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Stained judgments, tarnished judges, tainted desire: the rhetoric of sexual orientation in South African judgments 1926-1999

By John H Montgomery

A thesis submitted to the School of Law (Faculty of Commerce, Law and Management), University of the Witwatersrand, Johannesburg, in fulfilment of the requirements of the degree of Doctor of Philosophy

Abstract

This is a study of law and language; in particular an investigation into the language of judgments. The focus is on judgments as texts authored by judges. The main thinkers chosen as the theoretical basis are not experts in law – Michel Foucault, Mikhail Bakhtin, Norman Fairclough and Hayden White, for example. The reason for this choice is to consider the language of law from insights outside of law. Topics such as rhetoric, narrative, critical discourse analysis, intertextuality, interpretive communities, the monologic voice, oppositional reading, and power relations are seldom found in mainstream legal literature.

The position taken is that judgments are texts which are no more privileged (simply because they are legal texts) than any others that a society creates. However, judgments are viewed by some as being special societal texts, coated with a patina of mystique because they are dealing with inviolate legal principles. The patina is removed enough to suggest that judges use various linguistic processes to shape their judgments in ways no different from other authors, notwithstanding that they are writing about 'the law'. Judges are rhetoricians who use rhetoric to shape the facts, choose the most expedient legal principle, and incorporate views of society expedient to their opinion.

The thrust of this study is to locate rhetoric at work within a specific sphere. The corpus consists of forty-four cases over a seventy-five year period dealing with sexual orientation. This area of law was chosen for a number of reasons. It is self-contained and lends itself to detailed examination. The topic is emotive which means more rhetorical techniques are at play than in a fairly technical area of law. There have been

significant changes in the way sexual orientation has been treated in law over the years. It is interesting to trace how rhetoric facilitated that change. Lastly, we see how a judicial hegemony deals with an apolitical, splintered minority.

Any categorical conclusions are impossible in an exploration of this kind. The findings, however, indicate that judges are not as restricted as is generally considered and that their judgments are shaped by employing linguistic techniques available to writers of both fact and fiction. The intention is to provide a fresh way of reading judgments, where observations gleaned in one area can be applied to other areas of law.

Declaration

I declare that this thesis is my own unaided work.

It is being submitted for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other university.

John Montgomery

March, 2007

Dedication

To Dad, best father, best friend.

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Chapter 1: Introduction

'The directing impulses of judges will not so readily appear from analyses of their rationalizing words …. Which is not to say that … it will not be valuable to make studies, from the outside, of the motives and biases of judges … based on … shrewd surmises as to the buried meanings obliquely expressed in their language'.[1]

In its broadest sense, this is a study of law and language. In particular, it is an investigation into the language of judgments. I take the position that judgments are texts which are no more privileged – simply because they are legal texts – than any others that a society creates. Judgments are written by judges; complicated by the notion that judges are expected to recycle previous texts, for example in keeping with the doctrine of *stare decisis*.[2] Are they not then a combination of mixers of texts and original authors? But judges are not original authors in the manner of a novelist who can indulge in flights of fancy. They are constrained by certain factors – the facts of the case, the legal principles at issue, and the current views held by society, to name a few. In fact, it seems that the position of a judge leans towards the mechanistic. Are they then *tabula rasa*, clean slates waiting to be informed of the facts after which they will rule?

On close inspection one finds that the slate is not clean but cluttered with ideologies.

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[1] Frank, J., *Law and the modern mind*, p. 114.
[2] The principle that precedent decisions are to be followed by the courts. When a point of law has been settled by decision, it forms a precedent which is then usually not departed from.

Each judge falls somewhere in the continuum between highly original and very mechanistic and that position can change depending on the case at hand. A judge wanting to depart from the law as it stands may adopt a novel approach in interpreting that law. A judge wanting to enforce that same law might apply a narrow interpretation and ignore any opposition. Judges, then, use various linguistic processes to shape their judgments to support their worldviews. Judges are rhetoricians. They use rhetoric to shape the facts, apply the most expedient legal principle, and decide how far they want society's opinion to permeate their judgments.

These are claims which need backing, and rhetoric is an evasive term which needs instantiations. The thrust of this study, therefore, is to try and locate rhetoric at work within specific judgments. To do this, I analyze forty-four cases over a seventy-five year period dealing with homosexuality. This corpus covers sodomy and other so-called unnatural acts not only between males, but also between males and females. Yet this is not a study of homosexuality *per se*. I chose this area of law for a number of other reasons. It is self-contained and lends itself to a detailed examination. The topic is emotive and so one finds more rhetorical techniques at play than in a fairly technical area of law, such as company law. There have been significant changes in the way the subject has been treated over the years. We see how a judicial hegemony deals with an apolitical, splintered minority.

This study has certain delimitations. Only cases reported in the *South African Law Reports* (*SALR*) from 1926 to 1999 have been included. The last case is from the Constitutional Court brought against the Minister of Justice by the National Coalition for Gay and Lesbian Equality. By far the majority of cases are reported in English.

Essential cases reported in Afrikaans, and relevant extracts from textbooks written in Afrikaans, have been included and an approximate translation provided. Judges are only referred to in the masculine because all judges in the cases reviewed are males. (Justices Kate O'Regan and Yvonne Mokgoro presided on the Constitutional Court *National Coalition of Gays and Lesbians* but the opinions were delivered by Justices LWH Ackermann and Albie Sachs.)

If I suggest that judges are not *tabula rasa*, then I need to acknowledge that neither am I since we cannot help but write from a certain viewpoint. Before starting to research, I anticipated what language I would expect to find. These preconceived ideas changed later. I thought that judges would use vitriolic, homophobic language in the 1920s. This would soften over time until an epiphany would occur when, in 1996, the constitution ushered in acceptance of all sexual minorities. Those cases would be flagship judgments steadily demolishing prejudice and bias. History would be matched to teleology. I found the opposite. True, there is a good sprinkling of mean-spirited, bigoted judges but not enough to alter history. There are no flagship cases by which I mean consensual adult males contesting their rights. There is no evidence of a subordinate minority using the courts to steadily work away at toppling the dominant majority. In fact, if the cases were strung together in date order and turned into a story it would be incoherent, contradictory, utterly confusing and rather humorous. Finding that there is no grand narrative, I treat each case as it arises with no expectations and explore what it adds to our understanding of judicial rhetoric. As Jerome Frank suggests, the most we can do is make shrewd surmises as to the buried meanings obliquely expressed in the language judges use.

These speculations are explored by posing the following questions:

How restricted were judges?

Are judgments rhetorical constructions?

How is sexuality constructed in the corpus?

Law is constituted through language and yet legal sources seldom mention the mechanics of language or how different meanings are created through language choices. This lack of reference to language usage is surprising and one which I hope to contribute towards in this study. It seems as if lawyers and judges are more interested in the outcome – what is said or written – and ignore the variety of ideological choices that get made prior to this outcome. To redress this focus to language itself, the next chapter provides comprehensive overviews of the main aspects of language chosen as the theoretical basis for what is to follow. To this extent it is more than a mere literature review. Subsequent chapters provide instantiations from judgments to illustrate the importance of focusing on language in a legal context.

The theoretical chapter begins with 'law and literature' which movement first presented me with the idea that there could be a connection between the two. As is explained more fully in that section, I came to agree with the critics that the term 'movement' is too broad to adequately do justice to the various divisions it covered. This led me to further research what specific areas might contribute meaningfully towards an understanding of how judgments in particular are constructed.

Next is a note on rhetoric, not in its pejorative sense – the art of persuasion – but how meaning is shaped by the choice of language. Rather than being a pipe through which

meaning is channelled, language constitutes meaning. A comprehensive overview of critical discourse analysis (CDA) follows. CDA contributes by providing a structure in which we can look at language issues from a contextual point of view down to a close analysis of the text itself. It provides, then, a structure upon which to hang a specific topic; in this case the language used to construct sexuality.

CDA is a praxis informed to a large extent by Foucault, especially his thoughts on how knowledge comes to be legitimated within a society. Foucault also critiques the traditional dominant/subordinate view. It is for these reasons that I include a section on Foucault. Following that is a note on queer theory which would do away with the dominant/subordinate binary altogether. The review ends with a section on narrative. This theoretical basis is applied in a later chapter where I write the narrative of sodomy as based on the cases. All of these areas, therefore, assist in treating judgments as texts which are influenced by the authors and by the period in which they were written.

Chapter Three examines the society and culture over some seven decades between the 1920s and the 1990s with a particular emphasis on the legal culture in South Africa. It is in two sections and draws on examples from the corpus. The first section discusses apartheid as a backdrop and then analyses cases such as those dealing with police entrapment, cases where the police raided male sex-on-premises venues, and a case about a man dressed in drag. Under the 1996 constitution the intolerance diminishes, at least in public discourse. The second section considers the position of judges in society. The Truth and Reconciliation Commission Report provides an excellent starting point as it contains an extensive review of this period. Both the

'establishment' and 'anti-establishment' views of the judiciary are presented before the TRC makes a final conclusion. Its conclusion is of a judiciary which strongly favoured maintaining the *status quo*, primarily by relying on positivism. I elaborate on the TRC's findings by sketching a profile of a 'typical' judge and the influence which positivism had.

Reading a case as a stretch of text and not taking into account its context has its merits in that one concentrates on the text itself, but this affords no reliable way for criticizing the cultural context in which these texts occur, their 'unstated premises, their enacted but implicit values, their relation to their larger world'.[3] J B White acknowledges the need for an ideological criticism which pays attention to the social and cultural context of the text, to the 'unsaid'. In a celebrated article, Robert Cover proposes that law cannot exist apart from the narratives that locate it and give it meaning. Believing with Max Weber that 'man is an animal suspended in webs of significance he himself has spun', Cover draws on Clifford Geertz's coinage of 'thick description'.[4] Whereas a 'thin description' is merely what the person is doing, 'thick description' assigns significance to that action.[5] For Cover, narrative assigns that significance. 'Once understood in the context of the narratives that give it meaning,' he says, 'law becomes not merely a system of rules to be observed, but a world in

[3] White, J. B., *Heracles' bow*, p. 122.
[4] Geertz, C., *The interpretation of cultures*, p. 5.
[5] Cover, R. M., *Nomos and narrative*, p. 7.

which we live'.[6] He calls this world a nomos, a meaningful order, a normative world. The aim of this section is to provide a 'thick description' to locate judgments and judges within a specific cultural context.

The final two chapters analyse the text of the judgments in detail. There are a number of methods of textual analysis and I have chosen a particularistic approach. By this I mean that I analyse each case individually and avoid combining several cases and abstracting general points. The reason for this is that each case is an instance of rhetoric at work. The judge works with the particular facts, precedents and law to fashion his text. My hope is to reveal the textual properties at work in each instance.

Chapter Four begins by building a case that a judgment is a distinct literary genre, a rhetorical narrative which the judge constructs based on his interpretation of the facts and the legal issues in dispute. It is also a narrative which may be silent in areas where an oppositional reader would expect to hear something. For example, the silence of the defendant's side of the case is a sustained gap over all the cases studied. The chapter draws on legal academics who all view judgments textually. To them, all who are involved in legal discourse – mainly judges and lawyers (practising or academic) – do not give due regard to judgments as textual artefacts created within a specific society.

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[6] *Ibid.*, p. 4.

The balance of Chapter Four focuses on certain linguistic techniques used in the production of the text. It begins with looking at the names used to describe the people who perform the acts, for example, homosexuals or gays. Following this is an analysis of the words and metaphors which are used in relation to homosexuality. The words and metaphors used are an outward manifestation of the different perspectives different judges hold. These perspectives are discussed under abnormal sex vs. normal sex, essentialism vs. constructivism, and choice vs. immutability. The section ends with an examination of speech acts used in judgments.

Chapter Five explores the rhetoric used to construct sexuality. It is a lengthy chapter which begins with a detailed examination of the common law of sodomy and other so-called unnatural acts. An analysis of S20A of the *Sexual Offences Act* follows. A discussion of sexual abuse of minors strengthens the argument that it is the person who is being punished and not the act. The chapter concludes with an overview of all cases pertaining to lesbians.

Chapter 2: Theoretical basis

The law and literature movement

There are essentially two different strands to 'law and literature': 'law in literature' and 'law as literature'. 'Law in literature' is the depiction of lawyers and legal institutions in literature, particularly trials. It considers literary texts for what they say about law, how legal issues form part of the plot, or what the text and the characters say about what law is and what it should be. This approach also considers how literature views empathy in legal decision-making and the meanings of justice and mercy. An example is Harper Lee's *To Kill a Mockingbird*. The 'law as literature' strand is 'a system of texts', an inquiry 'into the use of literary devices and strategies in legal texts', and 'rhetorical and stylistic methods'.[7] It applies literary analysis to legal discourse and texts and demonstrates how literary strategies can participate in legal interpretation. This approach analyses examples from an actual text. These concrete examples can then be related back to theory or abstraction. Thomas Morawetz acknowledges the difficulty in defining 'law and literature' because the definition of literature is not as definitive as, for example, 'economics' in the 'law and economics' movement.

Some suggest that by studying law and literature, society will produce virtuous citizens. Brook Thomas suggests that legal scholars turning to literature for this reason run the risk of using literature to advocate values representative of some groups but

[7] Morawetz T., *Law and literature*, p. 452.

not others: 'To make the values constructed by great works of literature the foundation from which to criticize legal inequities is to grant those works a normative function'.[8] To grant this normative function presupposes that there is certainty as to what constitutes a canon of 'great works', itself an elitist sense of literature. It also assumes that authors of literature have access to a truth not found in other discourses.

Richard Posner – a judge, proponent of the law and economics movement and critic of law and literature – seeks to disconnect law and literature.[9] One would be better off learning about the law from a law textbook than reading *Bleak House*, and one does not have to be a lawyer to read *Bleak House*, he says. I find myself reluctantly agreeing with Posner. Reluctantly because I cannot agree with his formulaic alternative. Law, for Posner, is merely a 'technique of government', a science of economics not the art of literature.[10]

I only agree with Posner to the extent that much of the discussion on the law and literature movement favours one dictionary entry of 'literature' – 'that kind of written composition valued on account of its qualities of form or emotional effect' – over an equally valid, but more prosaic one – 'the body of books and writings that treat of a particular subject, printed matter of any kind'.[11] I favour the humdrum. Stripped of its value content, literature becomes synonymous with text. Considering the nature or

[8] Thomas, B., *Reflections on the law and literature revival*, p. 510.
[9] Posner, R. A., *Law and literature: a misunderstood relation.*
[10] Posner, R. A., *Law and literature: a relation reargued*, p. 1392.
[11] Shorter Oxford English Dictionary (5th ed.).

quality of a text is, for me, a far more worthwhile and rewarding exercise than studying the literary qualities of legal texts. 'Studying the literary qualities of legal texts will invariably be an unrewarding undertaking, not least because the quality of judicial and legislative prose is so poor …. [It is] a demoralizing experience to live in a legal culture which still regards Lord Denning as a supreme stylist'.[12]

A leading light in the early stages of law and literature is James Boyd White. His work is discussed shortly under 'rhetoric'. After a spate of articles between the late 1980s and 1990s, three books[13] were published approaching law and language in a more varied way.

Peter Brooks and Paul Gewirtz, as editors, put together papers presented at a symposium on narrative and rhetoric held at Yale Law School in 1995. In his review of *Law's stories*, Richard Posner acknowledges the importance of narrative in a legal context.[14] His observation of the book is that although it contains over twenty papers, many of them are too short to develop into anything substantial; it is 'spotty'.[15] His main criticism of the book is that 'conspicuous by its absence ... is any sustained consideration of the methodological issue – by what means is one to study the story

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[12] Julius, A., *Dickens the lawbreaker*, p. 44.
[13] Amsterdam, A. G. & Bruner, J., *Minding the law*; Binder, G. & Weisberg, R., *Literary criticisms of law*; Brooks, P. & Gewirtz, P. (eds.), *Law's stories*.
[14] Posner R. A., *Legal narratology*, p. 737.
[15] *Ibid.*, p. 742.

element in law?', for example.[16] This is a fair criticism and for this, it is better to turn to books dealing exclusively with narratology.[17]

Anthony Amsterdam and Jerome Bruner's *Minding the law* is another example of examining a variety of law and literature topics. Recently written by two respected scholars, it shows that the concern with law and text is current. In addition, it does not trot out the common 'law as literature' associations; rather it yokes together topics such as categories, narrative, rhetoric and culture to bring fresh insights into the role of text in legal discourse.

Written in the same year, Guyora Binder and Robert Weisberg's compendium is a tome. It did not get favourable reviews. Anne Couglin believes that the authors have anticipated too wide an audience, 'The result? Exactly what you'd expect when authors try to bite off something for every reader to chew: the fare is tastefully presented, bland, and there is an awful lot of it'.[18] In Richard Posner's review, his answer to a question he poses – What has modern literary theory to offer law? – is: 'Nothing'.[19] This book of 'inordinate length and promiscuous breadth … contains nothing that could be used to understand or improve the law'.[20] And yet elsewhere in the review he calls the chapter on narrative 'first-rate' and extols the value of

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[16] *Ibid.*, p. 741.
[17] For example, Bal, M., *Narratology*, and Prince, G., *Narratology*.
[18] Coughlin, A. M., *I'm in the mood for law*, p. 209-210.
[19] Posner, R. A., *What has modern literary theory to offer law?*, p. 195.
[20] *Ibid.*, pp. 208 & 196.

understanding narrative in a legal context. In his review of *Law's stories*,[21] he also mentions the benefit of studying narrative in a legal context. To Posner this book is 'a compendium of the authors' thoughts rather than a disciplined analysis of a subfield of law and literature'.[22]

Jane Baron questions whether 'law and literature' deserves the designation 'movement', fractured as it is: 'Any theme broad enough to tie all the strands together can be found and stated only at a level of abstraction so high as to threaten banality …. This is a movement of many methodologies and conclusions. The multiplicity of approaches and concerns that leads some to see literature as a source of nearly endless possibilities may lead skeptics to dismiss law and literature as an empty vessel, a phrase devoid of content'.[23] Mark Kingwell asks whether law is like literature, and answers, 'Law is utterly like literature because it consists of written texts that are subject to interpretation … divining meaning from written artefacts. But law is utterly unlike literature in that the practices governed by its texts have quite different goals'.[24]

These comments cause me to consider my own views on 'law and literature'. I agree with Baron that it is too splintered to warrant being referred to as a movement. Within 'law and literature', the 'law in literature' strand is, for my purposes, the least

[21] Posner R. A., *Legal narratology*, p. 737.
[22] Posner, R. A., *What has modern literary theory to offer law?*, pp. 203-204.
[23] Baron, J. B., *Law, Literature, and the problems of interdisciplinarity*, pp. 1061-1062.
[24] Kingwell, M., *Let's ask again: is law like literature?*, p. 35.

productive since I wish only to study factual narrative in the form of judgments and not fiction such as a novel which has law as its theme. The 'law as literature' avenue is of more interest to me because it considers the rhetoric of law, the use of how literary devices and strategies in legal texts might in fact constitute law. James Boyd White introduced the concept of constitutive rhetoric, particularly in *Heracles' Bow*. Another useful view which 'law as literature' exponents have highlighted is the value of narrative in a legal context. Even Posner, a sustained critic of law and literature, saw the benefit of studying narrative in a legal context. I take from 'law and literature', then, the ideas of rhetoric and narrative.

