

THE CASE OF STATE V. MAKWANYANE

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Source: S v. Makwanyane, (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

[In State v. Makwanyane (1995), the South African Constitutional Court ruled the death penalty unconstitutional. The case contains a lengthy discussion of foreign case law and is a widely discussed example of a court voluntarily taking into account foreign legal materials that lack the status of binding law in the national legal system.]

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA

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 ...

(...)

[4] The trial was concluded before the 1993 [Republic of South Africa] Constitution came into force, and so the question of the constitutionality of the death sentence did not arise at the trial. (...)

[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.

(...)

The Relevant Provisions of the Constitution

(...)

- [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.

(...)

- [10] *[S]ection 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.¹ It must also be construed in a way which secures for "individuals the full measure" of its protection.² 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.³

¹ *Jaga v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 662-663.

² *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) at 328-329.

³In the analysis that follows sections 8, 9 and 10 are treated together as giving meaning to section 11(2), which is the

(...)

Legislative History

[In paragraphs [12]-[25], CHASKALSON P discusses the purpose and background of the relevant sections of the Republic of South Africa Constitution. Before concluding that certain background material can be taken into account by a Court in interpreting the constitution, the South African Constitutional Court refers to various foreign legal materials concerning the admissibility of background evidence.]

(...)

International and Foreign Comparative Law

(...)

- [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, 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

provision of Chapter Three that deals specifically with punishment.

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.⁴ 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,⁵ the Inter-American Commission on Human Rights,⁶ the Inter-American Court of Human Rights,⁷ the European Commission on Human Rights,⁸ and the European Court of Human Rights,⁹ and in appropriate cases, reports 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

⁴ 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."

⁵ Established under article 28 of the International Covenant on Civil and Political Rights (ICCPR or International Covenant) 1966.

⁶ Established in terms of article 33 of the American Convention on Human Rights 1969.

⁷Id.

⁸Established in terms of article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ("European Convention").

⁹Id.

unqualified terms they either deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law.¹⁰ 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.

[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.¹¹ This has already been pointed out in a number of decisions of the Provincial and Local Divisions of the Supreme Court,¹² 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

¹⁰ 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 INVOLABLE. 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)

¹¹ See *S v Zuma and Two Others*, *supra* note 6.

¹² See, e.g., *Qozeleni*, *supra* note 36, at 80B-C; *S v Botha and Others* 1994 (3) BCLR 93 (W) at 110F-G.

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.¹³

- [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.¹⁴ 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

- [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".¹⁵ 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

¹³ Decision No. 23/1990 (X.31.) AB of the (Hungarian) Constitutional Court (George Feher trans.).

¹⁴ 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.

¹⁵ *Furman v. Georgia*, *supra* note 34, at 418 (Powell, J., joined by Burger, CJ., Blackmun, J. and Rehnquist, J., dissenting).

of the states to make laws for such purposes.¹⁶ The argument that capital punishment is unconstitutional was based on the Eighth Amendment, which prohibits cruel and unusual punishment.¹⁷ Although the Eighth Amendment "has not been regarded as a static concept"¹⁸ and as drawing its meaning "from the evolving standards of decency that mark the progress of a maturing society",¹⁹ 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.²⁰

[41] Although challenges under state constitutions to the validity of the death sentence have been successful,²¹ the federal constitutionality of the death sentence as a legitimate form of punishment for murder was affirmed by the United States Supreme Court in *Gregg v. Georgia*.²² 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.²³ 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.

[42] (...) 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

¹⁶ See *Furman v. Georgia*, *supra* note 34.

¹⁷ *Id.*

¹⁸ *GREGG v. GEORGIA*, 428 U.S. 153, 173 (1976) (STEWART, POWELL AND STEVENS, JJ.).

¹⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁰ 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.).

²¹ See *infra* paras. 91-92.

²² *Supra* note 60, at 187.

²³ 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.

Eighth Amendment; where the discretion has been "suitably directed and limited so as to minimise the risk of wholly arbitrary and capricious action",²⁴ the challenge to the statute has failed.²⁵

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.

(...)

[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 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. (...) At every stage of the process there is an element of chance.

(...)

[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

²⁴ *Gregg v. Georgia*, *supra* note 60, at 189.

²⁵ *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).

case that comes before the courts, and is almost certainly present to some degree in all court systems. (...) 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.²⁶ (...)

- [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,²⁷ 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

²⁶ "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, C.J.)(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.).

²⁷ *Id.* (compare Scalia, J., concurring, with Blackmun, J., dissenting).

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.²⁸ 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 "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."²⁹

[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. 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.³⁰

[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*³¹ was concerned with the extradition from Canada to the United States of two fugitives,

²⁸ *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.").

²⁹ *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."

³⁰ [1977] 45 BVerfGE 187, 228 (*Life Imprisonment case*)(as translated in Kommers, *supra* note 18, at 316).

³¹ (1992) 6 CRR (2d) 193 SC.

