing officer and their impact on the weight to be attached to mitigating and aggravating factors; the inadequacy of resources which compels the *pro - deo* system to depend substantially on the services of mostly very conscientious but inexperienced and relatively junior counsel; the levels of literacy and communication skills of the different accused in effectively transmitting to counsel the nuances of fact and inference often vital to the probabilities; the level of training and linguistic facilities of busy interpreters; the environmental milieu of the accused and the difference between that and the comparative environment of those who defend, prosecute and judge him; class, race, gender and age differences which influence *bona fide* perceptions, relevant to the determination of the ultimate sentence; the energy, skill and intensity of police investigations in a particular case; and the forensic skills and experience of counsel for the prosecution. There are many other such factors which influence the result and which determine who gets executed and who survives. The result is not susceptible to objective prediction. Some measure of arbitrariness seems inherent in the process. This truth has caused Blackmun J, one of the most experienced Judges of the United States Supreme Court, finally to conclude that it

> "is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question - does the system accurately and consistently determine which defendants 'deserve' to die? - cannot be answered in the affirmative" (*Callins v Collins 114 S. Ct. 1127; 127 L.Ed.2d 435 (1994)(Blackmun J, dissenting)).*

[274] It must, of course, be conceded that the factors which ensure arbitrariness in the judicial application of the death sentence, must in some considerable measure also influence a sentence of imprisonment, but there is an enormous difference between the death sentence and imprisonment or any other sentence. It is a qualitative and not just a quantitative difference. The unfair consequences of a wrong sentence of imprisonment can be reversed. Death, however, is final and irreversible. The accused, who is imprisoned, is still able to exercise, within the discipline of the prison, in varying degrees, some of the other rights which the Constitution guarantees to every person. The executed prisoner loses the right to pursue any other right. He simply dies.

[275] For substantially the reasons given by Chaskalson P, I am further of the view that the death penalty is also inconsistent with section 11(2) of the Constitution which provides that:

> "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[276] The different parts of section 11(2) must be read disjunctively. The death sentence would (subject to section 33) offend section 11(2) if it constitutes

(a) torture; or

(b) cruel treatment; or

(c) cruel punishment; or

(d) inhuman treatment; or

(e) inhuman punishment; or

(f) degrading treatment; or

(g) degrading punishment.

(See *Ex Parte Attorney-General, Namibia: In re Corporal Punishment 1991 (3) SA 76 (NmSC) at 86B-D)*

[277] In my view, the death sentence does indeed constitute cruel, inhuman or degrading punishment within the meaning of those expressions in section 11(2).

[278] Undoubtedly, this conclusion does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used in section 11(2); its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and the postamble to the Constitution; its harmony with the national ethos which the Constitution identifies; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life protected by the Constitution; its inherent arbitrariness in application; its impact on human dignity; and its consistency with constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilized community.

[279] I have dealt with some of these issues, in analysing the proper approach to the interpretation of the Constitution, and in focusing on the rights protected by sections 8, 9 and 10 of the Constitution. Some of the other issues relevant to the exercise, have been dealt with in the comprehensive judgment of the President and the persuasive comments of some of my colleagues.

[280] Applying the relevant considerations which emerge from the proper approach in assessing whether capital punishment is "cruel, inhuman or degrading punishment", I share the conclusions arrived at by the United Nations Committee on Human Rights, and the Hungarian Constitutional Court, (*Decision 23/1990 (X31) AB*) that the death sentence is cruel and degrading punishment and the conclusion of the Californian Supreme Court that it is "impermissibly cruel" (*People v Anderson 493 P.2d 880 (1972)*).

[281] In my view, it also constitutes inhuman punishment. It invades irreversibly the humanity of the offender by annihilating the minimum content of the right to life protected by section 9; by degrading impermissibly the humanity inherent in his right to dignity; by the inevitable arbitrariness with which its objective is implemented; by the continuing and corrosive denigration of his humanity in the long periods preceding his formal execution; by the inescapable denial of his humanity inherently involved in a sentence which directs his elimination from society.

[282] I am accordingly of the view that the death penalty does *prima facie* invade the right to life; the right to equality; the right to dignity; and the right not to be subject to cruel inhuman or degrading punishment, respectively protected by sections 9, 8, 10 and 11(2) of the Constitution.

[283] Notwithstanding that conclusion however, it would be our duty to uphold the constitutionality of the death penalty if it was saved by section 33 of the Constitution, which provides that the rights entrenched by Chapter 3 may be limited by a law of general application, provided that such limitation

> "(a) shall be permissible only to the extent that it is
> (i) reasonable; and
> (ii) justifiable in an open and democratic society based on freedom and equality; and
> (b) shall not negate the essential content of the right in question,
> and provided that any limitation to
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
> (bb) .....
> shall in addition to being reasonable as required in paragraph (a)(i) also be necessary".

On a proper construction of section 33, a "law of general application" which invades a right entrenched in Chapter 3, will be declared unconstitutional unless the party relying on such law is able to establish that it fulfils each of the conditions prescribed by this section, for its justification.

[284] In order to qualify as a permissible limitation in terms of section 33 the State must therefore

establish that the invasions on the right to life, the right to be protected from unfair discrimination, the right to dignity and the right to be protected from cruel, inhuman or degrading punishment, which the application of the death penalty causes, satisfy at least the three separate elements specified in sections 33(1)(a)(i), (ii) and 33(1)(b). In the case of a limitation on the right to dignity and the right to be protected from cruel, inhuman or degrading punishment, the fourth element of "necessity" contained in section 33(1)(aa) must further be satisfied.

[285] The most plausible argument in support of the submission that the death penalty does satisfy these onerous conditions prescribed by section 33 is the submission that it acts as a deterrent. That argument has dominated perceptions in support of the death penalty, both in South Africa and abroad.

[286] It must readily be conceded that if it could be established that the death sentence does indeed deter the commission of serious offences in respect of which the death penalty is a competent sentence, it would indeed be a very relevant and at least a potentially persuasive consideration in support of its justification in terms of section 33. There are, however, some serious difficulties involved in the acceptance of the proposition that the death penalty is, or ever has been, a demonstrable deterrence.

[287] The legitimacy of the argument must to a substantial degree be premised on an assumption which appears to me to be fallacious and at the least, highly speculative and rationally unconvincing. That assumption is that a criminal, contemplating the commission of a serious offence, weighs the risk that he might be sentenced to death against the risk that he might not be sentenced to death but only to a long term of imprisonment of twenty years or more. The assumption is that he would decide to commit the offence even at the risk of receiving a long term of imprisonment but that if the death sentence was the risk, he would refrain from committing the offence at all. I have serious difficulties with these assumptions. In the first place they are not supported by any empirical evidence or research in this country or abroad. Secondly, this argument attributes to the offender a capacity for reflection and contemplation and a maturity of analysis which appears to me

to be unrealistic. Thirdly, and more fundamentally, it ignores what is possibly the real factor in any risk assessment which might activate a potentially serious offender: the risk which he considers is that he will not be caught. If he believed that there was a real risk of being apprehended, charged and convicted he would not willingly assume the prospect of many years of quite punishing imprisonment.

[288] If, as I believe, such offenders commit the crimes contemplated because of a belief that they will probably not be apprehended at all, it is a belief which is regrettably justified. On the information that was common cause in argument before us, sixty or seventy percent of offenders who commit serious crimes are not apprehended at all and a substantial proportion of those who are, are never convicted. The risk is therefore worth taking, not because the death penalty would, in the perception of the offender, not be imposed but because no punishment is likely to result at all. The levels of serious crimes committed in South Africa are indeed disturbing. For many in the community, life has become dangerous and intolerable. Criminals do need vigorously to be deterred from conduct which endangers the security and freedom of citizens to a very distressing degree but, on the available evidence, it is facile to assume that the retention of the death penalty will provide the deterrence which is clearly needed. I have analysed such statistics as were debated in argument. In comparisons between States in the United States of America which retained the death penalty and those which did not, there is no manifest proof that the rate of serious crime was greater in the States which did not sanction capital punishment. In the case of those which did abolish capital punishment, there was no convincing proof that the rate of serious crime was greater after such act of abolition (*Peterson and Bailey, "Murder and Capital Punishment in the context of the Post-Furman Era (1988)66 Social Forces 774; Thorsten Sellin, The Death Penalty, 1982)*.