However, the champions of 'law as literature', such as J B White, provide no further guidelines on how to identify rhetoric and narrative at work. (Perhaps this was never their intention.) This is where critical discourse analysis proves useful by providing a framework to place a text first within its sociocultural context, and then analyse the text using techniques common to, and understood by linguists. After this next section on rhetoric, therefore, I consider how critical discourse analysis provides a structure to analyse rhetoric and narrative in specific contexts.

Rhetoric

Rhetoric is an extremely slippery term to define. Amsterdam and Bruner define it as: 'to denote the various linguistic processes by which a speaker can create, address, avoid, or shape issues that the speaker wishes or is called upon to contest, or that a

speaker suspects (at some level of awareness) may become contested'.[25]

This definition is explained more fully in James Boyd White's essay 'Rhetoric and law'. White dispenses with the prevailing pejorative view of rhetoric in favour of what he terms 'constitutive rhetoric'. Rather than being 'a second-rate way of dealing with facts that cannot really be known … a "failed science"', White places law as a branch of rhetoric, not science.[26] Rather than being a failed science, rhetoric is 'what we do when science doesn't work'.[27] By 'constitutive' White means that judges work with the language they have at hand and remake and rework their judgments – 'The legal speaker always acts upon the language that he or she uses; in this sense legal rhetoric is always argumentatively constitutive of the language it employs'.[28] White shows how the starting point in rhetoric is always with the language at hand: 'rhetoric invents … out of something. It always starts in a particular place among particular people …. Rhetoric always takes place with given materials. One cannot idealize rhetoric'.[29]

Richard Weisberg's comments fit with White's view on rhetoric. The 'reality for judges … [is that] rightness in a legal decision derives from an imaginative and intuitive *process* within the adjudicator. This process results in the opinion, and the

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[25] Amsterdam, A. G. & Bruner, J., *Minding the law*, p. 165.
[26] White, J. B., *Heracles' bow*, p. 32.
[27] *Ibid.*, p. 31.
[28] *Ibid.*, p. 34.
[29] *Ibid.*, p. 39.

way in which the adjudicator explains the case *determines* the rightness or wrongness of the decision. Rhetoric, in other words, does not assist an argument to march to a conclusion; rhetoric *is* the argument, and the perceived rightness or wrongness of the conclusion may be as much based on style and form of the argument as on the extrinsic application to it of the observer's notion of what the law of the case "should have been"'.[30]

A more exact analysis is necessary to examine the linguistic processes by which judges shape their judgments. Judges can only work with the language they have at hand. Rhetoric always starts in a particular place among particular people; one cannot idealize rhetoric. In order to observe rhetoric at work, I examine actual court judgments by using discourse techniques suggested by the linguist Norman Fairclough.[31]

Critical discourse analysis

Fairclough popularized critical discourse analysis (CDA), especially in *Language and Power*, but he is not the only advocate. Later I draw on Teun van Dijk to introduce Foucault. CDA works on the premise that no discourse can occur outside of language: 'language signifies reality in the sense of construing meaning for it, rather than that discourse is in a passive relation to reality, with language merely referring to objects

[30] Weisberg, R. H., *Poethics, and other strategies of law and literature*, p. 16.
[31] Fairclough, N., *Language and power*; Fairclough, N., *Discourse and social change*; Fairclough, N., *Critical discourse analysis*.

which are taken to be given in reality'.[32] What is needed is a technique to undertake an analysis of the text in order to see this discourse at work. In *Language and Power*, Fairclough explains his system by way of a diagram which has three circles within each other. The outer circle focuses on the society and culture where the text is found. The middle circle focuses on how the text is produced, distributed and consumed. In the inner circle is the text itself. Appropriating his system in terms of this study, a review of each aspect follows with an emphasis on the judges who operate within a particular society, and on the judgments they produce. At the end of each section I explain how these ideas are expanded in further chapters.

The outer circle – society and culture

The society in which the cases in the corpus take place is divided into two broad periods – from the 1920s until the constitution of 1996, and the period under the constitutions.[33] In terms of the period I have chosen to review, the pre-constitutional period is by far the longer of the two and takes place in the backdrop of apartheid where there is a police presence in the form of entrapment, sexual policing, and general police intolerance to sexual 'deviance'. The constitutional period is only in place for six years before the study ends. Nevertheless, there is a perceivable break with the past even in this short time. Judges are part of the hegemony of a society, no matter what dispensation they rule in. Being in this position of authority, the type of

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[32] Fairclough, N., *Discourse and social change*, p. 42.
[33] *Constitution of the Republic of South Africa* Act 108 of 1996, including cases heard under the *Interim Constitution* (Act 200 of 1993).

judgments they hand down can confirm the *status quo* or transform society. The direction which they take depends to an extent on the ideology they hold.

Chapter Three examines these sociocultural aspects in two sections and draws on examples from the corpus. The first section discusses apartheid as a backdrop and then analyses cases such as those dealing with police entrapment, cases where the police raided male sex-on-premises venues, and a case about a man dressed in drag. Under the 1996 constitution, the intolerance diminishes, at least in public discourse. The second section considers the position of judges in society. The Truth and Reconciliation Commission Report provides an extensive review of this period. Both the 'establishment' and 'anti-establishment' views of the judiciary are presented before the TRC makes a final conclusion. Its conclusion is of a judiciary which strongly favoured maintaining the *status quo* and relying on positivism as one of the reasons. I take this conclusion further by sketching a profile of a 'typical' judge and the influence which positivism had.

The middle circle – how the text is produced, distributed and consumed

In between considering the society in which a text is produced and the text itself lies the discourse practice 'circle' (the middle 'circle') which concentrates on how the text is produced, distributed and consumed.

The primary text which this study focuses on is the judgment which is produced by a judge within a court system. Multiple voices which are heard during the court case – counsel, witnesses, *etc.* – are subsumed by the judge. In addition, when the text is being produced, the judge incorporates other texts such as extracts from previous

judgments, references to academic books and articles *etc*. Fairclough calls this 'intertextuality'. Mikhail Bakhtin is relevant when exploring both the multiplicity of voices and intertextuality. I accessed Bakhtin through Michael Holquist's work[34] for general information, and Robert Rubinson's article[35] for how Bakhtin might apply in a legal context. I turn to Bakhtin next, therefore, to provide further thoughts on how judgments are produced.

With few exceptions, judgments are a 'paradigm of closed discourse', perfunctorily dismissing or diminishing alternative analyses.[36] They are 'typically monologues which reject exploration of complex issues of meaning in favor of the simple exercise of justifying a result'.[37] This closed view of judgment-writing hides how the judging process 'often entails hard choices among multiple perspectives, each of which might have a vital, independent force'.[38]

Yet for all this multiplicity, judges seldom take into account all voices. Bakhtin offers a useful framework here. One of Bakhtin's concerns is an 'extraordinary sensitivity to the immense plurality of experience'.[39] Bakhtin introduces two terms: the mode judges are most prone to which he calls 'monologic', while his ideal is 'polyphonic'. According to Rubinson, a monologic view rejects the open-ended dialogic nature of

[34] Holquist, M., *Dialogism: Bakhtin and his world*.
[35] Rubinson, R., *The polyphonic courtroom*, p. 3.
[36] *Ibid.*, p. 4.
[37] *Ibid.*, p. 4.
[38] *Ibid.*, p. 4.
[39] Holquist, M., *Dialogism: Bakhtin and his world*, p. xx.

meaning in favor of a unitary and finalized sense of the world. Monologism reduces multiple perspectives to a single ideological common denominator. The monologic mode operates under the fiction that there is a single, all-encompassing perspective. The polyphonic mode, however, embraces the dialogic nature of meaning and seeks to intensify the elaboration of meaning through intimate contact with another person's discourse.[40]

To Bakhtin, the consequence of monologism is that 'All that has the power to mean, all that has value, is everywhere concentrated around one center – the carrier. All ideological creative acts are conceived and perceived as possible expressions of a single consciousness, a single spirit …. Everything capable of meaning can be gathered together in one consciousness and subordinated to a unified accent; whatever does not submit to such a reduction is accidental and unessential …. Semantic unity of any sort is everywhere represented by a single consciousness and a single point of view'.[41]

In the context of a court case, this means that the judge speaks the words of all parties to the case. To Bakhtin this is an act of expropriation: 'Language is not a neutral medium that passes freely and easily into the private property of the speaker's intentions; it is populated – overpopulated – with the intentions of others. Expropriating it, forcing it to submit to one's own intentions and accents, is a difficult

[40] Rubinson, R., *The polyphonic courtroom*, pp. 10 & 12 (paraphrased and quotes omitted).
[41] Emerson C., *Problems of Dostoevsky's poetics*, pp. 81-82.

and complicated process'.[42]

The judge, then, works to 'appropriate all other voices into his own monologue'.[43] This act of expropriation validates or authorizes 'one form of life – one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority'.[44] In doing so, the judge is saying not only is this the 'right outcome for this case', but the 'right way to think and talk about this case, and others like it'.[45] Even when one judge speaks for concurring judges, the 'language and tone are his own, and his personal investment is clear'.[46] Favouring one form of life over another is an ethical and political performance, and can be seen as such.[47]

There is the risk that judges become 'boastful of powers' they do not have, and do not realize the possibility that there are 'other ways of seeing the world, organizing experience, and making a future'.[48] A trial consists of 'a plurality of discourses', for example counsel-witness, counsel-counsel, counsel-judge, party-counsel, judge-witness, each of which is structured in accordance with a particular pragmatic context.[49] The trial brings together people who are normally not placed together and

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[42] Holquist M., *The dialogic imagination*, p. 294.
[43] Ferguson, R. A., *The judicial opinion as literary genre*, p. 205.
[44] White, J. B., *Justice as translation*, p. 101.
[45] White, J. B., *What's an opinion for?*, p. 1366.
[46] Ferguson, R. A., *The judicial opinion as literary genre*, p. 205.
[47] White, J. B., *Justice as translation*, p. 215.
[48] Elkins, J. R., *The stories we tell ourselves*, p. 55.
[49] Jackson, B. S., *Law, fact and narrative coherence*, p. 36.

among whom 'severe tensions or contradictions can be found';[50] where not all participants are 'welcome … [or] equally valued'.[51]

Not only is the judge's voice the only voice in the judgment, the reader has to rely solely on what the judge chooses to say. Often there is an inadequate explanation as to the judging process itself – 'judges … deliver so-called opinions in which they purport to set forth the bases of their conclusions. Yet you will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process'.[52] Only the judge himself can tell you 'what facts counted for him, or did not count; what paradigm or template he applied to it; or how he resolved the tension, present in nearly every case, between the claims that can rationally be made on one side and those that can be made on the other'.[53] But as Bernard Jackson explains, even the judge's account of his own decision-making process is futile, because there can be 'no real correspondence between the rational, linguistic discourse of judicial exposition on the one hand and the emotions, operating often at the sub-conscious level, which are necessarily implicated in the actual decision-making process'.[54]

A judge will not readily admit to the freedom of choice he has. Instead, he must appear to be forced to an 'inevitable conclusion by the logic of the situation and the

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[50] White, J. B., *Heracles' bow*, p. 114.
[51] Sarat, A & Kearns, T. R., *The rhetoric of law*, p. 12.
[52] Frank, J., *Law and the modern mind*, pp. 102-103.
[53] White, J. B., *What's an opinion for?*, p. 1366.
[54] Jackson, B. S., *Law, fact and narrative coherence*, p. 15.

duties of office, which together eliminate all thought of an unfettered hand'.[55] White agrees, calling this non-admission a vice: '[o]ne great vice of theory in law is that it disguises the true power that the judge actually has, which it is his true task to exercise and to justify, under a pretense that the result is compelled by one or another intellectual system'.[56] As Laurence Sterne's *Tristram Shandy* shows, a judgment cannot contain everything that was spoken at the hearing. However, 'it is the measure of the excellence of a judicial opinion how far it recognizes what is valid or valuable in each side and includes that within itself'.[57] The judicial opinion should be 'profoundly against monotonal thought and speech, against the single voice, the single aspect of the self or culture dominating the rest'.[58]

Both White and Rubinson call for more openness. 'What we should demand … is that the judge give to the case attention of a certain sort and make it plain in writing that he … has done so, for there, in the attention itself, is where justice resides. We are entitled … to the full merits of a case … to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language'.[59] A 'judicial opinion is part of a continuing dialogue whose hallmark is exploration, not simplification …. [O]pinions should embrace dialogue and complexity, and recognize the independent validity of multiple perspectives. Such

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[55] Ferguson, R. A., *The judicial opinion as literary genre*, p. 207.
[56] White, J. B., *Heracles' bow*, 123.
[57] *Ibid.*, p. 116.
[58] *Ibid.*, p. 124.
[59] *Ibid.*, pp. 133-134.

opinions would elaborate, not restrict and reduce, meaning'.[60]

Bakhtin also proves useful when considering intertextuality. According to Bakhtin, 'our speech … is filled with others' words, varying degrees of otherness and varying degrees of "our-own-ness", varying degrees of awareness and detachment. These words of others carry with them their own expression, their own evaluative tone, which we assimilate, rework, and reaccentuate'.[61] Drawing on Bakhtin but substituting 'text' for 'speech', Fairclough asserts that texts are inherently intertextual, constituted by elements of other texts: '[T]he text absorbs and is built out of texts from the past (texts being the major artefacts that constitute history) …. [T]he text responds to, reaccentuates, and reworks past texts, and in doing so helps to make history'.[62] Judgments, for example, contain quotes from previous cases, 'old authorities', statutes, textbooks and articles, to name the most common.

Roland Barthes puts forward the possibility that there is no Author-God. A text is not 'a line of words releasing a single "theological" meaning (the "message" of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture …. His only power is to mix writings'.[63] Because of this intertextuality, Barthes claims that '[o]nce the Author is removed, the claim to

[60] Rubinson, R., *The polyphonic courtroom*, p. 5.
[61] Emerson C. and Holquist M., *Speech genres and other late essays*, p. 89.
[62] Fairclough, N., *Discourse and social change*, p. 102.
[63] Barthes, R., *The death of the author*, p. 146.

decipher a text becomes quite futile'.[64] For me the conclusion is not quite so nihilistic. I agree with Barthes that the 'true' meaning will never be arrived at, but suggest that the text can be analysed rhetorically. In other words it is possible to consider how the various texts are appropriated by the judge, and what new, constitutive meanings arise.

Full transcripts of cases in the superior courts are made but these are not freely available. The judge relies on this transcript when he is writing up the judgment.[65] If a judgment from a superior court is thought to have precedential value, it is published, for example in the *South African Law Reports*.[66] The editors of the *SALR* add a flynote and headnote and generally edit the judgment. These published cases could be used in future cases or be incorporated into other kinds of texts such as publications in the media or in academic textbooks or journals. Fairclough refers to these as 'intertextual chains'.

Text consumption refers to the way texts are received and interpreted within a society. How texts are interpreted depends on how they are read and in which interpretive community the reader belongs. Some readers agree with what they read whilst others oppose the text. Such oppositional readers read against the 'hegemonic grain', says

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[64] *Ibid.*, p. 147.
[65] Even though his clerk may draft the judgment, this does not absolve the judge from accepting full responsibility for what is written.
[66] This study only considers reported judgments.

Ross Chambers.[67] There are two types of reading – unopposed and opposed. There is always room for maneuver in discourse because discourse 'always has the potential, realized by reading, to mean other than it says (it is always open to interpretation)'. The act of reading has the power to produce an 'emergence of otherness'.[68] Those who would not oppose a reading of a judgment punishing consensual male sex, for example, would belong to a different interpretive community to those who would oppose this.

The idea of interpretive communities is a way of viewing not only different kinds of readers, but also writers. The term 'interpretive community' refers to 'a body of closely affiliated writers and readers whose shared assumptions and mutual interests identify them as a group that claims interpretive authority'.[69]

For J B White, the community is established between kindred writers and readers: '[W]henever we speak or write we define ourselves and another and a relation between us, and we do so in words that are necessarily made by others and modified by our use of them'.[70] 'The written "text" … reduces to permanence a process that is otherwise ephemeral and renders public … what is … private'.[71] The reader of a judgment sees how the judge uses resources such as statutes, common law and

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[67] Chambers, R., *Room for maneuver*, p. xi.
[68] *Ibid.*, p. xi.
[69] Leedes, G., *Cross-examining the narratives of law and literature*, p. 195.
[70] White, J. B., *When words lose their meaning*, p. 276.
[71] *Ibid.*, p. 280.

precedent to define values. For White, this textual community is 'a species of friendship'.[72]

William Page provides a useful commentary on White's view of interpretive communities but I believe he is not critical enough. He alludes to how certain voices are entirely excluded from the community – 'White's view assumes that the nonverbal individual cannot be just or harmonious'[73] – but does not follow through with how significant this point is. Excluding the voices of an 'outside' gender or race, for example, undermines the legitimacy of the community. A community of like voices will naturally result in the friendship White speaks of, but beyond that there is an enmity he seems blind to. Robin West is more critical: '[T]hose who are not included in the "textual community" as either readers, writers, or critics occupy an unbreakable circle of objectivity: because they are outside the community, they do not speak; because they do not speak, they are objects; because they are objects, they do not speak, and as nonspeakers they are outside the community'.[74]

Stanley Fish holds that the source of interpretive authority derives not from the text nor the reader, but from the writer: 'Interpretive communities are made up of those who share interpretive strategies not for reading, but for writing texts, for constituting their properties. In other words these strategies exist prior to the act of reading and

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[72] *Ibid.*, p. 289.
[73] Page, W. H., *The place of law and literature*, p. 415.
[74] West, R. L., *Communities, texts, and law*, p. 140.

therefore determine the shape of what is read rather than, as is usually assumed, the other way around'.[75] In the context of this study, Fish is suggesting that judges write their judgments with a specific kind of reader in mind who would agree with what has been written.