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...³²

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.

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

[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.³³

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. (...)

[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

³² Id. at 241 (per Cory, J, dissenting with Lamer, CJC, concurring). *See also*, Sopinka, J, dissenting (with Lamer, CJC, concurring) at 220.

³³ Id. at 202 (per La Forest, J)(L'Heureux-Dube and Gonthier, JJ concurring).

these grounds. (...)

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 Covenant on Civil and Political Rights. Once again, there was a division of opinion within the tribunal. (...)
- [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*.³⁴ 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

³⁴ (1989) 11 EHRR 439 at paras. 103, 105 and 111.

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 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*,³⁵ 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 1949.³⁶
- [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.
- [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."³⁷ 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.
- [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.

³⁵ (1980) 2 SCC 684.

³⁶ Id. at 730, para. 136.

³⁷ Id. at 709, para. 61.

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."³⁸

[76] The Court then dealt with international authorities for and against the death sentence, and with the arguments concerning deterrence and retribution.³⁹ 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' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose.⁴⁰

It accordingly held that *section* 302 of the Indian Penal Code "violates neither the letter nor the ethos of Article 19."⁴¹

[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:

³⁸ Id. at 712, para. 71.

³⁹ 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.

⁴⁰ Supra note 96, at 729, para. 132.

⁴¹ Id.

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

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.⁴²

[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*.

[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.⁴³ 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

⁴² 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).

⁴³ 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."

the prisoner, and in such circumstances the death sentence is liable to be set aside.⁴⁴

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.
- [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"⁴⁵ 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.

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,

⁴⁴ *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).

⁴⁵ *Supra* note 95, at 484.

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.⁴⁶

[83] An individual's right to life has been described as "[t]he most fundamental of all human rights",⁴⁷ and was dealt with in that way in the judgments of the Hungarian Constitutional Court declaring capital punishment to be unconstitutional.⁴⁸ 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 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.

⁴⁶ *Joseph Kindler v Canada*, *supra* note 94, at 23.

⁴⁷ Per Lord Bridge in *R v Home Secretary*, *Ex parte Bugdaycay* (1987) AC 514 at 531G.

⁴⁸ *Supra* note 55.

- [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

[In paragraphs [87]-[89] Justice CHASKALSON considers that while public opinion may have some relevance to the enquiry, it is in itself no substitute for the duty vested in the Courts to interpret the Constitution.]

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.⁴⁹

⁴⁹ The Californian Constitution was subsequently amended to sanction capital punishment.

- [91] The California decision is *People v. Anderson*.⁵⁰ Capital punishment was held by six of the seven judges of the Californian Supreme Court to be "impermissibly cruel"⁵¹ 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.⁵²
- [92] In the Massachusetts decision in *District Attorney for the Suffolk District v. Watson*,⁵³ 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.⁵⁴
- [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.
- [94] Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading.⁵⁵ (...)

⁵⁰ Supra note 62.

⁵¹ 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).

⁵² Id. at 899.

⁵³ 381 Mass. 648 (1980).

⁵⁴ "...[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 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).

⁵⁵ 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

[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,⁵⁶ I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.

[In paragraphs [96]-[143] CHASKALSON P considers whether capital punishment for murder is justifiable. He discusses the criteria for any limitation of constitutional rights prescribed by section 33(1) of the Constitution: 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. He also refers to limitation of rights in Canada, Germany and under the European Convention on Human Rights. His discussion encompasses observations on the guidance which can be derived from international and foreign comparative law. These observations are included hereunder.]

[109] (...) 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.

(...)

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.").

⁵⁶ *S v Zuma and Two Others*, *supra* note 6, para. 21.

The Essential Content of the Right

[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.⁵⁷ 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.⁵⁸

[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 the point of view of a constitutional norm that requires life and dignity to be protected, the punishment does

⁵⁷ 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).

⁵⁸ 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)).

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",⁵⁹ and the German Constitutional Court to hold in the life imprisonment case that all possibility of parole ought not to be excluded.⁶⁰

(...)

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.

⁵⁹ *R v Oakes*, *supra* note 132, at 337 (citing *R v Big M Drug Mart Ltd.*, *supra*, at 352).

⁶⁰ See *Kommers* *supra* note 18.

- [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 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)*.

(...)

The Order to be made

[In paragraphs 149-151 the following order is made: in terms of section 98(5) of the Constitution the provisions of paragraphs (a), (c), (d), (e) and (f) of section 277(1) of the Criminal Procedure Act are declared to be inconsistent with the Constitution and to be invalid. Furthermore the State is forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid.]

(...)

[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.

[In the paragraphs [192]-[204] KENTRIDGE AJ argues that the true issue for decision is whether or not the death penalty for murder is a “cruel, inhuman or degrading punishment”. He notes that in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading.]

The opinions of Ackermann, Didcott, Kriegler, Langa, Madala, Mahomed, Mokgoro, O’Regan, and Sachs J are omitted.