[289] Following a survey of research findings the United Nations concluded that -

> "this research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment - such proof is unlikely to be following. The evidence as a whole still gives no possible support to the deterrent hypothesis". (*United Nations: The Question of the Death Penalty and the New Contributions of Criminal Science to the Matter (1988) at 110).*

[290] We were not furnished with any reliable research dealing with the relationship between the rate of serious offences and the proportion of successful apprehensions and convictions following on the commission of serious offences. This would have been a significant enquiry. It appears to me to be an inherent probability that the more successful the police are in solving serious crimes and the more successful they are in apprehending the criminals concerned and securing their convictions, the greater will be the perception of risk for those contemplating such offences. That increase in the perception of risk, contemplated by the offender, would bear a relationship to the rate at which serious offences are committed. Successful arrest and conviction must operate as a deterrent and the State should, within the limits of its undoubtedly constrained resources, seek to deter serious crime by adequate remuneration for the police force; by incentives to improve their training and skill; by augmenting their numbers in key areas; and by facilitating their legitimacy in the perception of the communities in which they work.

[291] Successful deterrence of serious crime also involves the need for substantial redress in the socio-economic conditions of those ravaged by poverty, debilitated by disease and malnutrition and disempowered by illiteracy. Rapid amelioration in these areas must have some concomitant effect on the levels of crime. There has to be a corresponding campaign among the communities affected by serious crime to harness their own legitimacy and their own infrastructures, in interaction with the security agencies of the State. The power and influence of agencies of moral authority such as teachers, school principals and religious leaders must rapidly be restored. Crime is a multi-faceted phenomenon. It has to be assaulted on a multi-dimensional level to facilitate effective deterrence.

[292] The moratorium on the execution of the death penalty, which has been effectively in operation since 1990, is also relevant in offering some insight into the veracity of the proposition that executions for capital crimes operate as a deterrent. That proposition, as Didcott J has correctly analysed, is not cogently supported by the statistics made available to us for the period following upon the moratorium; nor is it supported by the rate at which crime levels increased during periods in our history when executions were administered with

vigour.

[293] Bringing to bear upon the issue, therefore, a rational and judicial judgment, I have not been persuaded that the fear of the death penalty rationally or practically operates as a demonstrable deterrent for offenders seeking to perpetrate serious crimes. It remains, for the reasons I have previously discussed, an impermissibly cruel invasion of rights, the sustenance of which is fundamental to a defensible civilization, protected in South Africa by the ethos of a Constitution, which is manifestly humanistic and caring in its content.

[294] Even if the fallacious and speculative assumptions which motivate the argument in support of the proposition that the death sentence does act as a deterrent against serious crime were to be accepted, rationally the fear of the death penalty would only operate on the mind of the potential offender if there was a serious risk that he could be so punished. On the information made available to us, however, that risk is in any event so minimal, as to constitute a remote statistical possibility, which, as Mr Trengove argued, might be no more significant than the risk of dying in a motor accident. It is difficult to appreciate how such a remote statistical possibility acts as a deterrent on the minds of potential offenders.

[295] On a judicial application of all the relevant considerations and the facts made available to us, I therefore cannot conclude that the State has successfully established that the death penalty *per se* has any deterrent effect on the potential perpetrators of serious offences.

[296] Is there any other basis on which the death penalty can be justified? The only serious alternative basis suggested in argument was that it is justifiable as an act of retribution. Retribution has indeed constituted one of the permissible objects of criminal punishment because there is an inherent legitimacy about the claim that the individual victims and society generally should, and are entitled to, enforce punishment as an expression of their moral outrage and sense of grievance. I have, however, some serious difficulties with the justification of the death sentence as a form of retribution. The proper approach is not to contrast the legitimacy of the death sentence as a form of retribution against no retribution at all. That is plainly untenable and manifestly indefensible. The relevant

contrast is between the death sentence and the alternative of a very lengthy period of imprisonment, in appropriate cases. It is difficult to appreciate why a sentence which compels the offender to spend years and years in prison, away from his family, in conditions of deliberate austerity and rigid discipline, substantially and continuously impeding his enjoyment of the elementary riches and gifts of civilized living, is not an effective and adequate expression of moral outrage. The unarticulated fallacy in the argument that it is not, is the proposition that it must indeed be equivalent in form to the offence committed. That is an impermissible argument. The burning of the house of the offender is not a permissible punishment for arson. The rape of the offender is not a permissible punishment of a rapist. Why should murder be a permissible punishment for murder? Indeed, there are good reasons why it should not, because its execution might desensitize respect for life *per se.* More crucially, within the context of the South African Constitution, it appears to be at variance with its basic premise and ethos which I analysed earlier in this judgment. On these considerations, I find it difficult to hold that the death sentence has been demonstrated by the State to be "justifiable in an open and democratic society based on freedom and equality".

[297] That conclusion should make it unnecessary for me to deal with the other elements of justification set out in section 33, but I am in any event of the view that the State has not established that the limitations the death penalty imposes on the relevant rights in Chapter 3, which I have discussed, can be said to be "necessary". That is a material element for justification in terms of section 33 where what is limited is the right to human dignity in section 10 or the right to be protected from cruel, inhuman or degrading punishment in terms of section 11(2). The failure to satisfy that element is fatal to the attempt to establish justification in terms of section 33. Section 277(1)(a) of Act 51 of 1977 must therefore be the constitutional casualty of this conclusion and therefore be struck down. The reasons which have prompted that conclusion are substantially also of application to sub-paragraphs (c) (d) (e) and (f) of section 277(1) and must therefore endure the same fate. For the reasons given by Chaskalson P, I agree that the issue as to whether section 277(1)(b) is unconstitutional should be left open.

[298] It also follows from my approach and the conclusions to which I have arrived, that it is unnecessary to decide whether or not the death penalty does "negate the essential content of the right in question" within the meaning of section 33(1)(b). I also prefer to leave this question open. In the absence of full argument, I do not consider it desirable to determine what the meaning of the reference to the "essential content of the right" is. Chaskalson P, in paragraph 132 of his judgment, has, without deciding, referred to two approaches which he describes as the "objective" and "subjective" determination of the essential content. Arguably, it is possible to consider a third angle which focuses on the distinction between the "essential content" of a right and some other content. This distinction might justify a relative approach to the determination of what is the essential content of a right by distinguishing the central core of the right from its peripheral outgrowth and subjecting "a law of general application" limiting an entrenched right, to the discipline of not invading the core, as distinct from the peripheral outgrowth. In this regard, there may conceivably be a difference between rights which are inherently capable of incremental invasion and those that are not. We have not heard proper argument on any of these distinctions which justify debate in the future in a proper case. I say no more.

[299] Consistent with my approach to the judicial process involved in the determination of the constitutionality of the death sentence, I am accordingly privileged to concur in the order supported by all my colleagues.

[300] **MOKGORO J:** I am in agreement with the judgement of Chaskalson P, its reasoning, and its conclusions, and I concur in the order that gives effect to those conclusions. I give this brief concurring opinion to highlight what I regard as important: namely that, when our courts promote the underlying values of an open and democratic society in terms of Section 35 when considering the constitutionality of laws, they should recognise that indigenous South African values are not always irrelevant nor unrelated to this task. In my view, these values are embodied in the Constitution and they impact directly on the death penalty as a form of punishment.

[301] Now that constitutionalism has become central to the new emerging South African jurisprudence, legislative interpretation will be radically different from what it used to be in the past legal order. In that legal order, due to the sovereignty of parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text - no matter how unjust the legislative provision. The view of the court in Bongopi *v Council of the State, Ciskei 1992(3) SA 250 (CK) at 265 H - I, as per Pickard CJ* is instructive in this regard:

> 'This court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function'.