Fish asks, 'Why, if the text contains its own meaning and constrains its own interpretation, do so many interpreters disagree about that meaning?',[76] and 'Why, if meaning is created by the individual reader from the perspective of his own experience and interpretive desires, is there so much that interpreters agree about?'.[77]

By way of an answer, he says that a certain point of view or 'way of organizing experience' attracts individuals who form a group around that point of view.[78] These individuals cohere around 'assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance'.[79] Disagreements arise not from the text itself but from the 'interpretive "angle" from which the text was to be seen and in being seeing, made'.[80] '[G]iven the notion of interpretive communities, agreement more or less explained itself: members of the same community will necessarily agree because they will see (and by seeing, make) everything in relation to that community's assumed purposes and goal; and conversely, members of different

[75] Fish, S. E., *Is there a text in this class?*, p. 14.
[76] Fish, S. E., *Doing what comes naturally*, p. 141.
[77] *Ibid.*, p. 141.
[78] *Ibid.*, p. 141.
[79] *Ibid.*, p. 141.
[80] *Ibid.*, p. 141.

communities will disagree because from each of their respective positions the other "simply" cannot see what is obviously and inescapably there: This, then, is the explanation for the stability of interpretation among different readers (they belong to the same community). It also explains why there are disagreements and why they can be debated in a principled way: not because of a stability in texts, but because of a stability in the makeup of interpretive communities and therefore in the opposing positions they make possible'.[81]

Fish responds to criticism that his view of interpretive communities does not explain how change occurs within such communities. The critics, Fish says, mistakenly assume that an interpretive community is a 'monolithic'[82] object whereas it is not an object but something created through language: 'the object to be described cannot be sharply distinguished from the descriptive vocabulary' that constitutes it.[83] In other words, an interpretive community is a 'way of organizing experience'.[84] To Fish change, then, is 'understood as a change in description'.[85] Rather than an impenetrable monolithic tower, an interpretive community is permeable, an 'engine of change … [with] no *status quo* to protect' in that it is a mechanism for organizing the world.[86] The community is willing to accept that presently-held beliefs can be

[81] Fish, S. E., *Is there a text in this class?*, p. 15.
[82] Fish, S. E., *Doing what comes naturally*, p. 142.
[83] *Ibid.*, p. 143.
[84] *Ibid.*, p. 141.
[85] *Ibid.*, p. 144.
[86] *Ibid.*, p. 156.

'redrawn from the inside' when challenged by a source external to it.[87] The change is not for 'change's sake' but to improve 'perceived deficiencies' of the interpretive community.[88]

Chapter Four begins by building a proposition that a judgment is a distinct literary genre, a rhetorical narrative which the judge constructs based on his interpretation of the facts and the legal issues in dispute. It is also a narrative which may be silent in areas where an oppositional reader would expect to hear something. For example, the silence of the defendant's side of the case is a sustained gap over all the cases studied. Within the text, rhetoric develops as form and content combine. The balance of Chapter Four examines examples from the corpus to identify how judges use speech acts, words and metaphors as rhetorical devices.

The inner circle – the text itself

The innermost circle in Fairclough's diagram is an analysis of the text itself. The text used in this study comprises a corpus of forty-four reported judgments. Textual analysis can be on a macro- or micro basis. Examples of macro analysis include an analysis of how categories are constructed, identifying gaps or silences in the text, and focusing on presuppositions, storytelling techniques and the use of tropes such as metaphor. Examples of micro analysis include the choice of words, key word clusters, sentence adjuncts (for example, 'obviously'), modality, the use of private verbs,

[87] *Ibid.*, p. 148.
[88] *Ibid.*, p. 159.

speech acts, and transitivity. Examples of these occur in Chapters Three and Four but mostly in Chapter Five.

This concludes the section on the CDA framework and how it is used to shape the forthcoming chapters. Whilst Fairclough provides a useful structure, a broader theoretical basis is needed in the areas of power and minorities, and in the use of narrative. This chapter proceeds with exploring Foucault's view of power. I then consider the impact this view of power has on the way minorities are constructed. The note on queer theory aims to demonstrate that the dominant and subordinate can be conflated so that one does not have to invoke subordination rhetoric. The chapter ends with a section on historiography. Here I draw on historiographers who propose that history is a narrative with the historian as the narrator. I suggest that this view lends itself to law where the judgment is the narrative and the judge is the narrator.

Michel Foucault

One of the main purposes of critical language studies is to 'denaturalize everyday language'[89] by focusing on the role of discourse in the 'production and challenge of dominance'.[90] By 'dominance' Teun van Dijk means 'the exercise of social power by elites, institutions or groups, that results in social inequality, including … racial and gender inequality'.[91] In a judicial context, the institution would be the courts and the

[89] Luke, A., *Text and discourse in education*, p. 12.
[90] Van Dijk, T. A., *Principles of critical discourse analysis*, p. 249.
[91] *Ibid.*, pp. 249-250.

elites would be the judges. Discourse analysis is therefore a fitting approach because it deals primarily with the discourse dimensions of power abuse, and the injustice and inequality that result from it. This focus on dominance and inequality implies that critical discourse analysis is 'primarily interested and motivated by pressing social issues, which it hopes to better understand through discourse analysis'.[92]

Van Dijk stresses that critical discourse analysis needs to be based on an understanding of the nature of social power and dominance. Social power is based on 'privileged access to socially valued resources, such as wealth, income, position, status, force, group membership, education or knowledge'.[93] Although power and dominance are usually organized and institutionalized, they are never total and are always contestable – 'in local events and sites …. discourse often unfolds in uneven, contested, and unpredictable social configurations'.[94]

Van Dijk also offers useful insights into discourse and access. He notes a 'parallelism between social power and discourse access: the more discourse genres, contexts, participants, audience, scope and text characteristics they (may) actively control or influence, the more powerful social groups, institutions or elites are'.[95] Based on this 'management of discourse access', those who dominate can stipulate 'who is allowed

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[92] *Ibid.*, p. 252.
[93] *Ibid.*, p. 254.
[94] Luke, A., *Text and discourse in education,* p. 14.
[95] Van Dijk, T. A., *Principles of critical discourse analysis,* p. 256.

to say/write/hear/read what to/from whom, where, when and how'.[96] In effect, this is a control of context. The court system is a good example of this. Through court procedure, and because of the leeway judges have when writing their judgments, some voices are suppressed, 'some opinions are not heard, some perspectives ignored: the discourse itself becomes a "segregated" structure'.[97]

For Michel Foucault, objects of knowledge are not present before discourse; they are constituted in discourse. He refutes a prevailing Western view that an objective body of knowledge exists outside of discourse, neutral or value-free, as a 'pre-existing reality'.[98] Similarly, he rejects 'unexplained notions' and 'unexamined concepts'[99] such as 'tradition' and the 'spirit of the times'[100] which imply an underlying unity. Instead, discourse should 'emerge in its own complexity'[101] of 'heterogeneous statements'.[102] Foucault's approach is that discourse emerges according to rules of formation.

These rules of formation centre around statements, 'those linguistic performances in which subjects are empowered to make serious truth claims because of their training,

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[96] *Ibid.*, p. 257.
[97] *Ibid.*, p. 260.
[98] Howarth, D., *Discourse*, p. 52.
[99] *Ibid.*, p. 50.
[100] Foucault, M., *The archaeology of knowledge*, pp. 21-4.
[101] *Ibid.*, p. 47.
[102] Howarth, D., *Discourse*, p. 51.

institutional location and mode of discourse'.[103] Foucault is interested only in statements that are accepted as 'serious claims to truth by particular societies and communities at different points in time' and his aim is to describe the 'appearance, types and relations between statements, as well as their regulated historical transformation'.[104]

Statements are made within a set of social relations, about particular practices or symptoms. These then become objects of knowledge for investigation, which Foucault terms 'surfaces of emergence'.[105] These practices or symptoms get to be placed in particular discourses by authorities who are empowered to make these decisions, whom he calls 'authorities of delimitation'.[106] In this way knowledge is constituted and located on 'grids of specification'[107] that classify and relate objects (of knowledge) according to the 'properties they possess, or the symptoms they exhibit'.[108]

Not all subjects can enunciate statements in a way that they are incorporated into the prevailing discourse. Subjects are only given the right to speak because of their 'recognized training and specialization …, [the] institutional sites from which they … speak …, and the subject positions from which legitimate and binding statements are

[103] *Ibid.*, p. 55.
[104] *Ibid.*, p. 55.
[105] Foucault, M., *The archaeology of knowledge*, p. 41.
[106] *Ibid.*, p. 41.
[107] *Ibid.*, p. 41.
[108] Howarth, D., *Discourse*, p. 53.

made'.[109] In a legal context, only a properly trained and authorized judge, sitting in a court room and occupying the subject position of judge can enunciate statements which find their way into the prevailing discourse.

In this way, various themes emerge within discourses, rather than being introduced with purpose or intention. The discourse is contingent upon what practices or symptoms authorized subjects are enunciating. The events that form objects are unpredictable, borne out of political clashes. He does not try to explain away inconsistencies nor 'discontinuities, ruptures, gaps, and lacunae'.[110] By meeting discourse on its own complex, messy terms, Foucault 'discloses new possibilities foreclosed by existing interpretations':[111] 'we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable …. [W]e must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated; but as a multiplicity of discursive elements that can come into play in various strategies'.[112]

It does not follow that subjects who are authorized to introduce objects of knowledge into discourse also have the power to maintain the *status quo*:

'Discourses are not once and for all subservient to power or raised up against it …. We must make allowance for the complex and unstable process whereby discourse

[109] *Ibid.*, p. 53.
[110] White, H. V., *The content of the form*, p. 108.
[111] Howarth, D., *Discourse*, p. 73.
[112] Foucault, M., *The history of sexuality, vol. 1*, p. 100.

can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it'.[113]

Foucault rejects a '"zero-sum" view of power by which power on one side always means the other side lacks power or is powerless'.[114] Power is not something held by one agent and lacking in another. Power is present in all forms of social relations, something that is at work in every situation. From this perspective, power 'is not something possessed or held in reserve, it is always in circulation creating the possibilities of resistance that further invoke it'.[115] Much emphasis is placed on who has power and what their ends are. To Foucault this emphasis on the agent is a 'wholly negative, narrow, skeletal conception of power …. [Power] needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression'.[116] He emphasizes 'not the what or who but the where and how of power' and that one asks even of the state, how it exercises power.[117]

Steven Winter suggests that so-called subordinated groups should deconstruct power

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[113] *Ibid.*, pp. 100-101.
[114] Hunt, A. & Wickham G., *Foucault and law*, p. 15.
[115] Simon, J., *Between power and knowledge*, p. 954.
[116] Foucault, M. 1980, *Truth and power*, p. 119.
[117] Simon, J., *In another kind of wood*, p. 53.

along the lines of Foucault's perspective.[118] Adopting this more contingent view of power is, for him, more empowering. He criticizes certain feminists for clinging onto concepts like power, domination, and subordination when they challenge a hierarchy.

Conventional metaphors on power, unreflectively and widely used, form the basis of the current view of power, Winter contends. Metaphors such as power is an object, a location (or container), a force, and that control is up give rise to statements so commonplace that the metaphors are not challenged.[119] In terms of this schema, 'power is understood as compulsion grounded in force used by the powerful to promote their interests'.[120] Accepting this schema gives rise to a concept of power where certain groups will forever be marginalized and dominated; concepts such as that power 'is an external force that operates on a passive victim; that it is a property of an actor who exercises domination over another; that it is expressed through hierarchy; and that power and agency are synonymous'.[121]

Foucault makes no attempt to explain how power emerges, who has it and how it was acquired – 'If one tries to erect a theory of power one will always be obliged to view it as emerging at a given place and time and hence to deduce it, to reconstruct its

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[118] Winter, S., *The "power" thing*, p. 721.
[119] For example, 'he possesses the real power', 'power-grab', 'power-broker', 'where does the real power lie?', 'bastion of power', 'power-base', 'having things under control', 'having the upper hand' – Winter, S., *The "power" thing*, pp. 745-749.
[120] Winter, S., *The "power" thing*, p. 753.
[121] *Ibid.*, p. 754.

genesis'.[122] He broke with what he terms the 'juridico-discursive' model because it presents power as negative and repressive laws being brought to bear on obedient subjects, coming from a legislative authority. He did not accept that 'power acts by laying down the rule'.[123] The model has an 'all-or-nothing quality …. built upon the dualism of an active agency (the legislative authority) and a passive subject (the obedient subordinate)'.[124]

Foucault advised that we 'not ... ask why certain people want to dominate, what they seek, what is their overall strategy. Let us ask, instead, how things work at the level of on-going subjugation, at the level of those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviours *etc*. In other words, ... we should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts *etc*. We should try to grasp subjection in its material instance as a constitution of subjects'.[125]

This view places the dominant and subordinated at the same level. It is then no longer possible to 'skirt the fact that the powerful, too, are subjects produced by the operations of power'.[126] Power 'is never localized here or there, never in anybody's

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[122] Foucault, M., *The confessions of flesh*, p. 199.
[123] Foucault, M., *The history of sexuality, vol. 1*, p. 83.
[124] Winter, S., *The "power" thing*, p. 796.
[125] Foucault, M., *Two lectures*, p. 97.
[126] Winter, S., *The "power" thing*, p. 798.

hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power'.[127] To the extent that 'power diminishes the agency of the dominant, it amplifies the agency of the subordinated. What it subtracts from one part of the network, it necessarily redistributes to the other'.[128]

By de-reifying power and wresting it from the 'dominant', Foucault introduces a way so-called subordinated groups can resist the *status quo*: 'there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power'.[129] Power can be 'exercised only over ... subjects who are faced with a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized'.[130]

Foucault, then, dismantles the dominant/subordinate binary. My study began as a critique on dominant groups from a subordinated point of view but now I amend these descriptors to take into account his views. The terms 'subordinated' and 'subaltern'

[127] Foucault, M., *Two lectures*, p. 98.
[128] Winter, S., *The "power" thing*, p. 835.
[129] Foucault, M., *Power and strategies*, p. 142.
[130] Foucault, M., *Afterword: the subject and power*, p. 221.

have the connotation of being irreversible, yet as Foucault shows, outsiders can exploit linguistic indeterminacy: 'linguistic indeterminacy makes it possible to generate opposing arguments with equal force and convictions'.[131] Based on Foucault, Ross Chambers explores the idea that outsiders are not powerless. No dominant power is so absolute that it is not susceptible to challenge. Minorities start from their given situation and use any forms of legitimate resistance they can. Between the 'possibility of disturbance in the system and the system's power to recuperate that disturbance there is "room for maneuver", and that it is in that space of "play" or "leeway" in the system that oppositionality arises and change can occur …. changes local and scattered that might one day take collective shape and work socially significant transformations'.[132]

To move away from the connotations attached to subordinate and subaltern, Robin West uses the phrase 'the textually excluded'.[133] It is a more neutral term and brings in the critical discourse notion that those in power get to decide which voices should be included in social texts. Benita Ramsey expresses a similar view – 'The dominant group enjoys a privileged and highly advantageous position. Those in this group have the power to shape the world and promote their interests by creating a body of language and knowledge, and a system of beliefs that "lock out" minority groups. By manipulating language to create self-serving labels for social conditions, the elite

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[131] Sarat, A & Kearns, T. R., *The rhetoric of law*, p. 10.
[132] Chambers, R., *Room for maneuver*, p. xi.
[133] West, R. L., *Communities, texts, and law*, p. 154.

ignore the repressive conditions under which society's less influential groups suffer …. The dominant language defines what is acceptable in any given situation'.[134]

Queer theory

Queer theory is an attempt to dismantle the dominant/subordinate dichotomy altogether. Queer theory originally arose from sexual minority opposition to compulsory heterosexuality. It counters from a consciously minority perspective the 'traditionalist assumptions and cultural practices of majoritarian self-interest across multiple categories of identity'.[135] In order for heterosexuality to be the norm, there has to be a sexuality abnormal to it: its existence is dependent on differentiation from the 'other'.[136] A binary division is thus established between heterosexuals and others. Since most of the population is (nominally) heterosexual, all 'others' are sexual minorities. In that act of juxtaposing, a hierarchy is created where the heterosexual is 'superordinate' to an array of other sexual minorities – lesbians, gays, bisexuals (male and female), transvestites (pre-op, post-op, and non-op) transsexual/transgendered people, people living with AIDS/HIV, and 'other sexual and gender dissidents of various, always changing, descriptions'.[137]

Queer theory critiques this binary division by questioning the identity of the norm-

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[134] Ramsey, B., *Excluded voices*, p. 2.
[135] Valdes, F., *Beyond sexual orientation in queer legal theory*, p. 1422.
[136] The following is a synopsis of Jagose, A., *Queer theory*, pp. 129-130 and Backer, L. C., *Queering theory*, pp. 187-189.
[137] Halley, J. E., *"Like race" arguments*, p. 41.

giving category, heterosexual. Deconstructing heteronormativity exposes incoherencies which render obsolete the assumption of a fixed category against which all other sexualities are measured. All other identities of sexuality can be similarly deconstructed and exposed for what they are, 'arbitrary, contingent and ideologically motivated'.[138] Queer is, therefore, an unfixed site with no allegiance to either side of the dichotomy.

