SACHS J ABRIDGED JUDGMENT (CONCURRING)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others

[107] Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and

> sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution. In expressing my concurrence with the comprehensive and forceful judgment of Ackermann J, I feel it necessary to add some complementary observations on the broader matters. I will present my remarks - in a preliminary manner as befits their sweep and complexity - in the context of responding to three issues which emerged in the course of argument. The first concerns the relationship between equality and privacy, the second the connection between equality and dignity, and the third the question of the meaning of the right to be different in the open and democratic society contemplated by the Constitution.

Equality and Privacy

[108] It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of

its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite

[108] who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.

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

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

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

[111] These concerns are undoubtedly valid. Yet, I consider that they arise from a set of assumptions that are flawed as to how equality and privacy rights interrelate and about the manner in which privacy rights should truly be understood; in the first place, the approach adopted by the applicants subjects equality and privacy rights to inappropriate sequential ordering, while secondly, it undervalues the scope and significance of privacy rights. The cumulative result is both to weaken rather than strengthen applicants' quest for human rights, and to put the general development of human rights jurisprudence on a false track.

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

[113] One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would

be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.

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

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

[116] There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers, Attorney General of Georgia v. Hardwick et al* made it clear that the much-quoted "right to be left alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get

on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Just as "liberty must be viewed not merely *'negatively* or selfishly as a mere absence of restraint, but *positively* and socially as an adjustment of restraints to the end of freedom of opportunity' ", so must privacy be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place.

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

[118] At the same time, there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what they do is sexual and done in private. In this respect, the assumptions about privacy rights are too broad. There are very few democratic societies, if any, which do not penalise persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private. Similarly, in democratic societies sex involving violence, deception, voyeurism, intrusion or harassment is punishable (if not always punished), or else actionable, wherever it takes place (there is controversy about prostitution and sado-masochistic and dangerous fetishistic sex). The privacy interest is overcome because of the perceived harm.

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

Equality and Dignity

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

[121] Ackermann J has, I believe, dealt convincingly with the assertion that the Court has failed to promote substantive as opposed to formal equality. Indeed, his judgment is itself a good example of a refusal to follow a formal equality test, which could have based invalidity simply on the different treatment accorded by the law to anal intercourse according to whether the partner was male or female. Instead, the judgment has with appropriate sensitivity for the way anti-gay prejudice has impinged on the dignity of members of the gay community, focussed on the manner in which the anti-sodomy laws have reinforced systemic disadvantage both of a practical and a spiritual nature. Furthermore, it has done so not by adopting the viewpoint of the so-called reasonable lawmaker who accepts as objective all the prejudices of heterosexual society as incorporated into the laws in question, but by

responding to the request of the applicants to look at the matter from the perspective of those whose lives and sense of self-worth are affected by the measures. I would like to endorse, and I believe, strengthen this argument by referring to reasons of principle and strategy why, when developing equality jurisprudence, the Court should continue to maintain its focus on the defined anti-discrimination principles of sections 9(3), (4) and (5), which contain respect for human dignity at their core.

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

[123] By developing its equality jurisprudence around the concept of unfair discrimination this Court engages in a structured discourse centred on respect for human rights and non-discrimination. It reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasising the Court's special responsibility for protecting fundamental rights in an affirmative manner. It also diminishes the possibility of the Court being inundated by unmeritorious claims, and best enables the Court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility. Finally, it places the Court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history.

[124] Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be

to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.

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

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

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

what you are, that impinges on the dignity and self-worth of a group.

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

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

The Treatment of Difference in an Open Society

[130] Although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of public institutions which are based on and perpetuate such prejudice. From today a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, less lonely and more dignified. The law catches up with an

evolving social reality. A love that for a number of years has dared openly to speak its name in bookshops, theatres, film festivals and public parades, and that has succeeded in becoming a rich and acknowledged part of South African cultural life, need no longer fear prosecution for intimate expression. A law which has facilitated homophobic assaults and induced self-oppression, ceases to be. The courts, the police and the prison system are enabled to devote the time and resources formerly spent on obnoxious and futile prosecutions, to catching and prosecuting criminals who prey on gays and straights alike. Homosexuals are no longer treated as failed heterosexuals but as persons in their own right.

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

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

[133] Section 9 of the Constitution is unambiguous: discrimination on the grounds of being gay or lesbian, is presumptively unfair and a violation of fundamental rights. This judgment holds that in determining the normative limits of permissible sexual conduct, homosexual erotic activity must be treated on an equal basis with heterosexual, in other words, that the same-sex quality of the conduct must not be a consideration in determining where and how the law should intervene. Commentators have suggested that respect for the equality principle goes further in two respects. The first is that the gay and lesbian community must have full access to decision-making on the questions at issue, so that their experiences, sense of right and wrong and proposals for effective law-making are given equal consideration when the outcome is determined. Secondly, the selection of issues for investigation must not be selected and treated on the basis of stereotypes and prejudice. It is not necessary to pronounce

on these complex issues in this case.

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

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

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

[137] The fact that the state may not impose orthodoxies of belief systems on the whole of

society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society.

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