[302] With the entrenchment of a Bill of Fundamental Rights and Freedoms in a supreme constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text. The constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.

[303] While it is important to appreciate that in the matter before us the court had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it is equally important to appreciate that the nature of the court's role in constitutional interpretation, and the duty placed on courts by Section 35, will of necessity draw them into the realm of making necessary value choices.

[304] The application of the limitation clause embodied in Section 33(1) to any law of general application which competes with a Chapter 3 right is essentially also an exercise in balancing opposing rights. To achieve the required balance will of necessity involve value judgements. This is the nature of constitutional interpretation. Indeed Section 11(2) which is the counterpart of Section 15(1) of the Constitution of Zimbabwe[1], and provides protection against cruel, inhuman or degrading punishment, embodies broad idealistic notions of dignity and humanity. If applied to determine whether the death penalty was a form of torture, treatment or punishment which is cruel, inhuman or degrading it also involves making value choices, as was held *per* Gubbay CJ in *Catholic Commision for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe*, 1993(4) SA 239(ZS) at 241. In order to guard against what Didcott J, in his concurring judgement terms the trap of undue subjectivity, the interpretation clause prescribes that courts seek guidance in international norms and foreign judicial precedent, reflective of the values which underlie an open and democratic society based on freedom and equality. By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism. Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality. This, in my view too, is the relevance of the submissions of Adv. Davids, appearing as *amicus curiae* on behalf of the Black Advocates' Forum, albeit that these submissions were inappropriately presented.

[305] In *Dudgeon v United Kingdom* (1982) 4 EHRR 149, the European Court of Human Rights, per

[1] *Act No 12 of 1979.*

Walsh J, expressed the view that:

> "... in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt" (at 184).

Although this view was expressed in relation to the legislative process, in as far as courts have to comply with the requirements of Section 35 of the Constitution the approach it embodies is not wholly inapplicable in constitutional adjudication. Enduring values, however, are not the same as fluctuating public opinion. In his argument before the court, the Attorney General submitted that:

> "... the overwhelming public opinion in favour of the retention of the death sentence is sufficiently well-known to be accepted as the true voice of the South African society. This opinion of the South African public is evidenced by newspaper articles, letters to newspapers, debates in the media and representations to the authorities..."

The described sources of public opinion can hardly be regarded as scientific. Yet even if they were, constitutional adjudication is quite different from the legislative process, because "the court is not a politically responsible institution"[2] to be seized every five years by majoritarian opinion. The values intended to be promoted by Section 35 are not founded on what may well be uninformed or indeed prejudiced public opinion. One of the functions of the court is precisely to ensure that vulnerable minorities are not deprived of their constitutional rights.

[2] *See Jesse Choper quoted in Rights and Constitutionalism; The New South African Legal Order; Van Wyk D. et al, Juta, 1994 p. 9.* The suggestion is that the judiciary is not wholly removed from the political process, where it plays a supervisory role, restraining the majority will through judicial review.

[306] In support of her main contention, Adv. Davids quite appropriately expressed concern for the need to consider the value systems of the formerly marginalised sectors of society in creating a South African jurisprudence. However, for reasons outlined in the concurring opinion of Sachs J, the issue was regrettably not argued. Indeed even if her submissions might not have influenced the final decision of the court, the opportunity to present and argue properly adduced evidence of those undistorted values historically disregarded in South African judicial law-making would have created an opportunity of important historical value, injecting such values into the mainstream of South African jurisprudence. The experience would, in my view, also have served to emphasise that the need to develop an all-inclusive South African jurisprudence is not only incumbent upon the judiciary, let alone the Constitutional Court. The broad legal profession, academia and those sectors of organised civil society particularly concerned with public interest law, have an equally important responsibility and role to play by combining efforts and resources to place the required evidence in argument before the courts. It is not as if these resources are lacking; what has been absent has been the will, and the acknowledgment of the importance of the material concerned.

[307] In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu - a notion now coming to be generally articulated in this country. It is well accepted that the transitional Constitution is a culmination of a negotiated political settlement. It is a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation. The post-amble of the Constitution expressly provides,

> "... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation..."

Not only is the notion of *ubuntu* expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in Sections 9 and 10 respectively.

[308] Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[3] In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly priced. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.

[309] In American jurisprudence, courts have recognised that the dignity of the individual in American society is the supreme value. Even the most evil offender, it has been held, "remains a human being possessed of a common human dignity" (*Furman v Georgia* 408 US 238 at 273 (1972)), thereby making the calculated process of the death penalty inconsistent with this basic, fundamental value. In Hungarian jurisprudence, the right to life and the right

[3] Mbigi, L., with J. Maree, *UBUNTU - The Spirit of African Transformation Management*, Knowledge Resources, 1995, pp. 1-16.

to human dignity are protected as twin rights in Section 54(1) of that Constitution[4]. They are viewed as an inseparable unity of rights. Not only are they regarded as a unity of indivisible rights, but they also have been held to be the genesis of all rights. In international law, on the other hand, human dignity is generally considered the fountain of all rights. The International Covenant on Civil and Political Rights (1966) G.A. Res 2200 (XXI), 21 U.N. GAOR, SUPP. (No, 16) at 52, U.N. DOC. A/6316(1966), in its preamble, makes references to "the inherent dignity of all members of the human family" and concludes that "human rights derive from the inherent dignity of the human person". This, in my view, is not different from what the spirit of *ubuntu* embraces.

[310] It is common cause, however, that the legal system in South Africa, and the socio-political system within which it operated, has for decades traumatised the human spirit. In many ways, it trampled on the basic humanity of citizens. We cannot in all conscience declare, as did a United States Supreme Court justice in *Furman v Georgia* 408 US 238, at 296 (1972) with reference to the American context, that respect for and protection of human dignity has been a central value in South African jurisprudence. We cannot view the death penalty as fundamentally inconsistent with our harsh legal heritage. Indeed, it was an integral part of a system of law enforcement that imposed severe penalties on those who aspired to achieve the values enshrined in our Constitution today.

[311] South Africa now has a new constitution however, which creates a constitutional state. This state is in turn founded on the recognition and protection of basic human rights, and although this constitutes a revolutionary change in legal terms, the idea is consistent with the inherited traditional value systems of South Africans in general - traditional values which hardly found the chance to bring South Africa on par with the rest of the world.

---

[4] *See analysis in the English translation of Decision No 23/1990 (X31) AB of the Hungarian Constitutional Court.*

As this constitution evolves to overcome the culture of gross human rights violations of the past, jurisprudence in South Africa will simultaneously develop a culture of respect for and protection of basic human rights. Central to this commitment is the need to revive the value of human dignity in South Africa, and in turn re-define and recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings, so that South Africans may also appreciate that "even the vilest criminal remains a human being"(*Furman v Georgia, supra*). In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both.

[312] In the past legal order, basic human rights in South Africa, including the right to life and human dignity, were not protected in a Bill of Fundamental Rights and Freedoms, in a supreme constitution, as is the case today. Parliament then was sovereign, and could pass any law it deemed fit. Legislation was supreme, and due to the absence of judicial review, no court of law could set aside any statute or its provision on grounds of violating fundamental rights. Hence, Section 277 of the Criminal Procedure Act, 51 of 1977, could survive untested to this day.

[313] Our new Constitution, unlike its dictatorial predecessor, is value-based. Among other things, it guarantees the protection of basic human rights, including the right to life and human dignity, two basic values supported by the spirit of *ubuntu* and protected in Sections 9 and 10 respectively. In terms of Section 35, this Constitution now commits the state to base the worth of human beings on the ideal values espoused by open democratic societies the world over and not on race colour, political, economic and social class. Although it has been argued that the currently high level of crime in the country is indicative of the breakdown of the moral fabric of society, it has not been conclusively shown that the death penalty, which is an affront to these basic values, is the best available practical form of punishment to reconstruct that moral fabric. In the second place, even if the end was desirable, that would not justify the means. The death penalty violates the essential content of the right to life embodied in Section 9, in that it extinguishes life itself. It instrumentalises the offender for the objectives of state policy. That is dehumanising. It is degrading and it violates the rights to respect for and protection of human dignity embodied in Section 10 of the Constitution.