The queer project is not only about sexuality; for example age and race can also be queered. It is more about creating a space where the idea of identities can be explored. To this extent, it 'promotes a non-identity – or even anti-identity – politics …. a negotiation of the very concept of identity itself'.[139] This focus on identity arose from within gay and lesbian movements who viewed as problematic even those terms they were using, gay and lesbian. Inevitably, if inadvertently, those movements were excluding and providing a 'false sense of universality'.[140] Where did race, age, disability, poverty *etc*. fit in, they asked.

As Janet Halley says, sexual orientation movements have the look and feel of identity movements, but in important ways, they lack the substance. 'Identity politics' is usually based on assumptions that identity inheres in group memberships, that group membership brings with it a 'uniformly shared range (or even a core) of authentic

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[138] Jagose, A., *Queer theory*, p. 130.
[139] *Ibid.*, p. 130.
[140] *Ibid.*, p. 130.

experience and attitude'; that the political and legal interests of the group are similarly coherent and that group members are therefore able to draw on their own experiences to discern those interests and to establish the authority they need to speak for the group. Sexual orientation identities do not support those assumptions very well, she contends. Sexual orientation movements are perhaps 'unique among contemporary identity movements in harboring an unforgivingly corrosive critique of identity itself'.[141]

Queer, then, is an identity category that has no interest in consolidating or even stabilizing itself. It maintains its critique of identity-focused movements by understanding that 'even the formation of its own coalitional and negotiated constituencies may well result in exclusionary and reifying effects far in excess of those intended'.[142]

Historiography and narrative

The final section of the literature review addresses historiography.[143] Historiography is used in various senses but here it is taken to mean the study of the way history is written – writing about history rather than of history itself. A significant part of

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[141] Halley, J. E., *"Like race" arguments*, pp. 41-42.
[142] Jagose, A., *Queer theory*, p. 130.
[143] The following section is a consideration of the views primarily presented in the following articles: Cohn, D., *Signposts of fictionality*; Lemon, M. C., *The structure of narrative*; Mink, L. O., *Narrative form as a cognitive instrument*; White, H. V., *Tropics of discourse*; White, H. V., *The content of the form*; White, H. V., *Figuring the nature of time deceased*, and White, H. V., *The historical text as literary artifact*.

historiography focuses on the crafting of historians' texts in the form of narratives. Jurisprudence can draw from these insights since both history and law have in common that they purport to tell the truth about past events, and both use narrative as the primary form to achieve this. Throughout this section, therefore, I equate judges with historians. A major contribution which historiography makes to this study is to provide a way to track the distinction which continually takes place between an act and the person performing that act. This is a significant part of how rhetoric is employed in the construction of sexuality. I use the ideas of historiographers to trace the historicity of sexual acts, particularly the historical narrative of sodomy which contains the most ambivalence between act and person.

Amsterdam and Bruner's definition of narrative includes non-fiction as narrative: 'An initial steady state grounded in the legitimate ordinariness of things that gets disrupted by a Trouble attributable to human agency, in turn evoking efforts at redress or transformation, which succeed or fail, so that the old steady state is restored or a new (transformed) steady state is created'.[144]

Michael Toolan's views a narrative as two stories in one. The reader must divide his or her attention between 'the individuals and events in the story itself, and the individual telling us about these'.[145] A judge, for example, retells the facts about the case (which retelling can never be value-neutral), and then gives his opinion. Readers

[144] Amsterdam, A. G. & Bruner, J., *Minding the law*, pp. 113-114, paraphrased.
[145] Toolan, M. J., *Narrative: a critical linguistic introduction*, p. 1.

should be able to trust the judge as narrator but this a rebuttable presumption because this judicial authority can be abused. Toolan's definition of narrative is wide enough to include non-fiction as narrative in that the main features of narratives apply to fiction and non-fiction, namely, sequenced and interrelated events, foregrounded individuals, and a crisis-to-resolution progression – 'A narrative is a perceived sequence of non-randomly connected events, typically involving, as the experiencing agonist, humans, … from whose experience we humans can "learn"'.[146]

Both these definitions easily lend themselves to the cycle of a trial. When a crime is committed the former state of peace is disturbed. The court case attempts to either return the situation to its former state or to transform the situation into something new. In the earlier male sexuality cases the aim was to restore the *status quo* whereas later cases attempted to transform the situation, for example by reducing the sentence. Toolan's definition lends itself to the judicial narrative of judgments by showing that there are two stories in one – the facts of the case and then the judge's commentary and ruling on the facts.

For Hayden White, fiction and non-fiction (which he terms factual narrative) are both forms of narrative because they both narrate events. Non-fiction narrative purports to represent past actuality. It is concerned with events which can be assigned to 'specific time-space locations, events which are (or were) in principle observable or

[146] *Ibid.*, p. 8.

perceivable'.[147] Unlike fiction, non-fiction narrative claims to be a true representation. Writers of fiction may write about real events but also write about imagined or hypothetical events. Although writing about different kinds of events, both types of writers wish to provide a verbal image of reality: 'There are many histories that could pass for novels, and many novels that could pass for histories …. Viewed simply as verbal artefacts histories and novels are indistinguishable from one another'.[148]

White nuances this unrefined distinction where fiction is held to represent the imagined and non-fiction the actual. For him, it is itself a fiction that the non-fiction narrator believes he is writing about states of affairs which are all 'actual' or 'real' and that he has merely recorded what happened. All narrative, says White, is not simply a recording of 'what happened' in the transition from one state of affairs to another, but a 'progressive *re*description of sets of events'.[149]

As with historians, there is a widely-held belief that judges do not invent but discover actuality. The 'facts of a case' is regarded as an untold story. First counsels' and then the judge's tasks are to discover that untold story and to retell it, albeit in abridged or edited form. The judge goes one step further by giving an opinion and then a ruling. The presupposition of an untold story is meant to give force of self-evidence to the difference between fiction and non-fiction, but Louis Mink suggests that there is a

[147] White, H. V., *Tropics of discourse*, p. 121. White is writing in the context of historians but what he says could apply equally to any writer of non-fiction, judges included.
[148] *Ibid.*, p. 122.
[149] White, H. V., *The historical text as literary artifact*, p. 234.

nagging feeling many experience that this difference is as 'implicitly presupposed as widely as it would be explicitly rejected'.[150]

Relating this observation to law, to speak of a court judgment as a narrative is nearly a contradiction in terms. That it is not perceived as a narrative reflects the extent to which the idea of 'Natural Law' is presupposed in, for example, sodomy cases. To the extent that the law pertaining to sodomy was regarded as natural law, then in that natural law many judges' dilemmas were appeased. They could just as well suppose that it contained the elements of the crime of sodomy upon which they could base their ruling.

There are instances in a legal context where narrative (or storytelling) is used in a purely fictional way, but I question its efficacy. Richard Delgado, a critical race theorist, draws on the fictive use of storytelling. 'An outgroup creates its own stories, which circulate within the group as a kind of counter-reality …. The stories … told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural'.[151] The majority of his article is a hypothetical conversation about the reason why a black person was not promoted to professor. It explores the viewpoints of the in- and out groups. The aim of storytelling, for Delgado, is iconoclastic – '[S]tories, parables, chronicles, and narratives are powerful means for destroying mindset – the bundle of presuppositions,

[150] Mink, L. O., *Narrative form as a cognitive instrument*, p. 213.
[151] Delgado, R., *Storytelling for oppositionists and others*, pp. 2411-2412.

received wisdoms, and shared understandings against a background of which legal and political discourse takes place'.[152]

Daniel Farber and Suzanna Sherry take 'sharp issue' with the legal storytelling movement.[153] They challenge whether the stories told by minorities are representative of the experiences of that group, or whether the 'stories are intentionally atypical'.[154] Storytelling lacks analytical rigor, they say, and 'storytelling stifles discussion and debate when the storyteller claims to be in a better position to understand the issue at hand because of his or her background'.[155] I side with Farber and Sherry. To me, Delgado's hope that by telling stories about minorities, the majority might become more inclined to change its view, is naïve. A stronger way of challenging a majority view would be to take cases which have come to court and then demonstrate through an analysis of the text, that a minority view has been suppressed or a majority view preferred. This would satisfy Farber and Sherry's critique as to the choice of atypical, fabricated stories.

Emplotment is a term associated with Hayden White and refers to the plot structure imposed on sequences of events. Emplotment is the 'encodation of the facts contained in the chronicle as components of specific kinds of plot structures', in the same way

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[152] *Ibid.*, p. 2413.
[153] Delgado, R. & Stefancic, J., *Critical race theory*, p. 90.
[154] *Ibid.*, p. 91.
[155] *Ibid.*, *Critical race theory*, p. 91.

as fictions are emplotted.[156] It is this act which creates the meaning embodied in, for example, a comic or tragic narrative. White maintains that without emplotment there is no narrative, only a chronicle. A chronicle is a 'kind of calendar. It lists events (or other data) in the order of their dates'.[157] For example, the cases used in this study are listed in the bibliography in date order. The continuity is based purely on the numerical ordering of dates. The chronicle is a sequence but its form is not in itself meaningful. Judges, like historians, gain part of their explanatory effect by their success in making stories out of *mere* chronicles; and stories in turn are made out of chronicles by emplotment.

To holders of the historical narrative view, events are not the raw material out of which narratives are constructed; rather they are an abstraction from a narrative. But 'if we accept that the description of events is a function of particular narrative structures, we cannot at the same time suppose that the actuality of the past is an untold story'.[158] There are no untold stories; there 'can be only past facts not yet described in a context of narrative form'.[159] To emplot real events as a story of a specific kind, such as comic or tragic, is to trope these events, for example by the use of metaphors. To White, 'stories are not lived; there is no such thing as a "real" story. Stories are told or written, not found. The notion of a "true" story is virtually a contradiction in terms since all stories are fictions. They can only be "true" in a

[156] White, H. V., *The historical text as literary artifact*, p. 223.
[157] Lemon, M. C., *The structure of narrative*, p. 108.
[158] Mink, L. O., *Narrative form as a cognitive instrument*, p. 220.
[159] *Ibid.*, p. 220.

metaphorical sense and in the sense in which any figure of speech can be true'.[160]

For White, then, narrative is not 'a neutral discursive form'; it is capable of manipulation, even back to the past.[161] He uses the term 'willing backward' by which he means that 'we rearrange events in the past that have been emplotted in a given way, in order to endow them with a different meaning or to draw from the new emplotment reasons for acting differently in the future from the way we have become accustomed to acting in our present'.[162] This is a useful point when considering how previous cases are used in present cases. If judges wish to move away from a precedent, they can 'rearrange' the previous case in order to ascribe to it a meaning that would allow them to distinguish it.

Some historians acknowledge that they are historians plus storytellers – the historian 'creates a plausible story out of congeries of "facts" which, in their unprocessed form, make no sense at all'.[163] But for White, this acknowledgment of the storytelling function of the historian does not take it far enough because 'no given set of casually recorded historical events can in itself constitute a story; the most it might offer to the historian are story *elements*. The events are *made* into a story by the suppression or subordination of certain of them and the highlighting of others'; the same techniques

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[160] White, H. V., *Figuring the nature of time deceased*, p. 27.
[161] White, H. V., *The content of the form*, p. ix.
[162] White, H. V., *The content of the form*, p. 150 (in an essay on Frederic Jameson entitled 'Getting out of history: Jameson's redemption of narrative').
[163] White, H. V., *The historical text as literary artifact*, p. 223.

employed by the novelist.[164] No historical event is intrinsically tragic, for example, 'it can only be conceived as such from a particular point of view or from within the context of a structured set of events of which it is an element enjoying a privileged place'.[165] What is tragic from one perspective might be comic from another. Similarly in law, sexual acts, for example, are in themselves value-neutral. It is the law that ascribes emplotments such as normal or abnormal.

Historical events, like judicial evidence, are in themselves value-neutral. Whether they are placed in a narrative that is tragic or comic depends on the historian's or judge's decision to '*con*figure them according to the imperatives of one plot structure or mythos rather than another'.[166] This suggests that an historian or a judge brings to his consideration of the events a 'notion of the types of configurations of events that can be recognized as stories by the audience for which he is writing'.[167]

Two judges hearing the same case concerning sodomy, for example, will not write their judgments in exactly the same way. Neither judge can be said to have had more knowledge of the 'facts'; they simply had different ideas of the kind of story that best fitted the facts. These alternatives, perhaps even mutually exclusive, representations of the same set of events will be interpreted differently by different readers depending on whether the judges share with their readers certain preconceptions about how

[164] *Ibid.*, p. 223.
[165] *Ibid.*, p. 223.
[166] *Ibid.*, p. 224.
[167] *Ibid.*, p. 224.

sodomy might be emplotted. In other words, agreement on a judgment will depend on whether both writer and reader subscribe to the same interpretive community. The skill used to match plot with events is essentially 'a literary, that is to say fiction-making, operation'.[168]

Writers of non-fiction – judges included – would object to their work being called fiction because their writing is 'supposed to correspond point by point to some extra-textual domain of occurrence or happening', to 'confirmable singular existential statements'.[169] The question whether there can be a reality outside of text is highly contestable. Non-fiction writers believe that they are doing something fundamentally different from the novelist, by virtue of their dealing with 'real' events, while the novelist deals with 'imagined' events. But neither the form nor the explanatory power of narrative derives from the different *contents* it is presumed to be able to accommodate, White maintains.[170] Both fiction and non-fiction writers use narrative to make the 'flux of experience comprehensible'.[171]

Judges hold that if they regarded their judgments as fiction, this would mean demoting law to a novel. An alternative view is that it could serve as a potent antidote to the tendency of judges to embrace one ideology as the correct perception of the way things *really* are. As White says, 'We are always able to see the fictive element in

[168] *Ibid.*, p. 225.
[169] White, H. V., *Tropics of discourse*, p. 122.
[170] White, H. V., *The historical text as literary artifact*, p. 225.
[171] Mink, L. O., *Narrative form as a cognitive instrument*, p. 213.

those historians with whose interpretations of a given set of events we disagree'.[172]

Even if a non-fiction writer's writings spoke of a reality outside of discourse, White says, this would still not be an account of reality because there is nothing connecting these 'facts'. Instead of being 'fetishistically enamored of the notion of "facts"',[173] he suggests that writers of non-fiction acknowledge that facts do not speak for themselves, that the narrator speaks for them, speaks on their behalf, and fashions the fragments of the past into a whole which is – in its *re*presentation – a purely discursive one. The process of fusing events, whether imaginary or real, into a comprehensible totality capable of serving as the *object* of a representation is a poetic process. Here the historians must utilize precisely the same tropological strategies, the same modalities of representing relationships in words, that the poet or novelist uses.[174]

When working up an account of an event in the form of a narrative, the seemingly logical flow of the story is secured 'by dint of fraudulent outlines' – to use Levi-Strauss's phrase – imposed by the historian on the record, or by the judge on the evidence.[175] Historians – and equally judges – construct a comprehensible story of the past, according to Levi-Strauss, only by a decision to surrender one or more of the sets of facts offering themselves for inclusion in the account. The narratives are

[172] White, H. V., *The historical text as literary artifact*, p. 235.
[173] White, H. V., *Tropics of discourse*, p. 126.
[174] *Ibid.*, p. 125.
[175] White, H. V., *The historical text as literary artifact*, p. 229.

determined more by what is left out than by what is put in. It is in this 'brutal capacity to exclude certain facts in the interest of constituting the very constitution of a set of events in such a way as to make a comprehensible story out of them, the historian charges those events with the symbolic significance of a comprehensible plot structure'.[176] These fraudulent outlines then, necessarily, turn the historian's and judge's texts into fiction.

In any field of study which, like history or law, is not a discipline which has a precise, definitive terminological system for describing its objects, in the way that physics and chemistry has, it is the types of figurative discourse that dictate the fundamental forms of the data to be studied, according to White. This means that the 'shape of the relationships which will appear to be inherent in the objects inhabiting the field will in reality have been imposed on the field by the investigator in the very act of identifying and describing the objects that he finds there. The implication is that historians [and judges] *constitute* their subjects as possible objects of narrative representation by the very language they use to *describe* them'.[177]

Dorrit Cohn challenges how Hayden White, for her, merges fiction and non-fiction.[178] She resists the possibility that insights from the study of narrative assist in understanding factual accounts, or that factual accounts can be considered narrative.

[176] *Ibid.*, p. 229.
[177] *Ibid.*, p. 232.
[178] Cohn, D., *Signposts of fictionality*. In the next few paragraphs I summarize her position as found on pp. 777-781.

To explain this stance, she acknowledges that the widely-held bi-level concept of story (fabula) / discourse (sjuzet) applies to all narratives. The story refers to the order of events in the story told and discourse refers to the order of events in the telling. Flashback is an example of such a distinction, the event being told (discourse) is some time earlier than the place in the story at which it is told.

To writers of non-fiction, however, this bi-level model of narratology is insufficient and incomplete. The concern for such writers is to have access to 'verifiable documentation …. reliably documented evidence of past events' out of which he fashions his story. Cohn thus turns the bi-level model into a tri-level model by introducing what she terms a referential level (or database) – reference / story / discourse. For Cohn, merely acknowledging that both fiction and non-fiction writers can manipulate story/discourse does not render these narratives similar. To her, this perspective can lead to the characterization of, for example judgment-writing, as a form of fiction making. Yet this is what I explore as a distinct possibility.

Here she specifically refers to White's view – 'There are many histories that could pass for novels, and many novels that could pass for histories …. Viewed simply as verbal artefacts histories and novels are indistinguishable from one another'[179] – and states that such comments expressly block out the referential level of non-fiction narrative. Cohn does not acknowledge that White is already cognizant of this

[179] White, H. V., *Tropics of discourse*, p. 122.

referential level when he said that non-fiction narrative is 'concerned with events which can be assigned to specific time-space locations, events which are (or were) in principle observable or perceivable'.[180] For Cohn it seems enough that she establishes this database of, to her, incontestable facts without considering how they come to be incorporated into the text.

For White the incorporation of pre-existing material is always contestable as writers endow it with meaning expedient to their ideology. Writers of non-fiction can select what to include and exclude, and where to begin and end. We see this happening when judges decided which Dutch jurists they should rely on, and over what period, in order to support the criminalisation of homosexuality. Critics of historical narrative say that the historian 'whose fascination with the "constructive" capacity of human thought has deadened their responsibility to the "found" data'.[181] The term 'found data' applied to law suggests that law is a reified object waiting to be put into operation.