[314] Once the life of a human being is taken in the deliberate and calculated fashion that characterises the described methods of execution the world over, it constitutes the ultimate cruelty with which any living creature could ever be treated. This extreme level of cruel treatment of a human being, however despicably such person might have treated another human being, is still inherently cruel. It is inhuman and degrading to the humanity of the individual, as well as to the humanity of those who carry it out.

[315] Taking the life of a human being will always be reprehensible. Those citizens who kill deserve the most severe punishment, if it deters and rehabilitates and therefore effectively addresses deviance of this nature. Punishment by death cannot achieve these objectives. The high rate of crime in this country is indeed disturbing and the state has a duty to protect the lives of all citizens - including those who kill. However, it should find more humane and effective integrated approaches to manage its penal system, and to rehabilitate offenders.

[316] The state is representative of its people and in many ways sets the standard for moral values within society. If it sanctions by law punishment for killing by killing, it sanctions vengeance by law. If it does so with a view to deterring others, it dehumanises the person and objectifies him or her as a tool for crime control. This objectification through the calculated killing of a human being, to serve state objectives, strips the offender of his or her human dignity and dehumanises, such a person constituting a violation of Section 10 of the Constitution.

[317] Although the Attorney General placed great reliance on the deterrent nature of the death penalty in his argument, it was conceded that this has not been conclusively proven. It has also not been shown that this form of punishment was the best available option for the rehabilitation of the offender. Retaining the death penalty for this purpose is therefore unnecessary. Section 277(1) which authorises the death penalty under these unnecessarily inhuman and degrading circumstances is inconsistent with the right to life and human dignity embodied in Sections 9 and 10 of the Constitution, respectively, and

is in direct conflict with the values that Section 35 aims to promote in the interpretation of these sections. Taking the life of a person under such deliberate and calculated circumstances, with the methods already described in the judgement of Chaskalson P, is cruel, inhuman or degrading treatment or punishment. It is inconsistent with Section 11(2) of the Constitution. In my view, therefore, the death penalty is unconstitutional. Not only does it violate the right not be subjected to cruel, inhuman or degrading treatment or punishment, it also violates the right to life and human dignity.

[318] **O'REGAN J:** I have read the judgment of Chaskalson P and I agree with the order that he proposes. However, although I agree that the death sentence constitutes a breach of section 11(2) of the Constitution that is not justified in terms of section 33, it is my view that it also constitutes a breach of section 9 (the right to life) and section 10 (the right to dignity) for the reasons that are given in this judgment.

[319] The crimes of which the two prisoners whose case has been referred to this court have been convicted were committed during a robbery from a bank security vehicle which was delivering monthly wages to the Coronation Hospital in Johannesburg. It appears from the judgment of the Appellate Division that the two prisoners were part of a group of robbers who had cold-bloodedly planned the robbery. All the robbers had been armed with AK-47s and had opened fire on the security vehicle and the accompanying vehicle when they had driven into the hospital parking area. As a result of the shooting, two policemen and two bank security officials were shot dead.

[320] There is no doubt that the crimes committed by the two prisoners were abhorrent. Our society cannot and does not condone brutal murder or robbery. Perpetrators of crimes such as these must be punished severely according to our system of criminal justice. In this case, the prisoners have been tried, convicted and sentenced. The question that this court must answer is not whether the prisoners committed these crimes, nor whether they should be punished. It has been established by the proper courts that they did commit crimes, and for that they must be punished. What this court must consider is whether the form of punishment that has been imposed is constitutional. Does our constitution permit any

convicted criminal, however heinous the crime, to be put to death by the government as punishment for that crime?

[321] The Constitution entrenches certain fundamental rights. Included amongst these are the right to life (section 9), the right to the respect for and protection of dignity (section 10) and the right not to be subjected to cruel, inhuman or degrading punishment (section 11(2)). The prisoners allege that the death penalty is in conflict with each of these. The language of each of these rights is broad and capable of different interpretations. How is this court to determine the content and scope of these rights? This question is at least partially answered by section 35(1) of the constitution which enjoins this court in interpreting the rights contained in the Constitution to 'promote the values which underlie an open and democratic society based on freedom and equality'.

[322] No-one could miss the significance of the hermeneutic standard set. The values urged upon the court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government. As the epilogue to the constitution states:

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

[323] In interpreting the rights enshrined in chapter 3, therefore, the court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new constitution. This is not to say that there is nothing from our past which should be retained. Of course this is not so. As Kentridge AJ described in the first judgment of this court(*S v Zuma* unreported judgment of this court, 5 April 1995), many of the rights entrenched in section 25 of the constitution concerning criminal justice are longstanding principles of our law, although eroded by statute and judicial decision. In interpreting the rights contained in section 25, those common law principles will be useful guides.

But generally section 35(1) instructs us, in interpreting the constitution, to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition.

[324] Section 9 of the Constitution provides that:

> 'Every person shall have the right to life.'

This formulation of the right to life is not one which has been used in the constitutions of other countries or in international human rights conventions. In choosing this formulation, the drafters have specifically avoided either expressly preserving the death penalty, or expressly outlawing it. In addition, they have not used the language so common in other constitutions, which provides that no-one may be deprived of life arbitrarily or without due process of law.[1] To the extent that the formulation of the right is different from that adopted in other jurisdictions, their jurisprudence will be of less value. The question is thus left for us to determine whether this right, or any of the others enshrined in chapter 3, would *prima facie* prohibit the death penalty.

[325] In giving meaning to section 9, we must seek the purpose for which it was included in the

---

[1] The Universal Declaration of Human Rights contains an unconditional form of the right: article 3 provides that `Everyone has the right to life, liberty and security of the person.' On the other hand, many other international rights instruments contain qualified protections of the right to life. Article 6(1) of the International Convention on Civil and Political Rights stipulates that `Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.' Subsections 2 - 5 of article 6 then provide for minimum standards for countries which have not abolished the death penalty, and article 6(6) provides that: `Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any state party to the present covenant.' In addition in 1989 an optional protocol was adopted by the General Assembly of the United Nations, article 1 of which provides that `No-one within the jurisdiction of state parties to the present optional protocol shall be executed'.

Article 4 of the Banjul Charter on Human and People's Rights (African Charter) provides that `Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of the person. No one may be arbitrarily deprived of this right.'

Article 2(1) of the European Convention on Human Rights provides that ` Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.' But in 1983 a protocol to the Convention was adopted which provided that capital punishment should be abolished. The protocol has been widely ratified. See Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights 2nd ed (1990)* pp 502 -3.

Constitution.[2] This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chapter 3 of the Constitution, and at other times a narrower or specific meaning. It is the responsibility of the courts, and ultimately this court, to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed.

[326] The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

[327] The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. This was recognised by the Hungarian constitutional court in the case in which it considered the constitutionality of the death

[2] See *S v Zuma* (unreported judgment of the Constitutional Court, 5 April 1995) para 15 in which Kentridge AJ referred to the judgment of Dickson J in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 395 - 6 with approval. See also *Law Society of British Columbia and another v Andrews and another* (1989) 36 CRR 193 (SCC) at 224 - 225.

penalty:

> `It is the untouchability and equality contained in the right to human dignity that results in man's right to life being a specific right to human life (over and above animals' and artificial subjects' right to being); on the other hand, dignity as a fundamental right does not have meaning for the individual if he or she is dead. ... Human dignity is a naturally accompanying quality of human life.' (Decision No 23/1990, (X.31.) AB, George Feher translation)

[328] The right to dignity is enshrined in our Constitution in section 10:

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

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.[3] This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3. As Brennan J held when speaking of forms of cruel and unusual punishments in the context of the American constitution:

> `The true significance of these punishments is that they treat members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.' (*Furman v Georgia* 408 US 238 at 272,3 (1972))

[329] Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.