The assertion that history deals with the 'real' and 'actual' derives largely from the reliance on historical documents. This equates to what Cohn calls verifiable documentation and reliably documented evidence of past events. For White, though, a verifiable document does not make the event it speaks of any clearer. In fact, 'the

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[180] *Ibid.*, p. 121. White is writing in the context of historians but what he says could apply equally to any writer of non-fiction, judges included.
[181] White, H. V., *The historical text as literary artifact*, p. 222.

opaqueness of the world figured in historical documents is, if anything, increased by the production of historical narratives. Each new historical work only adds to the number of possible texts that have to be interpreted if a full and accurate picture of a given historical milieu is to be faithfully drawn'.[182] Again, the Dutch jurists illustrate this point. Their views on sodomy vary to such an extent that there is no certainty as what gender sodomy relates to, or even whether the act needs to be between humans.[183]

Michael Lemon considers the idea of how something changing over time relates to narrative.[184] In an example, he asks whether a car which is yellow and then is resprayed blue is a new car of the same model but different colour or whether the car has merely changed colour. In the absence of any further information we cannot say whether the two things in question are different things or whether it is the same thing which has changed. Are we dealing with a different thing, or with a changed thing? For example, is male-male sodomy different to male-female sodomy or is it a changed act? In Chapter Five I consider this idea in more detail by looking at the history of sodomy according to the judgments.

If, as some judges believe, the law is a reified object located extra-textually, then their judgments, as factual narratives containing this law, *should* aggregate. Insofar as

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[182] *Ibid.*, p. 228.
[183] Sodomy could even be committed with pictures and statues according to Von Quistorp.
[184] Lemon, M. C., *The structure of narrative*, pp. 110-114.

judgments are supposed to make objective truth-claims about a selected segment of the law, they must surely be compatible with judgments which preceded them. Yet while court cases ought to aggregate into a more comprehensive narrative, in fact they do not; 'and here is where conceptual discomfort should set in'.[185] The traditional explanation, which Mink calls 'analgesic', has been to distinguish between 'objectivity' and 'subjectivity'. Judgments should combine into more comprehensive wholes to the extent that they achieve complete objectivity about a certain area of law. However, judges introduce their individual idiosyncrasies and values both in the selection and in the combination of facts. It is because of the differences in these subjective elements that one judge's judgment does not fit with another's.

The claim that historical objectivity is possible presupposes what Mink calls the idea of 'Universal History'[186] – that past actuality is an untold story and that there is a right way to tell it. Universal History equates to 'Natural Law'. According to natural law, the moral standards that govern human behavior are objectively derived from the nature of human beings. The authority of legal standards derives from considerations having to do with the moral merit of those standards. Natural law is believed to exist independently of positive law or society. Some things are as they are, because that is how they are. Natural law is particularly influential in the law relating to sodomy because of the moral connotations.

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[185] Mink, L. O., *Narrative form as a cognitive instrument*, p. 217.
[186] *Ibid.*, p. 217.

Objectivity cannot be translated into terms of judgments. A judgment must have a unity of its own – it must have a beginning, middle, and an end. And the reason why two judgments cannot be 'additively combined'[187] – as one can do with a chronicle – is that in the earlier judgment of such an aggregate the end would no longer be an end, and therefore the beginning of the next judgment would no longer be a beginning. Each judgment has its own unity which does not lend itself to aggregation. Sophocles' trilogy is not itself a play, Mink explains. If it were, its constituents would be not plays but acts.

A number of scholars acknowledge the influence of Hayden White in their writing.

Jerome Bruner believes along the same lines as White that 'human beings make sense of the world by telling stories about it – by using the narrative mode for construing reality'.[188] Bruner's view remains unchanged when he and Amsterdam define narrative in terms wide enough to include real events – 'A narrative can purport to be either a fiction or a real account of events; it does not have to specify which'.[189]

André Brink, drawing on Hayden White, is also of the opinion that history is accessible only though text, and that that act of textualization creates a narrative in no way different to fiction. '[H]istory "as such" is … inaccessible: our only grasp of

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[187] *Ibid.*, p. 217.
[188] Bruner, J. S., *The culture of education*, p. 130.
[189] Amsterdam, A. G. & Bruner, J., *Minding the law*, p. 113.

Waterloo is attained through what has been written about it. “Waterloo” is an act of language. And in the process of textualizing the event it is also narrativized: that is, the representations of history repeat, in almost every detail, the processes of fiction …. history, memory, and language intersect so precisely as to be almost indistinguishable: the “origins” of history, as recovered through memory, are encoded in language, and each of these three moments becomes a condition for the others’.[190]

L H La Rue endorses the idea that judgments are fictional: ‘judicial opinions are filled with “stories” that purport to be “factual” but that are instead “fictional”, and furthermore, … these “fictions” could not be eliminated without crippling the legal enterprise’.[191] He asks, ‘Can we produce stories without using the imagination? And is it possible to have stories based solely on facts? If not, then … most discourse is in part fictional’.[192]

James Elkins, and Robert Cover bring historiography into the legal context:

‘[T]here are other ways of seeing the world, organizing experience …. The rich possibilities of other “intentions” and forms of life and experience conveyed in narrative teach us … that law is incomplete and that students of law must see what has been left out, passed over, ignored, and forgotten’.[193]

and

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[190] Brink A., *Stories of history*, p. 32.
[191] LaRue, L., *Constitutional law as fiction*, p. 8.
[192] *Ibid.*, p. 13.
[193] Elkins, J. R., *The stories we tell ourselves*, p. 55.

'We inhabit a … normative universe …. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral'.[194]

Not mentioning Hayden White specifically, but in keeping with his sentiments, Pierre de Vos also holds the view that the language in the South African Constitution in particular, but generally any legal text, does not have a single 'objective' meaning and cannot always produce one absolute or fixed meaning.[195] Judges seem 'profoundly uncomfortable' with the notion that they are not merely discovering a 'true', 'objective' or 'original' meaning of the text.[196] If texts such as the Constitution do not have one objectively determinable meaning, the risk is that the judicial process will be open to criticism of arbitrariness and bias.[197]

In order to try and curtail the effect of the indeterminacy of a text such as the Constitution, de Vos suggests that the Constitutional Court judges rule in terms of a grand narrative. This grand narrative is a metaphor of a bridge bridging the past and the present.[198] (This is a clear example of what White would call troping.) According

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[194] Cover, R. M., *Nomos and narrative*, pp. 4 & 5.
[195] de Vos, P., *A bridge too far?*, pp. 2 & 3.
[196] *Ibid.*, p. 3.
[197] *Ibid.*, p. 5.
[198] The metaphor is in the Interim Constitution and was highlighted by Etienne Mureinik: E

to this metaphor 'one can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before commencement of the interim constitution'.[199] If accepted, the assumption is that the metaphor could assist in solving the dilemma of objective adjudication.[200]

However, adopting a grand narrative 'relies on a rather naïve and outdated view of the nature of history'.[201] In the above notes on Foucault and historiography we see that those presently in power get to write their version of history. However, power is always contestable and there is no guarantee that those who adopted the bridge metaphor will always be in power. If this view of history is accepted, any attempt by the Constitutional Court judges to rely on a metaphor as a device to place distance between their personal views and the interpretation of the constitutional text is doomed to failure: 'Because historical determinacy is itself impossible to attain, and because any interpretation of the past is deeply political, the use of history as a device to constrain judges seems impossible'.[202] In another way de Vos is saying that truly factual narrative is not attainable.

Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 31-32. Under the heading, National Unity and Reconciliation, the interim Constitution declares: 'The 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.'

[199] de Vos, P., *A bridge too far?*, p. 11.

[200] *Ibid.*, p. 9.

[201] *Ibid.*, p. 16.

[202] *Ibid.*, p. 21.

This section on historiography has put forward the view that there is no difference between fiction and non-fiction narrative. The *contents* of different narratives might be designated factual or fictive but the *process* of turning a mere chronicle of events into a story is the same. Applied to judgments, this view undermines the belief that some judges hold that their texts are based on an immutable pre-existing law.

Chapter 3: Judges and judgments in context

Judgments in context

Socio-legal context pre-constitution – apartheid

'Our law has never treated lesbians and gays kindly,' says Edwin Cameron.[203] This unkindness was largely attributable to the 'unlovely creature', as J M Coetzee calls apartheid.[204] Most general commentary about apartheid centres, correctly, around racial apartheid. However, there was also sexual apartheid.[205] During the period from which my corpus is mostly taken, apartheid was the prevailing ideology within which the judiciary operated. Critics such as John Dugard, and later the Truth and Reconciliation Commission, accused the judiciary of adopting this ideology. Here I consider apartheid generally and then particularly as it applied to the moral policing of sexual activity.

The term 'apartheid' was first coined in 1943.[206] It was first used in parliament on 25 January 1944 by Dr Malan – 'To ensure the safety of the white race and of Christian civilization by the honest maintenance of the principles of apartheid and guardianship'.[207] In 1948, it was widely used as a slogan in the election and

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[203] Cameron, E., *Sexual orientation and the constitution*, p. 453.
[204] Coetzee, J. M., *The mind of apartheid*, pp. 1 & 2.
[205] The most obvious is s16 of the *Immorality Act* 23 of 1957 which criminalized interracial sex but this is outside the scope of this study.
[206] Brookes, E. H., *Apartheid a documentary study of modern South Africa*, pp. xxvi & 1: The word was used for the first time in a leading article in *Die Burger* on 26 March 1943 ('Nationalists' policy of apartheid'), and next in a leading article in *Die Burger* on 9 September 1943 ('the recognized Afrikaner standpoint of apartheid').
[207] Brookes, E. H., *Apartheid a documentary study of modern South Africa*, p. 1.

'undoubtedly helped to bring the Nationalists into power'.[208]

Whilst apartheid ideology dates back to 1652, 1948 was a watershed year – 'Apartheid after 1948 is different, not only in degree but even in some measure in kind, from pre-1948 policies of separation'.[209] It was at this time that it was institutionalized as policy at government level, and racial discrimination became entrenched in law. The main association of racial separation with apartheid is obvious: 'Apartheid caused poverty, degradation and suffering on a massive scale. It denied to the overwhelming majority of the population access to ownership and occupation of land, to proper education and to fundamental rights and freedoms …. It forced those who were not white into inferior positions in society, denying them work and employment opportunities and requiring them to live in degrading and humiliating conditions. Through the pass laws, and the influx control system … it brought about the separation of families and had a devastating impact upon family life. Apartheid, in itself, and in the way it was implemented, constituted a gross abuse of human rights'.[210]

Whilst not detracting from this main harmful effect, 'there is a long history that remains as yet unwritten of the repression and regulation of sexuality by the apartheid

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[208] *Ibid.*, p. xxvi.
[209] *Ibid.*, p. xxvii.
[210] *Truth and Reconciliation report*, vol. 4, ch. 4, para. 23.

state during its 40-year hold on power'.[211] The control of sexuality through the law was an important aspect of the ideological aims of those in power during apartheid.[212] The socio-legal control of homosexuality was accordingly influenced by the prevailing thinking of the time – '[e]xclusivist definitions of human identity, European constructions of morality, preconceived perceptions of what is considered "natural" and ideological stereotypes of race, class, and ethnography have been primary among these'.[213] Apartheid sought to reorganize social relations among people in both the public and private domains, including determining with whom they could have sexual intercourse.[214]

Sexual policing 'to stamp out nonconformist eroticism' was an important part of National Party government policy: 'Racist legislation and iron-fisted rule have, since the earliest days of Nationalist government, gone hand in hand with an obsessive interest in sexual policing'.[215] This policing was 'based on the values of Christian Nationalist apartheid ideology: the need to keep the white nation sexually and morally pure so that it had the strength to resist the black communist onslaught'.[216] From the first time apartheid was uttered in parliament, it was in the context of a Christian Nationalist ethos.[217]

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[211] Gevisser, M. & Cameron, E., *Defiant desire*, p. 99.
[212] Botha, K. & Cameron, E., *South Africa*, p. 12.
[213] *Ibid.*, pp. 12-13.
[214] Louw, R., *Gay and lesbian sexualities in South Africa*, p. 139.
[215] Gevisser, M. & Cameron, E., *Defiant desire*, p. 100.
[216] *Ibid.*, p. 100.
[217] Brookes, E. H., *Apartheid a documentary study of modern South Africa*, p. xxvi.

The received common law in South Africa, Judeo-Christian in origin, criminalized homosexual conduct under the offences of sodomy and unnatural acts. The previous government codified and extended the common law, principally via the *Sexual Offences Act* of 1957.[218] In section 14 the heterosexual age of consent was set at sixteen years while that of homosexuals (male and female) was set at nineteen years. In 1967 section 20A of the *Sexual Offences Act* became law. This section made it a crime for two men at a party to commit an act which was 'calculated to stimulate sexual passion or give sexual gratification', where a party was defined as being an occasion where more than two persons were present. Sodomy was classified as a Schedule 1 offence in terms of the *Criminal Procedure Act* of 1977, which permitted the killing of, in certain circumstances, sodomites or suspected sodomites.

Exploring reasons for the eventual de-criminilisation of homosexual acts leads one back to Foucault's view that the processes through which reality is constructed and dissimulated are always acts of power and will always be resisted and contested. Apartheid was resisted by many on whom the policy was imposed. If the court was a site of repression and social regulation, it was 'also a site of resistance and struggle'.[219] A study of the sexual orientation cases makes 'visible the manner in which the construction of reality in apartheid discourse has been contested by a series

[218] Louw, R., *Gay and lesbian sexualities in South Africa*, pp. 139-140.
[219] *Ibid.*, p. 139.

of other, opposing symbolizations of reality'.[220] Apartheid, in Aletta Norval's view, 'was not a fully fledged blueprint for the ordering of society … it constantly had to take cognizance of the forces opposing it'.[221] In order to form a heterosexual, Christian identity, it was necessary to exclude the other, 'the canker that afflicted the Biblical Sodom'.[222] However, 'what is excluded as "other" has the capacity to challenge and subvert the manner in which social division is constituted'.[223]

In the *National Coalition* case, Ackermann J acknowledged the part apartheid played: 'Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society'.[224]

Although common law sodomy may have been struck down and the offending statutes flagged 'unconstitutional', the 'unlovely creature' still resides in the 'lair of the heart'.[225] Apartheid laws may be dismantled, its practices combated, but apartheid

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[220] Norval, A. J., *Deconstructing apartheid discourse*, p. 3.
[221] *Ibid.*, p. 8.
[222] Gevisser, M. & Cameron, E., *Defiant desire*, p. 98.
[223] Norval, A. J., *Deconstructing apartheid discourse*, pp. 8-9.
[224] *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others* 1999 (1) SA 6 (CC), 28-29. This case will be referred to as the *Constitutional Court National Coalition* in the footnotes.
[225] Coetzee, J. M., *The mind of apartheid*, p. 2.

thinking is 'likely to resist coercion'.[226] It is 'ultimately in the lair of the heart that apartheid must be approached. If we wish to understand apartheid … we cannot ignore its testament as it comes down to us in the heart-speech'.[227]

This was a society that allowed the police to entrap homosexuals, the last entrapment case being in 1987.[228]

In the middle of May 1952, two men booked into a room at the National Hotel, Pretoria. One of the men, R, was working for police detectives. R was to deliberately entice V to perform a homosexual act so that police detectives could catch him. R stripped naked and lay on a bed on his stomach. V, in his underpants, lay on top of R. The detectives entered the room and 'observed that the accused's penis was erect when he rolled off R', that it was 'emerging from the fly of his underpants'.[229] V was found guilty of attempted sodomy.

The way Greenberg ACJ structured his judgment, there is no mention that this was a police entrapment case until eighty-five percent of the way into the text. When reading the opening line of the case – 'The appellant was charged ... with the offence of sodomy'[230] – no explanation is given as to how V came to trial. The first mention

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[226] *Ibid.*, p. 1.
[227] *Ibid.*, p. 2.
[228] *R v V* 1953 (3) SA 314 (A), *R v C* 1955 (2) SA 51 (T), *S v C* 1987 (2) SA 76 (W).
[229] *R v V* 1953 (3) SA 314 (A), 323.
[230] *R v V* 1953 (3) SA 314 (A), 314.

of entrapment is at the end of the case when R's name is preceded with the unusual use of 'trap' as an adjective – the 'trap R'.[231]

Not only is there no judicial censure; the judge commends R and wholly endorses his testimony: 'The trap R created a favourable impression on the Court of his demeanour and the manner of answering the questions put to him. It is true that one should be cautious in dealing with the evidence of a trap, but what in my view provides overwhelming corroboration of R's story is the evidence given by the two detectives …. R's testimony was corroborated in all material particulars and left the Court in no doubt as to his truthfulness'.[232]

The accused's testimony was dismissed entirely: 'The accused's story, on the other hand, is inherently improbable and unworthy of credence … I need say no more than that his testimony is a fabrication from beginning to end'.[233] His testimony may have been fabricated, but at this stage in the law there was no room to challenge the injustice of the entrapment itself.

In the mid-1950s, a man was suspected of having sex with school boys, but had never been caught. To build a case, the police sent in a 'native constable',[234] in the guise of

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[231] *R v V* 1953 (3) SA 314 (A), 323.
[232] *R v V* 1953 (3) SA 314 (A), 323.
[233] *R v V* 1953 (3) SA 314 (A), 323.
[234] *R v C* 1955 (2) SA 51 (T), 54.

a servant who 'cleaned the accused's shoes'.[235] The man made 'some overture'[236] towards the constable who then asked his officers in charge whether he could reciprocate. He was 'given permission to perform indecent acts with the accused'.[237] The man was charged with sodomy, 'in that he did wrongfully and unlawfully incite, command or procure a native male, E, to commit the crime of sodomy upon him, the said appellant, and to permit him, the said appellant, to commit the crime of sodomy upon the said E'.[238]

There are a few points about this charge. Describing E as a 'native' is gratuitous since race was not part of the so-called definition of sodomy. In the way the charge is styled, the man is the agent in both getting Constable E to sodomise him and in sodomising E. Yet the man did not 'incite, command or procure' anyone to commit sodomy with him. The constable was there as part of an entrapment where he 'insinuated himself or was insinuated into the room of the accused'.[239] It was Constable E who requested permission to have sex with the man. In this light, the man's version is more believable when he says that E 'took the lead and performed acts that aroused his excitement'.[240] Sodomy was not proved and from the facts of the case it is unlikely that anal intercourse took place.