[3]See, for discussion of the right to dignity and the death penalty, the judgment of Solyom J in the Hungarian case concerning the constitutionality of the death penalty (Decision no 23/1990 (X.31.) AB, George Feher translation).

[330] But human dignity is important to all democracies. In an aphorism coined by Ronald Dworkin `Because we honour dignity, we demand democracy'.[4] Its importance was recognised too by Cory J in *Kindler v Canada* (1992) 6 CRR (2nd) 193 (SCC) at 237 in which he held that `[i]t is the dignity and importance of the individual which is the essence and the cornerstone of democratic government'.[5]

[331] The Attorney-General argued that the prisoners, and others like them, who are convicted of crimes for which the death penalty is currently competent, have forfeited their right to life and dignity. This cannot be correct. It is a fundamental premise of our constitution that the rights in chapter 3 are available to all South Africans no matter how atrocious their conduct. As Gubbay CJ held in *Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe* 1993 (4) SA 239 (ZS) at 247 g -h:

> `It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication.'

[332] It must be emphasised that the entrenchment of a Bill of Rights, enforceable by a judiciary, is designed, in part, to protect those who are the marginalised, the dispossessed and the outcasts of our society. They are the test of our commitment to a common humanity and cannot be excluded from it.

---

[4] See Ronald Dworkin *Life's Dominion: An argument about abortion and euthanasia* (1993) at 239.

[5] See also *S v Ncube* 1988 (2) SA 702 (ZS) at 717 B - D.

[333] Are the rights to life and dignity breached by the death penalty? The death sentence has been part of South African law since the colonial era. Not only has the law permitted the death sentence, but it has been regularly imposed by courts and carried out by the government. For many years, South Africa had the doubtful honour of being a world leader in the number of judicial executions carried out. Although there is some uncertainty about the statistics, it appears that between 1981 and 1990 approximately 1100 people were executed in South Africa, including the Transkei, Ciskei, Bophuthatswana and Venda.[6] The death sentence was imposed sometimes for crimes that were motivated by political ideals. In this way the death penalty came to be seen by some as part of the repressive machinery of the former government. Towards the end of the 1980s there were several major public campaigns to halt the execution of people who were perceived to be political opponents of the government. There is no doubt that these campaigns to prevent the execution of amongst others, the 'Sharpeville Six' and the 'Upington 26' were partly responsible for the government's decision in 1990 to suspend the implementation of sentences of death.

[334] The purpose of the death penalty is to kill convicted criminals. Its very purpose lies in the deprivation of existence. Its inevitable result is the denial of human life. It is hard to see how this methodical and deliberate destruction of life by the government can be anything other than a breach of the right to life.

[335] The implementation of the death penalty is also a denial of the individual's right to dignity. The execution of the death penalty was described by Professor Chris Barnard as follows:

> `The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor....' (*Rand Daily Mail* 12 June 1978, cited in Appellants' heads)

[6] See Murray `Hangings in Southern Africa: The last ten years' (1990) 6 *SAJHR* 439 - 441; Keightley `Hangings in Southern Africa: the last ten years' (1991) 7 *SAJHR* 347 - 349; `The Death Penalty in SA: Statistics' (1989) 2 *SACJ* 251; Amnesty International `When the State Kills... The Death Penalty vs Human Rights' (1989) 204 - 207.

This frank description of the execution process leaves little doubt that it is one which is destructive of human dignity. As Cory J held in *Kindler v Canada* (1992) 6 CRR (2nd) 193 (SCC) at 241:

> `The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity.'

[336] But it is not only the manner of execution which is destructive of dignity, the circumstances in which convicted criminals await the execution of their sentence also constitutes a breach of dignity. These circumstances have been amply and aptly described by Gubbay CJ in *Catholic Commission for Justice and Peace, Zimbabwe v Attorney-General, Zimbabwe* 1993(4) SA 239 (ZS) at 268-9. Although little evidence has been placed before us to describe the experience of condemned prisoners in South Africa, it seems all too probable that it resembles the conditions described by Gubbay CJ. Indeed, the moratorium on the implementation of the death sentence described by Chaskalson P has probably aggravated the conditions of condemned prisoners considerably.

[337] Section 277 of the Criminal Procedure Act is therefore not only a breach of section 11(2) of the Constitution as held by Chaskalson P, but it is also a breach of section 9 (the right to life) and section 10 (the right to dignity). It is unnecessary and would be inappropriate to consider the further scope of these rights.

[338] The Constitution does recognise in section 33 that the rights it entrenches may be limited by law of general application if a law is reasonable and justifiable (and in some circumstances, necessary) in an open and democratic society based on freedom and equality. The infringement of the rights to life and dignity occasioned by section 277 of the Criminal Procedure Act needs to be measured against this test. In this regard, it should be noted that a law which infringes the right to dignity must be shown to be a reasonable, justifiable and necessary limitation, whereas a law which contains a limitation upon the right to life need only be shown to be reasonable and justifiable.

[339] The purpose of the bifurcated levels of justification need not detain us here. What is clear is that section 33 introduces different levels of scrutiny for laws which cause an infringement of rights. The requirement of reasonableness and justifiability which attaches to some of the section 33 rights clearly envisages a less stringent constitutional standard than does the requirement of necessity. In both cases, the enquiry concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights. Where the constitutional standard is necessity, the considerations are similar, but the standard is more stringent.

[340] In determining whether the breaches of sections 9 and 10 are justified in terms of section 33, the relevant considerations are the same as those traversed by Chaskalson P at paragraphs 116 - 131 of his judgment albeit only in the context of a breach of section 11(2). The Attorney-General argued that the purpose of section 277 was the deterrence and prevention of crime, and retribution. Although deterrence is an important goal, as Chaskalson P has described, the deterrent effect of the death penalty remains unproven, perhaps unprovable.

[341] The question of retribution is a more complex one. I agree with Chaskalson P that in a democratic society retribution as a goal of punishment should not be given undue weight. Indeed, I am unconvinced that, where the punishment is held to constitute a breach of a fundamental right, retribution would ever, on its own, be a sufficient ground for justification. As Marshall J noted in *Furman v Georgia* 408 US 238 at 344-5 (1972):

> `To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The `cruel and unusual' language limits the avenues through which vengeance can be channelled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.'

[342] It remains then to balance the purposes of section 277 with the infringement of sections 9 and 10 it causes. In this exercise, it is undeniable that sections 9 and 10 are rights which lie at the heart of our constitutional framework and that section 277 grievously infringes the ambit of these rights. They weigh very heavily in the scales of proportionality. On the other hand, while the goals of deterrence and prevention which are the purpose of section 277 are important legislative purposes, it has not been satisfactorily demonstrated that they could not be sufficiently and realistically achieved by other means. After a careful consideration of the nature of the rights, the extent of the infringement of those rights, and the purposes of section 277, I remain unpersuaded that section 277 is a constitutionally acceptable limitation upon the rights to life and dignity.

[343] Section 33(1)(b) provides that, in addition to being reasonable and justifiable (and where appropriate, necessary) a limitation upon a right should not negate the essential contents of the right in question. As section 277 does not meet the requirements of reasonableness, justifiability and necessity, it is not necessary and it would be inadvisable to consider whether it negates the essential contents of the rights in question.

[344] In conclusion, then, the death penalty is unconstitutional. It is a breach of the rights to life and dignity that are entrenched in sections 9 and 10 of our Constitution, as well as a breach of the prohibition of cruel, inhuman and degrading punishment contained in section 11(2). The new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect. We cannot postpone giving effect to that commitment.

[345] **SACHS J:** I agree fully with the judgment of the President of the court, and wish merely to elaborate on two matters, both of emphasis rather than substance, which I feel merit further treatment.

[346] The first relates to the balance between the right to life and the right to dignity. The judgment appropriately regards the two rights as mutually re-enforcing, but places greater reliance on the prohibition against cruel, inhuman or degrading punishment than it does on the

right to life. For reasons which I will outline, I think the starting-off point for an analysis of capital punishment should be the right to life.

[347] Secondly, I think it important to say something about the source of values which, in terms of section 35 of the Constitution, our interpretation is required to promote.

The Right to Life and Proportionality

[348] Decent people throughout the world are divided over which arouses the greatest horror: the thought of the State deliberately killing its citizens, or the idea of allowing cruel killers to co-exist with honest citizens. For some, the fact that we cold-bloodedly kill our own kind, taints the whole of our society and makes us all accomplices to the premeditated and solemn extinction of human life. For others, on the contrary, the disgrace is that we place a higher value on the life and dignity of the killer than on that of the victim. A third group prefer a purely pragmatic approach which emphasises not the moral issues, but the inordinate stress that capital punishment puts on the judicial process and, ultimately, on the Presidency, as well as the morbid passions it arouses in the public; from a purely practical point of view, they argue, capital punishment appears to offer an illusory solution to crime, and as such actually detracts from really effective measures to protect the public.

[349] We are not called upon to decide between these positions. They are essentially emotional, moral and pragmatic in character and will no doubt occupy the attention of the Constitutional Assembly. Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one.

[350] This court is unlikely to get another case which is emotionally and philosophically more elusive, and textually more direct. Section 9 states: "Every person shall have the right to life." These unqualified and unadorned words are binding on the State (sections 4 and 7) and,

on the face of it, outlaw capital punishment. Section 33 does allow for limitations on fundamental rights; yet, in my view, executing someone is not limiting that person's life, but extinguishing it.

[351] Life is different. In the vivid phrase used by Mahomed J in the course of argument, the right to life is not subject to incremental invasion. Life cannot be diminished for an hour, or a day, or 'for life'. While its enjoyment can be qualified, its existence cannot. Similarly, death is different. It is total and irreversible. Just, as there are no degrees of life, so there are no degrees of death (though, as we shall see, there were once degrees of severity in relation to how the sentence of death should be carried out). A level of arbitrariness and the possibilities of mistake that might be inescapable and therefore tolerable in relation to other forms of punishment, burst the parameters of constitutionality when they impact on the deliberate taking of life. The life of any human being is inevitably subject to the ultimate vagaries of the due processes of nature; our Constitution does not permit it to be qualified by the unavoidable caprices of the due processes of law.[1]

[352] In the case of other constitutional rights, proportionate balances can be struck between the exercise of the right and permissible derogations from it. In matters such as torture, where no derogations are allowed, thresholds of permissible and impermissible conduct can be established. When it comes to execution, however, there is no scope for proportionality, while the only relevant threshold is, tragically, that to eternity.

[353] Even if one applies an objective approach in relation to the enjoyment of the right to life, namely, that the State is under a duty to create conditions to enable all persons to enjoy

[1]The issue, of course, is whether inescapable caprice prevents the process from being 'due' when the consequences are so drastic.

the right, in my view this cannot mean that the State's function can be extended to encompass complete, intentional and avoidable obliteration of any person's subjective right. Subject to further argument on the matter, my initial view is that the objective approach can be used to qualify the subjective enjoyment of the right, but not to eliminate it completely, and certainly not to eliminate the subject. It can provide the basis for limiting enjoyment of other subjective rights - to dignity, personal freedom, movement - for a period, or in relation to a concrete situation, or in respect of a physical space, if the requirements of section 33 are met. Yet, life by its very nature cannot be restricted, qualified, abridged, limited or derogated from in the same way. You are either alive or dead.

[354] In my view, section 33 permits limitations on rights, not their extinction. Our Constitution in this sense is different from those that expressly authorise deprivation of life if due process of law is followed, or those that prohibit the arbitrary taking of life. The unqualified statement that 'every person has the right to life', in effect outlaws capital punishment. Instead of establishing a constitutional framework within which the State may deprive citizens of their lives, as it could have done, our Constitution commits the State to affirming and protecting life. Because section 33 is not concerned with creating circumstances in which the right of any person may be disregarded altogether, nor with establishing exceptions which qualify the nature of the right itself, or exclude its operation, it cannot be invoked as an authorization for capital punishment.

[355] A full conceptualization of the right to life will have to await examination of a multitude of complex issues, each of which has its own contextual setting and particularities. In contrast to capital punishment, there are circumstances relating to the right to life where proportionality could well play an important role in balancing out competing interests. Whether or not section 33 would be applicable in each case, or whether proportionality will enter into the definition of the ambit of the right itself, or whether it relates simply to competition between two or more people to exercise the right when it is under immediate threat, need not be decided here. Thus, the German Constitutional Court has relied heavily on the principle of proportionality in relation to the question of when person-

hood and legally protected life begin and, in particular of how to balance foetal rights as against the rights of the woman concerned.[2] Force used by the State in cases of self-defence or dealing with hostage-takers or mutineers, must be proportionate to the danger apprehended; the issue arises because two or more persons compete for the right to life; for the one to live, the other must die. The imminence of danger is fundamental: to kill an assailant or hostage-taker or prisoner of war after he or she has been disarmed, is regarded as murder.

[356] Executing a trussed human being long after the violence has ended, totally lacks proportionality in relation to the use of force, and does not fall within the principles of self-defence. From one point of view capital punishment, unless cruelly performed, is a contradiction in terms. The 'capital' part ends rather than expresses the 'punishment', in the sense that the condemned person is eliminated, not punished. A living being held for years in prison is punished; a corpse cannot be punished, only mutilated. Thus, execution ceases to be a punishment of a human being in terms of the Constitution, and becomes instead the obliteration of a sub-human from the purview of the Constitution.

[357] At its core, constitutionalism is about the protection and development of rights, not their extinction. In the absence of the clearest contextual indications that the framers of the Constitution intended that the State's sovereignty should be so extended as to allow it deliberately to take of the life of its citizens, Section 9 should be read to mean exactly what it says: Every person shall have the right to life. If not, the killer unwittingly achieves a final and perverse moral victory by making the state a killer too, thus reducing social abhorrence at the conscious extinction of human beings.

The Source of Values

[2] 88 BVerfGE 203 (2nd Abortion Case).

[358] The second issue that caused me special concern was the source of the values that we are to apply in assessing whether or not capital punishment is a cruel, inhuman or degrading punishment as constitutionally understood. The matter was raised in an amicus brief and argued orally before us by Ms. Davids on behalf of the Black Advocates Forum.

[359] Her main contention was that we should not pronounce on the subject of capital punishment until we had been apprised by sociological analysis of the relevant expectations, sensitivities and interests of society as a whole. In the past, she stated, the all-white minority had imposed Eurocentric values on the majority, and an all-white judiciary had taken cognisance merely of the interests of white society. Now, for the first time, she added, we had the opportunity to nurture an open and democratic society and to have due regard to an emerging national consensus on values to be upheld in relation to punishment.

[360] Many of the points she made had a political rather than a legal character, and as such should have been directed to the Constitutional Assembly rather than to the Constitutional Court. Nevertheless, much of her argument has a bearing on the way this court sees its functions, and deserves the courtesy of a reply.

[361] To begin with, I wish firmly to express my agreement with the need to take account of the traditions, beliefs and values of all sectors of South African society when developing our jurisprudence.

[362] In broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution. The Constitution was the first public document of legal force in South African history to emerge from an inclusive process in which the overwhelming majority were represented. Reference in the Constitution to the role of public international law [sections 35(1) and 231] underlines our common adherence to internationally accepted principles. Whatever the status of earlier legislation and jurisprudence may be, the Constitution speaks for the whole of society and not just one

section.

[363] The preamble, postamble and the principles of freedom and equality espoused in sections 8, 33 and 35 of the Constitution, require such an amplitude of vision. The principle of inclusivity shines through the language provisions in section 3, and underlies the provisions which led to the adoption of the new flag and anthem, and the selection of public holidays.