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[235] *R v C* 1955 (2) SA 51 (T), 54. Contrast to *S v K* 1973 (1) SA 87 (RA), 88 'a humble African domestic servant of 21 years of age, the sort of man who would be likely to yield easily to persuasion of this sort'.
[236] *R v C* 1955 (2) SA 51 (T), 54.
[237] *R v C* 1955 (2) SA 51 (T), 54.
[238] *R v C* 1955 (2) SA 51 (T), 51.
[239] *R v C* 1955 (2) SA 51 (T), 54.
[240] *R v C* 1955 (2) SA 51 (T), 54.

Both judges condemned not the entrapment process itself, but the permission given to the constable. Ramsbottom J refers to the person trapping only as a 'native' and never acknowledges that E was a constable. Significantly, the reader only learns that E is actually a constable in the very last sentence of the judgment.

Ramsbottom J said, 'It is to me a most shocking thing that a native should be "given permission" to perform indecent acts in order to secure the conviction of the person suspected of an aberration of this kind. If I had not seen it in a court record and sworn to upon oath by the policemen themselves, I would have had the greatest difficulty in believing that a thing of this kind could occur. I sincerely hope that it will never occur again'.[241]

Clayden J said, 'I do wish, however, to associate myself with the expression of disapproval of the fact that a native constable was allowed, after he had reported that acts of immorality might be committed against him, to continue and subject himself to the possibility of further such acts, and I concur in the expression of the view that certainly no such happenings should be allowed in the future'.[242]

At 1:30 in the morning of Labour Day 1 May 1985, Major Kleynhans was patrolling the dimly-lit passages of Lebane Steam Baths 'about the performance of his duty ....

[241] *R v C* 1955 (2) SA 51 (T), 54.
[242] *R v C* 1955 (2) SA 51 (T), 54-55.

to inspect for sodomy and other unlawful acts'.[243]

Suspecting sodomy was occurring in a cubicle, he 'pushed the door open, entered the cubicle and switched on its light. There is a conflict between the appellant and Major Kleynhans as to what precisely the appellant and D, who were both naked, were doing at that moment and as to the postures they were assuming …. No sooner had Major Kleynhans entered the cubicle and switched on the light when the appellant and D moved apart and jumped up. The appellant dashed out of the cubicle and fled into the steam baths area. Major Kleynhans apprehended D there and then and subsequently also arrested the appellant elsewhere in the building'.[244] The headnote uses other verbs in its version – 'A policeman, K, barged in and turned on the light; two men sprang apart and dashed off'.[245]

The transitivity of the verbs shows the hunter and the hunted, the stalker and the stalked in this entrapment process. Major Kleynhans pushed the door open, entered the cubicle, barged in, switched on its light. The appellants moved apart, sprang apart, jumped up, dashed out, fled. Major Kleynhans apprehended, arrested.

Since this was suspected sodomy, Major Kleynhans was legally entitled to kill his

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[243] *S v C* 1987 (2) SA 76 (W), 81.
[244] *S v C* 1987 (2) SA 76 (W), 79.
[245] *S v C* 1987 (2) SA 76 (W), 77.

quarry. Sodomy is[246] a Schedule 1 offence in terms of the *Criminal Procedure Act*. One of the effects[247] this has, for example, is that when the men 'dashed out of the cubicle and fled into the steam baths area',[248] they were fleeing the scene of a crime and they could have been killed if there was no other way for the policeman to stop the men from avoiding arrest.[249] The patrons of Lebane Steam Baths are transformed into Schedule 1 criminals and the steam bath becomes a scene of a crime.

Yet even in this restrictive society, one case shows that there was room for resistance.

Prior to leaving home on 26 May 1965, a 19-year-old man (referred to by the court as 'Coloured') put on make-up, a wig and woman's clothing, most likely a dress. He then walked down Bezuidenhout Street, Johannesburg, with two friends also dressed in drag. Detective Constable Bambridge approached, informed him that he was a policeman and asked him his name. He gave his correct surname, Kola, and was then arrested.

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[246] The present tense since sodomy remains in Schedule 1 of the *Criminal Procedure Act* 51 of 1977 but has been declared inconsistent with the provisions of the Constitution and invalid to the extent set out in the Constitutional Court Order published under Government Notice No R1354 in Government Gazette 19349 of 23 October 1998 and Government Notice No R588 in Government Gazette 21266 of 15 June 2000.

[247] In *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others* 1998 (2) SACR 102 (W), 110-111 counsel for the applicant lists ten effects. Similarly, there were three effects of listing sodomy in the Schedule to the *Security Officers Act* 92 of 1987. This case will be referred to as the *High Court National Coalition* case in the footnotes.

[248] *S v C* 1987 (2) SA 76 (W), 79.

[249] Section 49(2) of the *Criminal Procedure Act* allows a person authorised to arrest an individual suspected of having committed sodomy to kill the suspect if that suspect flees the scene of the crime and there is no other way to stop the suspect from avoiding arrest.

The Attorney General pressed into service an obscure law from 1891 which read 'The wearing or use of masks, false beards, or other means whereby disguises are effected, in public roads or other public places is forbidden'.[250] This law was used to bring the case to the magistrate's court. The magistrate sentenced him to a fine of R10 or 14 days' imprisonment. The Attorney General appealed to the Supreme Court where the conviction and sentence were set aside. The Attorney General then applied to have the case heard by the Appellate Division.[251] The Appellate Division upheld the conviction but the sentence was altered to a caution and discharge. Such was the power of the Attorney General to take a case from the lowest to the highest court of the land. However, I like to think Mr Kola's form of resistance won the day. A look at the treatment he received and his response help explain.

During the court hearing his attorney was unsure whether his client was a man or a woman and so he had a district surgeon inspect Mr Kola's genitals. This was the second time a district surgeon had examined his genitals. Six months earlier Detective Constable Heine had seen him in Marshall Square and had sent him for an examination. He was treated like a freak, not dissimilar to Sarah Bartman ('The Hottentot Venus') – 'a tragic case',[252] a 'psychological aberration'.[253] There were

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[250] Sec. 1 of Law 2 of 1891 of the Transvaal as quoted in *S v Kola* 1966 (4) SA 322 (A), 324.
[251] *S v Kola* 1966 (4) SA 322 (A), 325 'With the leave of that Court, the Attorney-General of the Transvaal has appealed to this Court'.
[252] *S v Kola* 1966 (4) SA 322 (A), 325.
[253] *S v Kola* 1966 (4) SA 322 (A), 327.

'doubts about his sex',[254] and so he was examined. 'The evidence of the district surgeon ... showed that, although his general physical configuration (e.g. his build and hips) and sexual organs were those of a male, the pitch and tone of his voice and the style of the hair on his head were feminine, that possibly he had a sexually inverted mind, which was congenital, and that he was in consequence a psychological misfit or deviate'.[255] When a person's expression of sexual identity does not conform, that sexual identity is perceived by the court as 'deviant'. The court did not know why he dressed this way, perhaps 'to satisfy some feminine instinct or urge, or perhaps to save himself from the embarrassment or inconvenience that his feminine characteristics, such as his voice, could cause him', they mused.[256]

This indignity notwithstanding, he also had to hear a bewildering array of legal talk which he could never have contemplated would arise from a walk down Bezuidenhout Street: talk of false beards, theatrical performances, masked balls, extracts from the Oxford English Dictionary – The shepherd's garb the woman shall disguise, a disguise or habit of a girl beyond sea – translations from Dutch to English, extracts from a 1917 insurance case, and a quote from Halsbury, Laws of England, vol 10, p283, note (m).

In all this he never uttered one word. The 'embarrassment or inconvenience that his

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[254] *S v Kola* 1966 (4) SA 322 (A), 327.
[255] *S v Kola* 1966 (4) SA 322 (A), 325.
[256] *S v Kola* 1966 (4) SA 322 (A), 327.

feminine characteristics, such as his voice, could cause him', were never put to the test.[257] Had he testified, he would probably have told the truth. He had answered the policeman's questions truthfully then *a fortiori*, he would have answered the court's.

But, '[t]he accused himself did not testify', causing Trollip AJA, with Beyers JA and Holmes JA concurringly to presume, 'I think that, in the absence of any evidence from him explaining his conduct, it must ... be presumed that he ... intended to conceal his identity, for that would be a reasonable and probable consequence of concealing his sex …. The failure of the accused to testify is of importance ... because .... "Where a question of the state of mind of an accused person is in issue, it is not easy for a Court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject'".[258] Yet in spite of his silence, the court did come to a conclusion more 'favourable to the accused'.

Not only did the accused choose not to testify, he dressed in drag for each court appearance. 'On both occasions on which the appellant appeared in court he was dressed as, and had the appearance of, a woman'.[259] '[H]is own attorney must have been impressed by his appearance because during the hearing he applied for a postponement "to have accused medically examined, he says that the sex of the

[257] *S v Kola* 1966 (4) SA 322 (A), 327.
[258] *S v Kola* 1966 (4) SA 322 (A), 327.
[259] *S v Kola* 1966 (4) SA 322 (A), 327.

accused is in dispute"'.[260]

This 19-year-old youth's silence and his going to court in drag were acts which twice confirm the district surgeons' findings. He sat in court, impeccably turned-out and silently watched, in ascending importance, three courts flip-flop – guilty and a sentence, not guilty therefore no sentence, guilty but no sentence. In retrospect, the Attorney General lost. If he had stopped at the magistrate's court he would have secured a conviction and a sentence. It was Ms Kola's day in court.

There is a history of scrutinizing beds, bedrooms and, generally, private and public spaces occupied by homosexuals. It is not normal, according to one judge, for members of the same sex to occupy private spaces for intimate purposes, for it is 'male and female who share a bed'.[261] When beds and bedrooms are mentioned in the corpus, they are always in the context of tainted sites: men getting into or lying on top of beds, all-male steam baths or a lesbian's bedroom.

In the mid-1920s a witness saw two men get into bed: 'he saw Riley on one occasion get into accused's bed'.[262] The specific use of the preposition 'into' indicates that they got in between the sheets. Thirty years later two men lay on a bed: 'R took off his pants and underpants and lay on a bed on his stomach. V, in his underpants, lay on top

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[260] *S v Kola* 1966 (4) SA 322 (A), 327.
[261] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329-330.
[262] *R v Curtis* 1926 CPD 385, 388.

of R'.[263] Both cases resulted in criminal sentences.

The descriptions by policemen in court describing two all-male steam baths resemble here-there-be-monsters stories:

'The health clinic is divided up into various large rooms. In the centre of the health clinic there is a swimming pool and a round whirlpool. On the lefthand side of the building as well as on the right-hand side, it is a sort of a square. It used to be an old school in the old days. There are rooms about the size of the court room, divided up into cubicles with wood partitioning and there is a curtain hanging in front of each cubicle, it is a loose curtain. In each cubicle there are two beds, in some cases there are three'.[264]

and

'The place was a small room or cubicle fitted with a bed, within a building complex known as the Lebane Steam Baths in Polly Street, Johannesburg. The centre consisted of a reception area and various facilities, including change-rooms, areas for steam bathing and for showering; a TV room and towards the back, a passage along which three or four cubicles, including the cubicle in question, were situated. Each cubicle had a door opening onto the passage'.[265]

Whereas the men's 'bedrooms' are curtained cubicles with two or three beds, in

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[263] *R v V* 1953 (3) SA 314 (A), 323.
[264] *S v C* 1983 (4) SA 361 (T), 363.
[265] *S v C* 1987 (2) SA 76 (W), 78.

public downtown Johannesburg, the women's bedrooms are private and domestic, in the suburbs. The number of beds for women is not mentioned but by implication there is only one – 'Not only is she a lesbian but she lives in a lesbian relationship. She shares the house and the bedroom with her associate'.[266]

'The choice, as in regard to her bedroom life, is hers'.[267] Here 'bedroom life' is discreetly euphemized as sex life whereas in the male cases policemen physically enter the private areas and observe 'that the accused's penis was erect when he rolled off R', that it was 'emerging from the fly of his underpants'[268] or patrol the passages of Lebane Steam Baths in the middle of the night 'to inspect for sodomy and other unlawful acts'.[269]

Flemming DJP's obsession with beds and bedrooms finds its way into the final order. GM (the applicant's partner) is specifically mentioned in the order as the person with whom the mother may not share a bedroom – 'when the children sleep at the applicant's residence, the applicant will not share a bedroom with GM'.[270] This poorly-crafted order makes it possible for the applicant to 'share' any other room in the house with GM, or to share her bedroom with XY.

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[266] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 326.
[267] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.
[268] *R v V* 1953 (3) SA 314 (A), 323.
[269] *S v C* 1987 (2) SA 76 (W), 81.
[270] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 331.

Ackermann J puts an end to bedroom-policing when he makes an American case applicable to South Africa. 'Hardwick, an adult male, was criminally charged for violating Georgia's sodomy statute by committing a sexual act with another adult male … in his own bedroom …. [I]n the kind of society contemplated by our Constitution, government must offer greater justification to police the bedroom than it must to police the streets …. The position is also anomalous in South African law'.[271]

Socio-legal context under the constitution

This attitude to homosexuality softened under constitutional discourse. If society's attitudes to contraception and marriages which are deliberately childless had changed, these changing attitudes 'must inevitably cause a change in attitudes to homosexuality'.[272]

The *National Coalition* cases touch on deep convictions and evoke strong emotions: 'It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law …. It is nevertheless equally important to point out that such

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[271] *S v H* 1995 (1) SA 120 (C), 125 & 127, referring to *Bowers v Hardwick* 478 US 186 (1986).
[272] *S v H* 1995 (1) SA 120 (C), 125.

views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation'.[273]

Under a constitutional discourse judges could speak openly of a change in society's view of homosexuality: 'The changing attitude of society generally to intimate relations between homosexuals demands greater tolerance and lenience in the sphere of sentencing adult persons for private consensual acts of intimacy which are still proscribed by the criminal law'.[274]

and

'Events in the sphere of constitutional negotiation, whatever the ultimate result might be, indicate a significant change in attitude in South African society to the issue of homosexuality'.[275]

'Constitutionally we have reached a stage of maturity,' says Heher J, 'in which recognition of the dignity and innate worth of every member of society is not a matter of reluctant concession but is one of easy acceptance. Nor is that perception inimical to views held by a large percentage of the population, as witness the liberalisation of attitudes in the media, the open acceptance of persons of divergent sexual orientation into positions of responsibility in society and the public recognition of what has always been the *de facto* reality that, by reason of their particular emotional and

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[273] *Constitutional Court National Coalition*, 32.
[274] *S v H* 1995 (1) SA 120 (C), 124.
[275] *S v H* 1995 (1) SA 120 (C), 129.

intellectual make-up, many homosexuals contribute vastly to the greater well-being of mankind'.[276]

This is fairly patronising in that many homosexuals do not contribute vastly to the greater well-being of mankind. And why should that be a consideration? The case which dealt a significant blow to the end sodomy, for example, was about a semi-literate, unemployed prisoner. There is this deliberate attempt to make homosexuals acceptable. Writing in 2004, Pierre de Vos says that homosexuality 'is still widely regarded in almost all societies as an aberration, a deviation from the heterosexual norm and even when accepted this acceptance often seems to stem from a patronising impulse to accommodate "abnormal" sexuality in the name of tolerance and openmindedness'.[277]

During the pre-constitutional period the immorality of homosexuality was a strong driving force behind the decisions judges reached. The following extracts acknowledge this and dismantle the morality justification.

'The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice'.[278]

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[276] *High Court National Coalition*, 112.
[277] de Vos, P., *Gay and lesbian legal theory*, p. 330.
[278] *Constitutional Court National Coalition*, 31.

S20A ‘was motivated by … rank prejudice’[279]

‘Although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of public institutions which are based on and perpetuate such prejudice’.[280]

‘A law which has facilitated homophobic assaults and induced self-oppression, ceases to be’.[281]

‘Although the suppression of sodomy may in times past have been regarded as a necessary prop of morality both public and private, that is today too tenuous a thread upon which to support its continued criminalisation’.[282]

‘What passes (or attempts to pass) for justification are, I find, historical antipathy, personal revulsion, religious conviction, the prevailing opinion in society, and the protection of the morals of the people’.[283]

‘The Court is not concerned with making any value-judgment as to the morality of

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[279] *Constitutional Court National Coalition*, 44.
[280] *Constitutional Court National Coalition*, 66-67.
[281] *Constitutional Court National Coalition*, 67.
[282] *High Court National Coalition*, 122.
[283] *High Court National Coalition*, 122.

homosexual relations between male adults'.[284]

'Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved'.[285]

'… many of those who believe that homosexual activity between adult males is immoral and should be proscribed by criminal sanction may be occasioned distress by the thought that others are engaging in such acts, albeit in private'.[286]

'It may be that when the legislation was enacted Parliament regarded the threat posed by homosexual licence to public morality or the pernicious influence of the impugned conduct on other persons who might be present (perhaps innocently), as more real and serious than any like behaviour by women or heterosexuals and that equivalent criminalisation of the same conduct by women or between a man and a woman was unnecessary. There is no evidence suggesting that the distinction is still warranted or regarded as justified'.[287]

'… how we manage difference. In the past difference has been experienced as a curse,

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[284] *S v Kampher* 1997 (4) SA 460 (C), 473.
[285] *S v Kampher* 1997 (4) SA 460 (C), 474.
[286] *S v Kampher* 1997 (4) SA 460 (C), 476.
[287] *Constitutional Court National Coalition*, 105.

today it can be seen as a source of interactive vitality …. 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'.[288]

To those who sincerely believe that homosexuality is evil, 'those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs'.[289]

The concept of a 'gay and lesbian community' is introduced in the *Constitutional Court National Coalition* case.[290] Sachs J commenting on Ackermann J's judgment says, 'the judgment has with appropriate sensitivity for the way anti-gay prejudice has impinged on the dignity of members of the gay community, focused on the manner in which the anti-sodomy laws have reinforced systemic disadvantage both of a practical and a spiritual nature'.[291]

This so-called community formed the National Coalition for Gay and Lesbian

[288] *Constitutional Court National Coalition*, 69.
[289] *Constitutional Court National Coalition*, 69.
[290] *Constitutional Court National Coalition*, 56, 67 (2).
[291] *Constitutional Court National Coalition*, 63.

Equality, a duly constituted voluntary association of gay, lesbian, bisexual and transgendered persons comprising seventy organisations and associations. The coalition was the first applicant in the cases that challenged the sodomy laws. It was a big group because the issues involved a wide range of sexual minorities and it was expedient to band together in this way, a pragmatic 'choose your battle' approach.[292] However, there were a variety of people who came under the sexual minority banner – lesbians, gay men, bisexuals, transsexuals, and the transgendered. These descriptors do not imply that persons in each of these groups is the same. It simply acknowledges that these sexual minorities are 'perceived as aberrational under traditional heteropatriarchal ideology'.[293]

It is not strange therefore that, like the Homosexual Law Reform Fund in the 1960s (discussed later), this group also disbanded after their cause had been achieved. The goals of a 'unified' group 'may not reflect exactly those of certain factions within it, yet the larger group benefits from their participation because of the increased numbers they bring'.[294] There are no 'stable assumptions about who belongs to the group and what their interests are, and about who can speak for the group'.[295] The so-called gay and lesbian community was also splintered along racial lines. Urban blacks formed an organisation called GLOW (Gay and Lesbian Organisation of the Witwatersrand). This indicates that blacks were willing to be called gay and lesbian but not to be

[292] Valdes, F., *Intersections of race, ethnicity etc*., p. 1316.
[293] Valdes, F., *Intersections of race, ethnicity etc*., p. 1295.
[294] Delgado, R. & Stefancic, J., *Critical race theory*, p. 56.
[295] Halley, J. E., *"Like race" arguments'*, p. 45.

aligned to the white organisations.

Judges in context

This study considers judges over nearly seventy-five years. It is useful to consider the position of a judge to see if the nature of that position changed over time. Drawing on Foucault, if we accept that knowledge is not a pre-existing reality but rather constituted within discourse, we have to then ask who lays claim to that ability to constitute. Foucault would say it is those with the right to enunciate according to the rules of formation.

These rules of formation centre around statements uttered by subjects empowered to make serious truth claims because of their training, institutional location and mode of discourse. In a legal context, this means that only a properly trained and appointed judge, sitting in a court room and occupying the subject position of judge can enunciate statements which would find their way into the prevailing discourse by way of court judgments. In the theatre of the courtroom, the judge is elevated and is said to 'hand down' a judgment. In this way various legal concepts emerge within society, rather than being introduced with purpose or intention. Just as there is no teleological purpose specifying which themes are to emerge, those that do often comprise heterogeneous judgments which future judges sometimes force with procrustean crudity to conform to their viewpoint. The originality of Foucault is that he does not try to explain away such inconsistencies. By meeting discourse on its own complex, messy terms, he entertains new possibilities foreclosed by ordinary thinking.

The Truth and Reconciliation Commission hearing

At the Legal Hearing of the Truth and Reconciliation Commission two questions were put to the judiciary which go to the heart of John Dugard's sustained criticism of them: 'How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government?'[296]

The judiciary and the 'establishment' legal professionals answered[297] that the doctrine of parliamentary sovereignty required judges to defer to the will of the majority in parliament, thus denying the courts the opportunity to fashion statute law to achieve a degree of justice in the face of legislated injustice. Where there was some room for manoeuvre, particularly in the construction and development of the common law, or where clear statutory ambiguity permitted it, judges mostly adopted an interpretation that favoured liberty and equity. Any attempt by the judiciary to circumvent unjust effects would have led to further legislative steps to reverse such decisions or would have led to a 'packing of the Bench'. The record of judicial impartiality and pursuit of justice was satisfactory, if not good. In a nutshell, the judiciary's submissions argued that an administration of justice and a legal order that preserved a limited degree of impartiality and independence was better, in all circumstances, than a legal system

[296] Dyzenhaus, D., *Truth, reconciliation and the apartheid legal order*, p. 27.
[297] The following is a paraphrase of the *Truth and Reconciliation report*, vol. 4, ch. 4, paras. 7-17.

that was completely subservient to the will and whims of the political masters in parliament.

The counter argument[298] was that the judiciary had co-operated in servicing and enforcing a diabolically unjust political order, that parliamentary sovereignty was no defence and that judicial independence was a myth. Judges were able to exercise a choice in almost all circumstances, although in some cases the range of options might have been extremely narrow. The inherent ambiguity of language and the diversity of factual circumstances allowed judges a degree of latitude in deciding what the law was, the more so for common law. In the rare circumstances where little or no judicial choice existed, judges could still have criticized the law both on and off the bench, within the limits of propriety. The judicial oath of office demanded that judges 'administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa'.[299] This was not the case.

After hearing the submissions from both sides, the Commission found[300] that the National Party leaders craved the aura of legitimacy that 'the law' bestowed on their harsh injustice. The courts subconsciously or unwittingly connived in this legislative

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[298] The following is a paraphrase of the *Truth and Reconciliation report*, vol. 4, ch. 4, paras. 18-30.
[299] *Supreme Court Act* 59 of 1959, sec 10(2)(a).
[300] The following is a paraphrase of the *Truth and Reconciliation report*, vol. 4, ch. 4, paras. 32-47.

and executive pursuit of injustice. Judges too easily made sense of the illogical and the unjust in language, and too quickly accepted the word of the police or official witness in preference to that of the accused. The judiciary unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice, and was intent on maintaining and protecting the *status quo*.

Some judicial submissions emphasized their relative impotence in the face of the exercise of legislative power by a sovereign parliament. The Commission regarded this as a flawed argument: parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that parliament. This situation never applied in South Africa. Judges had a choice, and it was feasible for them to have heightened their alertness as to government abuse of powers in the power vacuum created by the partially-representative legislature and the absence of basic fairness in the citizen-state relationship. Judges, had they wished to do so, could have resisted encroachments on basic rights and fairness, using the skills and knowledge which they manifestly possessed and arguing from common law principles.

Profile of judges and the influence of positivism

The TRC criticized the judiciary for maintaining the *status quo* rather than exploiting ambiguity in language to effect change. This maintenance was due largely to the composition of the judiciary and the positivistic training such judges had. For this reason I look at the composition of the judiciary in more detail and review the debates about the role positivism played with the South African judiciary. Judges, at the time, were a small professional elite, drawn mostly from senior advocates in private

practice.[301] Although this 'ensured a high level of professionalism', it also led to 'insulation from the wider implications of social problems and dynamics', and to 'complacency and self-satisfaction' on the part of judges.[302] This small elite was mostly white, male, Protestant, privileged and political.[303]

The National Party government packed the bench either with political appointments or with lawyers who had no history of opposition to apartheid. During this time, there was a small minority of 'liberal' judges.[304] Dugard estimates that at least fifty percent of the judiciary could broadly be described as supporters of the National Party Government, with a loyalty to the *status quo*.[305] South African judges prided themselves on their political neutrality and refrained from identifying themselves publicly with any political party. But, to Dugard, this is one of the 'many legal fictions which is assiduously maintained in South Africa'.[306] The South African public was generally given the impression that newly appointed judges were distinguished jurists with no political affiliation, who had earned their appointments on pure merit.[307]

Although judges did not make overt political statements from the bench, their views

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[301] Cameron, E., *Judicial accountability in South Africa*, p. 256 and Dugard, J., *Human rights and the South African legal order*, pp. 279 & 282.
[302] Cameron, E., *Judicial accountability in South Africa*, p. 256.
[303] Swart, M., *The Carfinian curse*, p. 540.
[304] Dyzenhaus, D., *Truth, reconciliation and the apartheid legal order*, p. 38.
[305] Dugard, J., *Human rights and the South African legal order*, pp. 284 & 380.
[306] *Ibid.*, p. 283.
[307] *Ibid.*, p. 284.

were 'mediated through law'.[308] Ideally, judges are supposed to come to court like a '*tabula rasa*, with no knowledge whatsoever of the situation – a blank space waiting to be filled by facts'.[309] In reality, judges usually find confirming legal rationalizations for their choices or adopt whatever seems easiest or least controversial, which often involves ignoring or distorting contrary arguments, authorities, facts, or social realities, according to Bernard Jackson.[310] Judges are most influenced by 'the culture that pervades their daily lives, their associations, their self-perceptions, and the world around them'.[311]

It is accepted that personal bias plays a part in legal decisions. The degree of bias varies and, hopefully, the 'better the judge, the less likely is this to occur'.[312] In a rare admission of bias, Centlivres JA wrote that a judge's 'duty is to administer the law as it exists but he may in administering it express his strong disapproval of it … [H]e cannot on becoming a Judge be expected to divest himself of those views'.[313] As Edwin Cameron notes, 'judges do not enter public office as ideological virgins'.[314]

According to the International Commission of Jurists, commenting on the judiciary in the 1960s, 'the overall impression is of a judiciary as 'establishment-minded' as the

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[308] Kairys, D., *The politics of law*, p. 8.
[309] Jackson, B. S., *Law, fact and narrative coherence*, p. 112.
[310] *Ibid.*, p. 112.
[311] Kairys, D., *The politics of law*, p. 8.
[312] Marcus, G., *Judging the judges*, p. 163.
[313] *R v Milne & Erleigh* (6) 1951 (1) SA 1 (A), 12.
[314] Cameron, E., *Judicial accountability in South Africa*, p. 258.

executive, prepared to adopt an interpretation that will facilitate the executive's task rather than defend the liberty of the subject and uphold the Rule of Law'.[315] For Dugard, positivism was at the root of the accusation that the South African judiciary had become 'establishment-minded'.[316] There was no suggestion of deliberate bias; all that he suggested was that by relying on mechanical, positivistic methods of interpretation, judges had become 'subconsciously influenced by submerged forces which may coincide with the will of the executive'.[317]

In cases concerning male sexuality, judges were also influenced by their own views on 'normal' sexuality as well as being aware of the anti-homosexual attitude of the National Party. There was little or no incentive to disturb the prevailing attitude in these kinds of cases. Judges are not 'value-free arbiters, independent of and unaffected by social and economic relations, political forces, and cultural phenomena'.[318] Judges are neither neutral nor objective; rather, they are affected by their society and this reflects in their judgments: '[T]he law consists of people-made decisions and doctrines, and the thought processes and modes of reconciling conflicting considerations of … judges are not mystical, inevitable, or very different from the rest of ours'.[319]

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[315] Dugard, J., *Human rights and the South African legal order*, p. 279 quoting *Erosion of the Rule of Law in South Africa*, Geneva, International Commission of Jurists, 1968, editorial comment, iv.
[316] Dugard, J., *Human rights and the South African legal order*, p. 380.
[317] *Ibid.*, p. 380.
[318] Kairys, D., *The politics of law*, p. 6.
[319] *Ibid.*, p. 6.

Judges accepted legal positivism as their 'jurisprudential guide', in Dugard's view.[320] By doing so, judges regarded as their duty 'to analyse and interpret the will of parliament but not to "reason why"'.[321] This enabled judges to apply harsh laws with an easy conscience and sometimes resulted in a failure to grasp the extent to which technical rules of interpretation might be invoked to moderate the inequity. Dugard maintained that where there was no applicable rule or ambiguity or uncertainty, the judge had the discretion to 'fill in the gaps in the law'.[322] His criticism of the judiciary was that they 'failed to exercise this discretion in favour of the essentially libertarian principles of the Roman-Dutch common law'.[323] South African judges had 'not sufficiently selected that rule of construction, presumption, principle or precedent which most advances human rights'.[324] There was a great deal of latitude available to judges when interpreting the Dutch jurists' views on sodomy, for example. Yet there is not one comment by a judge in the pre-constitutional cases comprising over 92,000 words on how male sodomy laws might be an abuse of human rights.

Whereas Dugard mainly blamed positivism for the judges' non-engagement, observers of the South African judicial system regarded this neutral, objective attitude

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[320] Dugard, J., *The judicial process, positivism and civil liberty*, p. 183.
[321] *Ibid.*, p. 187.
[322] Wacks, R., *Judges and injustice*, p. 270.
[323] *Ibid.*, p. 270.
[324] Dugard, J., *Some realism about the judicial process and positivism – a reply*, p. 372.

as ‘an excellent state of affairs’,[325] but ‘[t]hey forget that legal positivism, judicial aloofness, and protestations of political neutrality are often an unconscious device for disguising inarticulate considerations. Judicial positivism cannot eradicate inarticulate premises. As long as the judicial function is entrusted to men, not automatons, subconscious prejudices and preferences will never be completely removed from the judicial process’.[326]

Benjamin Cardozo had acknowledged these inarticulate considerations more than fifty years before Dugard – ‘Deep below consciousness … forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, … make the … judge …. There has been a certain lack of candour in much of the discussion of the theme, or rather in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitation’.[327]

Dugard quotes Jerome Frank (a contemporary of Cardozo) who also recognized the part played by inarticulate premises – in ‘decisions handed down …. judges exercised their choice in one direction or another without any satisfactory explanation, which suggests that the inarticulate premise may have played some part in the preference shown for certain precedents and principles of apparent equal force and validity ….

[325] Dugard, J., *Human rights and the South African legal order*, p. 374.
[326] *Ibid.*, p. 374.
[327] Cardozo, B. N. 1921, *The nature of the judicial process*, Yale Univ. Press, New Haven pp. 167-168, quoted in Dugard, J. 1978, *Human rights and the South African legal order*, p. 374.

While the inarticulate premise is not susceptible to total eradication, it can at least be curbed or controlled by an open recognition of the irrational forces at work in the judicial process and by a conscious determination to suppress these forces'.[328]

According to Christopher Forsyth and Johann Schiller, Dugard's reason for rejecting positivism as a jurisprudential guide is mistaken in that he had misunderstood the nature of positivism, and had therefore wrongly attributed judicial flaws to it.[329]

To these authors, positivism is not a theory of law but a theory of knowledge, the central tenet of which is that 'all genuine knowledge is based on sense experience and can only be advanced by means of observation and experiment, [and that] metaphysical or speculative attempts to gain knowledge by reason unchecked by experience should be abandoned'.[330] Applying this tenet to the study of law, knowledge about law is gained by the application of reason to certain 'observed phenomena, viz previously decided cases and the relevant statutes, rather than by reference to moral values'.[331] The authors acknowledge that laws are not value-free but their point is that the study of law should be value-free.[332] They appear to contradict themselves, however, when they state that a positivist can hold and act

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[328] Dugard, J., *Human rights and the South African legal order*, p. 381.
[329] Forsyth, C. & Schiller, J., *The judicial process, positivism and civil liberty II*.
[330] *Ibid.*, p. 220, quoting from *The Concise Encyclopedia of Western Philosophy and Philosophers*.
[331] *Ibid.*, p. 221.
[332] *Ibid.*, p. 223.

upon moral or political truths they know cannot be objectively proven.[333]

In a rebuttal article Dugard said that his aim was to 'depict the pathology of the South African legal order', not to analyze positivism itself.[334] His empirical study of the legal process in South Africa led him to conclude that judges adopted a 'neutral, non-activist position in their approach to human rights issues and that a form of positivism may account for this phenomenon'.[335] Dugard still contended that judges had been influenced by positivism which resulted in 'moral disengagement'.[336]

Dugard criticized judges for adopting a mechanical approach when interpreting statutes. His comments apply, *a fortiori*, to the common law which is even more open to interpretation. He questioned the view that judges had no creative power in the interpretation process, 'it would seem that the court's only duty is to "discover" and then to "declare" the "true" intention of the legislature'.[337] This mechanical approach was adopted, Dugard believed, to absolve the judge from personal responsibility, assuming the judge really was against government policy in the first place. It is 'comforting for the judge opposed to the laws he is required to enforce to seek refuge

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[333] '… the positivist may hold moral and political beliefs, and indeed will need to act upon those beliefs, even though he acknowledges that such beliefs cannot be shown to be true. They remain subjective beliefs, not objective truths'. Forsyth, C. & Schiller, J., *The judicial process, positivism and civil liberty II*, p. 225.
[334] Dugard, J., *Some realism about the judicial process and positivism – a reply*, p. 373.
[335] *Ibid.*, p. 373.
[336] *Ibid.*, p. 374.
[337] Dugard, J., *Human rights and the South African legal order*, p. 369.

in the knowledge that his role is purely … mechanical'.[338] What judges did not seem to notice is that disinterestedness is itself a stance, endorsing the *status quo* and rendering judges 'unresponsive to victimized individuals ensnared in legal technicalities'.[339]

Dugard's main complaint against the South African judiciary was that it refused to recognize that it does make law, 'albeit only "interstitially"', that it does make policy decisions, and that it is part of the South African political process'.[340] For Dugard, later vindicated by the Truth and Reconciliation Commission, judges could have played a 'creative role in filling in the gaps' of both statutory and common law.[341] A judge does 'not follow a previously laid down rule nor does he "discover" the intention of parliament, but by his choice of one or other interpretation he makes the law on the point'.[342] Most South African judges, however, denied that they had this ability to make or invent new law. But as Jerome Frank (an outspoken iconoclast) had noted in 1949, judges 'no more make or invent new law than Columbus made or invented America'.[343] What judges were trying to deny was that they do make law.

Judges purport to speak on behalf of society

Judges are part of the hegemony of a society. The society during the National Party

[338] *Ibid.*, p. 372.
[339] Leedes, G., *Cross-examining the narratives of law and literature*, p. 198.
[340] Dugard, J., *Human rights and the South African legal order*, p. 367.
[341] *Ibid.*, p. 370.
[342] Forsyth, C. & Schiller, J., *The judicial process, positivism and civil liberty II*, p. 218.
[343] Frank, J. 1949, *Law and the modern mind*, Brenato's Pub., New York, 32.

period clearly did not favour promoting homosexuality. The absence of any outspoken criticism by judges (either on or off the bench) indicates that they were not willing to make this their battle. Judges could have interpreted the common law in ways more favourable to the defendants. However, as this story by George Orwell illustrates, those in power are constrained by society to act in a certain way.