[364] The secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country. This would include benefiting from the learning of those judges who in the previous era managed to articulate a sense of justice that transcended the limits of race, as well as acknowledging the challenging writings of academics such as the late Dr. Barend van Niekerk, who bravely broke the taboos on criticism of the legal system.[3]

[365] Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot, unfortunately, extend the equality principle backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalized.

[366] Redressing the balance in a conceptually sound, methodologically secure and functionally efficient way, will be far from easy. Extensive research and public debate will be required. Legislation will play a key role; indeed, the Constitution expressly acknowledges situations where legal pluralism based on religion can be recognised [14(3)], and where indigenous law can be applied (s.181). Constitutional Principle XIII declares that *"..... Indigenous law, like common law, shall be recognised and applied by*

[3]Cf. 1969 SALJ 455 and 1970 SALJ 60; S v Van Niekerk 1970 (3) SA 655.

the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith".

[367] Yet the issue raised by Ms Davids goes beyond the question of achieving recognition of different systems of personal law.

[368] In interpreting Chapter 3 of the Constitution, which deals with fundamental rights, all courts must promote the values of an open and democratic society based on freedom and equality [s.35(1)]. One of the values of an open and democratic society is precisely that the values of all sections of society must be taken into account and given due weight when matters of public import are being decided. Ms. David's concern is that when it comes to interpreting Chapter 3, and in particular, the concept of punishment, the values of only one section of the community are taken into account.

[369] Paul Sieghart points out that "*the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness. Although individual interests must on occasion be subordinated to those of a group, democracy does not mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position*".[4] The principle that cognisance must be taken of minority opinions should apply with at least equal force to majority opinions; if one of the functions of the Constitution is to protect unpopular minorities from abuse, another must surely be to rescue the majority from marginalization.

[370] In a democratic society such as we are trying to establish, this is primarily the task of Parliament, where the will of the majority can be directly expressed within the framework of a system of fundamental rights. Our function as members of this court - as I see it - is, when interpreting the Constitution, to pay due regard to the values of all sections of society, and not to confine ourselves to the values of one portion only,

[4]The International Law of Human Rights, Oxford 1983, reprinted 1992, at p. 93 referring to James, Young and Webster v U.K. Judgment of the European Court of Human Rights on 13/08/81.

however, exalted or subordinate it might have been in the past.

[371] It is a distressing fact that our law reports and legal textbooks contain few references to African sources as part of the general law of the country. That is no reason for this court to continue to ignore the legal institutions and values of a very large part of the population, moreover, of that section that suffered the most violations of fundamental rights under previous legal regimes, and that perhaps has the most to hope for from the new constitutional order.

[372] Appropriate source material is limited and any conclusions that individual members of this court might wish to offer would inevitably have to be tentative rather than definitive. We would certainly require much fuller research and argument than we had in the present case. The paucity of materials, however, is a reason for putting the issue on the agenda, not a justification for postponing it.

[373] The evolution of core values in all sections of the community is particularly relevant to the characterization of what at any moment are regarded as cruel, inhuman and degrading punishments [s.11(2)]. In my view, s.35(1) requires this court not only to have regard to public international law and foreign case law, but also to all the dimensions of the evolution of South African law which may help us in our task of promoting freedom and equality. This would require reference not only to what in legal discourse is referred to as 'our common law' but also to traditional African jurisprudence.

[374] I must stress that what follows relates to matters not properly canvassed in argument. The statements I make should not be regarded as an attempt on my part to 'lay down the law' on subjects that might well be controversial. Rather, the materials are presented for their possible relevance to the search for core and enduring values consistent with the text and spirit of the Constitution. It is unfortunate they were not placed before us to enable their reliability and their merits to be debated; they are intended to indicate that, speaking for myself, these are the kinds of scholarly sources which I would have regarded as helpful in determining questions such as the present one, if Ms. Davids had presented them to us

rather than complain about their absence. I might add that there is nothing to indicate that had these sources been properly presented and subjected to the rigorous analysis which our judicial procedure calls for, the decision of this Court would have been different. There does not appear to be any foundation for her plea that we postpone the matter. On the contrary, the materials that I will refer to point to a source of values entirely consistent with the overall thrust of the President's judgment, and, in particular, with his reference to the constitutionally acknowledged principle of *ubuntu*.[5]

[375] Our libraries contain a large number of studies by African and other scholars of repute, which delineate in considerable detail how disputes were resolved and punishments meted out in traditional African society. There are a number of references to capital punishment and I can only repeat that it is unfortunate that their import was never canvassed in the present matter.

[5]See the postamble, also referred to as the epilogue or afterword, where reference is made to the "need for ubuntu".

[376] In the first place, the sources indicate that it is necessary to acknowledge that systems of law enforcement based on rational procedures were well entrenched in traditional society. In his classic study of the Tsonga-speaking people, Henri Junod observes that *"... the Bantus possess a strong sense of justice. They believe in social order and in the observance of the laws, and, although these laws were not written, they are universal and perfectly well known"*.[6] The Cape Law Journal, in a long and admiring report on what it refers to as a Kafir Law Suit, declares that in a typical trial 'the Socratic method of debate appears in all its perfection.'[7] John Henderson Soga points out that offences were considered to be against the community or tribe rather than the individual, and punishment of a constructive or corrective nature was administered for disturbing the balance of tribal life.[8]

[377] More directly for our purposes, the materials suggest that amongst the Cape Nguni, the death penalty was practically confined to cases of suspected witchcraft, and was normally spontaneously carried out after accusation by the diviners.[9] Soga says that the death penalty was never imposed, the reasoning being as follows: 'Why sacrifice a second life for one already lost?'[10] Professor Z.K. Mathews is in broad agreement.[11] The Cape Law Journal notes that summary executions were usually inflicted for assault on the wives of chiefs or aggravated cases of witchcraft, but otherwise the death sentence 'seldom followed even murder, when committed without the aid of supernatural powers; and as banishment, imprisonment and corporal punishment are all unknown in (African) jurisprudence, the property of the people constitutes the great fund out of which debts of justice are paid'.[12]

---

[6]Junod, Henri A - The Life of a South African Tribe 2nd Edition published Macmillan 1927 at p. 436.

[7]1889 CLJ 87 - Extracts from Maclean's Handbook.

[8]John Henderson Soga - The Ama-Xosa: Life and Customs, published Lovedale Press , South Africa; London, Kegan Paul, at p. 46.

[9]Hammond-Tooke D: The 'other side' of frontier history: a model of Cape Nguni political process, in African Societies in Southern Africa ed. Leonard Thompson, London 1969, at p. 255.

[10]Soga supra at p. 46.

[11]Bantu Law and Western Civilisation in South Africa - a study in the clash of cultures (1934 Yale University MA Thesis).

[12]1889 CLJ 89, 1890 CLJ 23 at 34.

[378] Similar approaches were apparently followed in other African communities. The Sotho King Moshoeshoe was said to be well known for his opposition to capital punishment, even for supposed witchcraft,[13] as was Montshiwa during his long reign as King of the Barolong.[14] The absence of capital punishment among the Zulu people apparently angered Shepstone, Lieutenant Governor of Natal. Donald Morris writes as follows:

[379] *'Hearken to Shepstone on November 25, 1850, substituting capital punishment for the native system of cattle fines in the case of murder:*

[13]J M Orpen: History of the Basutus of South Africa, Cape Argus 1857, Reprinted UCT 1955.

[14]Molema SM: Montshiwa (1815 - 1896) Barolong Chief and Patriot (published C. Struik 1966).

[380] *"... Know ye all .... a man's life has no price : no cattle can pay for it. He who intentionally kills another, whether for Witchcraft or otherwise, Shall die himself."*[15]

[381] Thus, if these sources are reliable, it would appear that the relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder. Such executions as took place were the frenzied, extra-judicial killings of supposed witches, a spontaneous and irrational form of crowd behaviour that has unfortunately continued to this day in the form of necklacing and witch-burning. In addition, punishments by military leaders in terms of military discipline were frequently of the harshest kind and accounted for the lives of many persons. Yet, the sources referred to above indicate that, where judicial procedures were followed, capital punishment was in general not applied as a punishment for murder.

[382] In seeking the kind of values which should inform our broad approach to interpreting the Constitution, I have little doubt as to which of these three contrasted aspects of tradition we should follow and which we should reject. The rational and humane adjudicatory approach is entirely consistent with and re-enforcing of the fundamental rights enshrined in our Constitution; the exorcist and militarist concepts are not.

[383] We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the once powerful common law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality, and we uphold and develop those many aspects of the common law which feed into and enrich the fundamental rights enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles

[15]Donald R Morris: The washing of the Spears - A History of the Rise of the Zulu Nation under Shaka and its Fall in the Zulu war of 1879. Jonathan Cape 1965, Random House 1995, p. 174-5.

of the new constitutional order.

[384] It is instructive to look at the evolution of values in the colonial settlement as well as in African society. In the Dutch settlement, as yet unaffected by the changes sweeping Europe, torture was used until the end of the 18th century as an integral part of the judicial process.[16] Persons were not only condemned to death, the judges specified in detail gruesome modes of execution designed to produce maximum pain and greatest indignity over the longest period of time. The concept of a dignified execution was seen as a contradiction in terms. The public was invited to witness the lingering death, the mutilation and the turning of human beings into carrion for the birds. This is logical. If executions are to deter, they should receive the maximum publicity, and the killers should undergo an agony equal to that to which they subjected their victims.

[385] Yet the British colonial administration that took over at the time of the Napoleonic wars, adopted a different position. Torture was abolished. The multiple degrees of severity of capital punishment were replaced by the single relatively swift mode of hanging. The reason for this was that torture and cruel modes of execution were regarded as barbaric in themselves and degrading to the society which practised them. The incumbent judges protested that whatever might have been appropriate in Britain, in the conditions of the Cape to rely merely on hangings, corporal punishment and prison was to invite slave uprisings and mayhem. The public executioner was so distressed that he hanged himself. All this is a matter of record.[17]

---

[16]C. Graham Botha 1915 SALJ 319. More generally, see footnote 15. These matters were referred to but not developed in Applicants' written argument.

[17]Sir John Barrow, FRS: Travels into the Interior of Southern Africa Volume 2 p. 138 -9. London 1806 quoted in C. Graham Botha 1915 SALJ 322, also by E. Kahn, the Death Penalty 1970 THRHR, p. 110. Letter by British Commander to Cape Court of Justice quoted by C. Graham Botha 1913 SALJ 294; reply by Court quoted in 1915 SALJ 327; see also, V. de Kock - Those in Bondage, an account of the life of the slave at the Cape, George Allen and Unwin, London 1950 p 158-60. For punishments generally see de V Roos 1897 CLJ 11-23, C.H. van Zyl 1907 SALJ 352, 370; 1908 SALJ 4, 264.

[386] Two centuries have passed since then, and it would not be surprising if the framers of the Constitution felt that a further qualitative evolution had taken place. Current practices in the Southern African region as a whole with regard to capital punishment, testify to such an evolution. Information placed before this court[18] showed that of six countries sharing a frontier with South Africa, only one has carried out executions in recent years (Zimbabwe). The last judicial execution in Lesotho was in 1984, in Swaziland in 1983 and in Botswana in 1986, although capital punishment still remains on the statute books and people have in fact been sentenced to death in these countries. Mozambique and Namibia both expressly outlaw capital punishment in their constitutions.

[387] The positions adopted by the framers of the Mozambican and Namibian constitutions were not apparently based on bending the knee to foreign ideas, as was implicit in Ms. David's contention, but rather on memories of massacres and martyrdom in their own countries. As Churchill is reputed to have said, the grass never grows green under the gallows.[19] Germany after Nazism, Italy after fascism, and Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain all abolished capital punishment for peacetime offences after emerging from periods of severe repression. They did so mostly through constitutional provisions.[20]

[388] It is not unreasonable to think that similar considerations influenced the framers of our Constitution as well. In avoiding any direct or indirect reference to the death sentence, they were able to pay due regard to the fact that one of this country's greatest assets was the passion for freedom, democracy and human rights amongst the generation of persons who fought hardest against injustice in the past. Included in this was a deep respect, amounting to veneration, for life. The emerging nation could squander this precious asset at its peril. The framers could not

[18]Applicants' heads of argument, taken from When the State Kills - The Death Penalty v. Human Rights, Amnesty International, London 1989.

[19]This is confirmed by South African experience ranging from Slachters Nek to the Cape Rebels to the 1922 Strike leaders to Vuyisile Mini and Solomon Mahlangu in recent times.

[20]Amnesty International op cit. There has also been a marked move away from capital punishment in the countries of Eastern Europe after the ending of authoritarian one-party rule there.

have been unaware of the fact that the time to guard against future repression was when memories of past injustice and pain were still fresh. If they chose sweeping language in favour of life, this could well in part have been because of a realisation that this was the moment to remove any temptation in coming years to attempt to solve grave social and political problems by means of executing opponents.

[389] Historically, constitutionalism was a product of the age of enlightenment. It was associated with the overthrow of arbitrary power and the attempt to ensure that government functioned according to established principles and processes and in the light of enduring values. It came together with the abolition of torture and the opening up of dungeons. It based itself on the twin propositions that all persons had certain inherent rights that came with their humanity, and that no one had a God-given right to rule over others.

[390] The second great wave of constitutionalism after World War II, was also a reaction to gross abuse of power, institutionalised inhumanity and organised disrespect for life. Human rights were not merely declared to exist: against the background of genocide and crimes against humanity committed in the name of a racial ideology linked to state sovereignty, firm constitutional limits were placed on state power. In particular, the more that life had been cheapened and the human personality disregarded, the greater the entrenchment of the rights to life and dignity.

[391] Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life.

[392] Accordingly, the idealism that we uphold with this judgment is to be found not in the minds of the judges, but in both the explicit text of the Constitution itself, and the values it enshrines. I have no doubt that even if, as the President's judgment suggests, the framers subjectively intended to keep the issue open for determination by this court, they effectively closed the door

by the language they used and the values they required us to uphold. It is difficult to see how they could have done otherwise. In a founding document dealing with fundamental rights, you either authorize the death sentence or you do not. In my view, the values expressed by section 9 are conclusive of the matter. Everyone, including the most abominable of human beings, has the right to life, and capital punishment is therefore unconstitutional.

CASE NO	**:**	CCT/3/94
COUNSEL FOR APPLICANT	:	W. Trengove SC GJ Marcus PHJ Van Vuuren
INSTRUCTED BY	**:**	GM Budlender NDB Orleyn-Sekete Legal Resources Center
COUNSEL FOR RESPONDENT	**:**	KPCO Von Lieres und Wilkau SC TP McNally SC JSM Henning SC HE Van Jaarsveld R Bhika RJ Chinner PP Stander AJ Van Rensburg AAL Neill PJ Wasserman
COUNSEL FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**:**	G Bizos SC L M Molopa

INSTRUCTED BY	**:**	The State Attorney
COUNSEL FOR AMICUSCURIAE - BLACK ADVOCATES FORUM (BAFO)	**:**	FE Davids GM Makhanya
INSTRUCTED BY	**:**	Nat A Victor
COUNSEL FOR AMICUS CURIAE - LAWYERS FOR HUMAN RIGHTS, CENTRE FOR APPLIED LEGAL STUDIES, AND THE SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA	**:**	DM Davis DI Berger
INSTRUCTED BY	**:**	A Motala & S Ebrahim
COUNSEL FOR AMICUS CURIAE - IAN GLAUBER	**:**	E Zar SC
INSTRUCTED BY	**:**	K Mundell