Orwell was a British policeman in Burma, himself against colonialism yet embodying British rule to the locals, and therefore maligned by them.[344] An elephant had run amok and he was called to assist. He took a rifle to scare the elephant. When he arrived, the elephant's rage had passed. As he turned to go back, he noted that a huge crowd had gathered – 'faces all happy and excited over this bit of fun. They were watching me as they would watch a conjurer about to perform a trick. They did not like me, but with the magical rifle in my hands I was momentarily worth watching. And suddenly I realized that I should have to shoot the elephant after all. The people expected it of me and I had got to do it; I could feel their two thousand wills pressing me forward, irresistibly'. He realises that even though he held the power, he had to obey the will of the people: 'Here was I ... seemingly the leading actor of the piece; but in reality I was only an absurd puppet pushed to and fro by the will of those faces behind .... a hollow, posing dummy .... a mask, [whose] face grows to fit it. I had got to shoot the elephant'. He concludes, 'I often wondered whether any of the others

[344] Orwell, George. 1961, 'Shooting an elephant' in *Collected essays*, London: Secker & Warburg. I acknowledge Steven Winter who mentions this story in Winter, S. 1996, 'The "power" thing', *Virginia L. R.*, vol. 82, p. 721.

grasped that I had done it solely to avoid looking a fool'.

This account illustrates that judges do not have unlimited power and that there is a potential for backlash when they disappoint the majority. The analogy breaks down when one considers how some judges 'shot elephants' with alacrity, or when they expressed no objections as to what they were being 'forced' to do. The story also illustrates how judges could say certain things in their judgments with impunity, such as the pejorative words they used to refer to homosexuals, until such time as it became unacceptable to do so. Judges could certainly have been more neutral and outspoken but to have been overtly pro-gay would have been like not shooting the elephant.

In their judgments, judges purport to speak on behalf of society. In doing so, they add their own opinion, either for or against. In 1926, referring to unnatural acts between males, a judge said, 'Is there then any reason to think that the commission of the acts charged has ceased to be an offence? There has been no change in public opinion, which would cause such conduct to be regarded as otherwise than abhorrent'.[345] Here the judge states with certainty that there has been no change to public opinion, and that the public consider such acts abhorrent.

In 1932, a judge commenting on why male-female oral sex should not be punishable said, 'The real reason … is that it has become out of harmony with modern views and

[345] *R v Gough & Narroway* 1926 CPD, 163.

unsuited to modern conditions …. public opinion has for long recognised the advisability of leaving the offence to be dealt with by sanctions of morality and religion rather those of the criminal law'.[346] This quote is repeated in *R v M*,[347] also a case dealing with an 'unnatural sexual act committed by male on female'. In both instances it is the male-female acts which enjoy immunity. By differentiating between male-male and male-female oral sex, the judge is in effect saying that no matter the shaky grounds of authority, male-male sex had not yet become out of harmony with modern views or unsuited to modern conditions.

In 1990, a judge accepted that society's attitude was changing towards homosexuals: 'We cannot close our eyes, however, to the fact that society accepts that there are individuals who have homosexual tendencies and who form intimate relationships with those of their own sex. It has to be taken into account that homosexuality is more openly discussed and written about. It is common knowledge that so-called gay clubs are formed, where homosexuals openly meet and have social intercourse. If that is accepted by society, even with reluctance or distaste, it is also a factor that has to be taken into account by the courts when sentence is considered'.[348]

The acceptance, however, is equivocal and grudging. Phrases which suggest this are 'we cannot close our eyes', 'has to be taken into account', and 'openly meet'. In this

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[346] *R v K & F* 1932 EDL, 75.
[347] 1969 (1) SA 328 (R), 330.
[348] *S v M* 1990 (2) SACR 509 (E), 514.

judge's view society accepts homosexuality but with reluctance and distaste. He uses the word 'gay' but it is prefixed with the adjective 'so-called', indicating that such clubs are generally referred to by the term 'gay' but he himself is not willing to use the word. Instead, he uses the word 'homosexuals' in the same sentence where, had he been sincerely advocating social acceptance, he might have used the term preferred by the group he is referring to. Jansen J's observation is regarded by Kevin Botha and Edwin Cameron as Jansen J calling 'for judicial notice to be taken of social acceptance of homosexuality', but the language itself does not indicate acceptance.[349] How can this be so when, on the same page of the judgment he says, 'The majority of people, who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible'.[350] One can only call for judicial notice for something which is so widely accepted that it can almost be taken for granted.

In 1995 Ackermann J said that 'Although sodomy between males is still a crime today, the question arises as to what an appropriate sentence is where the parties involved are consenting adults who commit the act in private, particularly having regard to changing public attitudes regarding homosexual relationships and self-expression. There is a growing body of opinion, in South Africa as well, which questions fundamentally the sociological, biological, religious and other premises on which the proscription of homosexual acts between consenting adult men which takes

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[349] Botha, K. & Cameron, E., *South Africa*, p. 27.
[350] *S v M* 1990 (2) SACR 509 (E), 514. Criticised by Ackermann J in *S v H* 1995 (1) SA 120 (C), 124.

place in private, have traditionally been based'.[351]

He then negates the pro-religious objection. The 'evolution of these offences was greatly influenced by … theological considerations …. There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds to this view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homosexuality'.[352]

The language used in the above extract indicates that the judge is in favour of the changes to the way society thinks. After quoting the passage from the 1990 judgment by Jansen J, Ackermann J deliberately expands on this by saying, 'I am certainly in respectful agreement with the tolerant approach enunciated in regard to sentencing. I would go further, however, and hold that consensual adult sodomy committed in private can rarely, if ever, justify a custodial sentence whether or not the accused is a first offender and whether or not the initiative has come from the other party'.[353]

Ackermann J also introduces texts to support the move for reform, for example the

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[351] *S v H* 1995 (1) SA 120 (C), 121-122.
[352] *S v H* 1995 (1) SA 120 (C), 124-125.
[353] *S v H* 1995 (1) SA 120 (C), 124.

Bowers case. For four years this case had been available to the judge in the 1990 case but he chose not to refer to it. Ackermann J devotes a quarter of his judgment to extracts from *Bowers v Hardwick* 478 US 186 (1986), a case which took a critical look at sodomy in the USA. He also quotes from an Afrikaans textbook on criminal law which was already in 1975 calling for a more tolerant view – 'There is great doubt as whether there is enough authority to justify the crime "unnatural offence". In the landmark decision of *R v Gough and Narroway* (1926 CPD 159) there is strong reliance on … Dutch writers …. It is a pity that these sources were not considered more critically …. One hopes that less conservative attitudes as that in 1926 will prevail if the question ever arises again. We no longer live in the middle ages and the history of Sodom lies in ancient times'.[354] From this we can see that although the two judges took the changes of society into account when passing sentence, the one did so unwillingly while the other did so with more enthusiasm. Ackerman J uses intertextuality to include texts to support his view. Jansen J had these same texts at his disposal but chose not to use them.

Sachs J presents the most accepting view of homosexuality. He illustrates how in reality there was already a strong homosexual presence in South African society and that it was a matter of time before the law caught up with this reality. '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

[354] Quoted in *S v H* 1995 (1) SA 120 (C), 122. The above is an approximate translation of De Wet, J. C. & Swanepoel, H. L. 1975, *Strafreg*, (3rd ed.), Butterworths, Durban, 270.

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'.[355]

The phrase 'dared openly to speak its name' is a reference to Lord Alfred Douglas's poem 'Two Loves' (1894). A line from that poem – 'I am the love that dare not speak its name' – became famous in the Oscar Wilde trial:

Prosecutor: What is 'the love that dare not speak its name'?

Wilde: It is in this century misunderstood, so much misunderstood that it may be described as the 'Love that dare not speak its name', and on account of it I am placed where I am now. It is beautiful, it is fine, it is the noblest form of affection. There is nothing unnatural about it.

But Sachs J's Wilde love is Heher J's wild lust. To Sachs J there are books where this 'love' dares openly speak its name in bookshops, but to Heher J these selfsame books are about 'orgiastic practices to which homosexuality seems often to fall prey (if one may fairly judge from the books on "male bonding" which lie exposed to the inspection of all and sundry, including children, in the reputable bookshops of Johannesburg)'.[356]

The rhetoric in Sachs J's judgment indicates a relief that homosexuality, which was

[355] *Constitutional Court National Coalition*, 67.
[356] *High Court National Coalition*, 110.

there all the time, can now be legally sanctioned. His allusion to the poem shows a willingness to be associated with the pro-Wilde camp. The rhetoric in Heher J's judgment is that of homosexual orgies which even children can stumble upon by going into even a reputable bookshop. The same books are treated so differently. Both judges go to extremes with their rhetoric.

Chapter 4: Judgments as a genre and the grammar of sexuality

Judgments as a genre

In his essay 'The judicial opinion and the poem', White advocates a close reading of the judgment as text, in a similar way New Critics used to read poems: 'It is … never enough to read a poem or an opinion for its main idea, which is often … trite …. [T]he interesting question is not what the main idea is but how it is given meaning by the text, and given meaning in particular by the oppositions that are its life'.[357]

But the judgment is a certain kind of text. It is a narrative according to White. Since all voices at the trial – for example, the parties, counsel and witnesses – are subsumed by the judge, he imputes to the judgment its own 'organic design' to the exclusion of other competing designs.[358] By an 'organic design', White means a narrative. When seen as a narrative, the judgment is an artefact made by another mind, with a meaning of its own. The judge can impute his own meaning out of material he has inherited. The judgment gives 'special and related meanings to sets of words … and make[s] these new meanings available to others'. The judge assigns these meanings 'not by stipulative definitions but … by the way [he] uses them: by association and contrast with other terms, by location in a larger imaginative and purposive design, and by the tensions it establishes among them and among their various uses'.[359]

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[357] White, J. B., *Heracles' bow*, p. 117.
[358] *Ibid.*, p. 114.
[359] *Ibid.*, p. 112.

The judgment is variously described as a 'distinct literary genre',[360] a 'prototypical legal text',[361] or a 'specific … "register" of an actually existent language system'[362] found within 'adjudicatory discourse' or 'justificatory discourse'.[363]

If a judgment is a distinct literary genre, what would be its characteristics as found in a typical case reported in the *South African Law Reports*? These judgments are edited by *SALR* editors who attach a flynote and a headnote to each judgment, and edit the judgment text itself. The flynote is a brief telegraphic section indicating what section of law is being considered. The headnote provides a brief account of the case followed by the holdings, that is, details of what the court held or decided. Some cases list the authorities counsel cited during the proceedings.

This is followed by the judge's own words (sparingly edited) who usually begins with a restatement of the facts of the case which 'squats somewhere near the beginning of the text'.[364] Within the facts section David Papke suggests judges 'may omit or alter pertinent details, recharacterize what happened prior to or at trial, or in various ways present the "facts" in a new narrative framework'.[365] Rubinson agrees that a judge will try to 'present facts as determinate and finite when in fact they are carefully

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[360] Ferguson, R. A., *The judicial opinion as literary genre*, p. 202.
[361] Papke, D. R., *Narrative and the legal discourse*, p. 1.
[362] Goodrich, P., *Legal discourse*, p. 1.
[363] Jackson, B. S., *Law, fact and narrative coherence*, p. 93.
[364] Papke, D. R., *Narrative and the legal discourse*, p. 207.
[365] *Ibid.*, p. 207.

chosen to present a given story'.[366] Nor is this skepticism about the veracity of the facts new. In 1949 Jerome Frank wrote, 'The facts of a case are not the actual past facts as they happened in the past. At first glance they seem to be what the trial judge thinks happened. But … when the judge publishes his findings, we can never be sure that they report what he thinks were the facts. Those findings report merely what he says he thinks the facts were …. To discover what he thinks, it would be necessary to learn what "went on in his mind"'.[367]

The 'facts' are then usually followed by a discussion of what legal rules apply, and a justification for applying those rules to the particular facts. This section is broadly referred to as the judge's opinion which precedes the actual judgment or ruling, thus concluding the text. The judge's opinion embeds a variety of narratives, culminating in a formula story or master narrative, suggests Papke, which 'articulate normative understandings of social life'.[368] Master narratives arrange themselves into genres, according to Papke, and each genre has a fundamental, basically fixed formula. Individual judges develop variations, but the formula remains essentially the same until supplanted by a new one. These master narratives 'constitute virtual morality tales for the dominant system.'[369] The master narrative of homosexuality, for example, seemed to be one of getting rid of a diseased, cancerous part of society, or at least hiding and containing it. This narrative was supplanted after the constitution as

[366] Rubinson, R., *The polyphonic courtroom*, p. 4.
[367] Frank J., *Courts on trial*, p. 167.
[368] Papke, D. R., *Narrative and the legal discourse*, p. 208.
[369] *Ibid.*, p. 209.

one of acceptance of difference.

If law is its own linguistic register within its own discourse, it can be described linguistically and discursively 'in terms of its systematic appropriation and privileging of legally recognized meanings, accents and connotations (modes of inclusion), and its simultaneous rejection of alternative and competing meanings and accents, forms of utterance and discourse generally, as extrinsic, unauthorized or threatening (modes of exclusion)'.[370] Considering first what is included in the text, '[w]ords are arguably the fundamental element of law', the 'quantifiable building blocks of judicial opinions'.[371]

When Joe Rollins makes this rather obvious observation, he is focusing on the text, the actual words, phrases, and sentences as written. The text of a judgment is rich and diverse; apart from the actual decision, it can comprise 'factual restatements, critiques of lower courts, presentations of conflicting arguments, attempts to frame crucial questions, invocations of various precedents, freshly imagined hypotheticals, extended exercises in syllogistic reasoning, and a wide range of historical and social policy discussions'.[372] In South Africa one could add that it also contains extracts from Roman and Dutch authorities, and extracts from legislation. Through the inclusion of these various, distinct sources, a judgment takes on a certain form which places it

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[370] Goodrich, P., *Legal discourse*, p. 3.
[371] Rollins, J., *AIDS, law, and the rhetoric of sexuality*, pp. 161 & 163.
[372] Papke, D. R., *Narrative and the legal discourse*, p. 180.

within a distinct literary genre.

But a judgment also has substance, naturally. Nearly all who approach a case do so for its substance, particularly for its *ratio* and precedential value. Very few approach a judgment for its form, its genre. Fewer still stop to consider whether form and substance have any relationship. For Benjamin Cardoza a strong form leads to unassailable substance: '[t]he strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance'.[373] J B White agrees with Cardoza that form gives essence to content. Applying this to judgments, he shows how the opinion is often neglected as mere form in favour of the result. Only for purposes of discussion will White accept 'the rather common separation of the opinion from the result, the form from the content',[374] otherwise he maintains that the two are inseparable. Foregrounding the opinion, he suggests that it is in this part of the text where the judge 'explains or justifies or otherwise talks about the decision that he … [has] reached in a particular case'.[375]

White reasons that the judge cannot grant authority to the 'result simpliciter' since a result is expressed in text; not as some reification beyond the text.[376] The result is the 'result as characterized',[377] 'an act for which meaning is claimed'[378] by the opinion. It

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[373] Cardozo, B. N., *Law and literature*, p. 699.
[374] White, J. B., *Justice as translation*, p. 91.
[375] *Ibid.*, p. 91.
[376] White, J. B., *What's an opinion for?*, p. 1366.
[377] *Ibid.*, p. 1366.

is in the opinion that the judge is meant to give his reasons for coming to a particular result. Like results, reasons are also expressed in text, not 'reified propositions'.[379] Through the text of the opinion the reader is entitled to see the judge's 'method of thought', his way of imagining the world and his own role within it, his intellectual and literary procedures, his sense of the shape of a proper argument, including what counts as a result.[380] If a judgment is to be classed excellent then it has to be so in form combined with substance, an 'excellence of thought, represented and enacted in language'.[381] In keeping with Cardoza, the feebleness that is born of lack of form arising from, for example, 'narrow minded or unperceptive or dishonest or authoritarian'[382] reasoning reflects in the quality of the substance – the result. The separation of opinion from the result is an artificial construct; each informs the other and should be read as a single stretch of text.

Without the aid of the opinion component, there would be no precedent, J B White maintains, since later judges would 'not know what the cases meant'.[383] Merely restating previous decisions would not count as *stare decisis*. There would be no indication as to how past judges perceived the cases they decided or why they decided them as they did. There would be no way for present judges to speak about the past

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[378] White, J. B., *Justice as translation*, p. 92.
[379] White, J. B., *What's an opinion for?*, p. 1366.
[380] *Ibid.*, p. 1366.
[381] *Ibid.*, p. 1367.
[382] *Ibid.*, p. 1368.
[383] *Ibid.*, p. 1364.

events. Different cases in 'varying contexts'[384] will 'define the cluster of opinions that count … with special force'.[385] This variety imputes to a topic's 'key terms a … richness and complexity and clarity, a location in our experience, that they could not otherwise have'.[386] For Posner, each previous case is an 'effort to formulate, refine, or apply a concept', which future judges can 'revise … to make it approximate the concept better'.[387] Reflexively, current decisions 'must be warranted by past decisions read together, against the backdrop of historical experience'.[388] Both White and Posner strike me as ingenuous in not being able to see the power judges have to manipulate previous cases. As Karl Llewellyn notes, 'there is no precedent that the judge may not at his need either file down to razor thinness or expand into a bludgeon'.[389] The section on the history of sodomy in Chapter Five illustrates how cases do not always follow the ideals of *stare decisis*. They are more in keeping with Foucault's view of meeting each text on its own terms without trying to impute a teleological purpose.

Instead of taking full account of the whole judgment, lawyers often embark on a 'brutal reductiveness' of rule-seeking and treat opinions as 'cluttered display cases containing isolated pieces of legal jewellery'[390] and the rest is dismissed as 'mere

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[384] White, J. B., *Justice as translation*, p. 89.
[385] White, J. B., *Heracles' bow*, 111.
[386] *Ibid.*, 117.
[387] Posner, R. A., *Law and literature: a misunderstood relation*, p. 269.
[388] Binder, G. & Weisberg, R., *Literary criticisms of law*, p. 267.
[389] Llewellyn, K. N., *The bramble bush*, p. 180.
[390] Papke, D. R., *Narrative and the legal discourse*, p. 216.

dicta'.[391] Papke says that this evaluative divide is short-sighted because the formula story resides in the dicta 'more general and mythic than precise and specific'[392] and is lost to lawyers intent only upon the 'application of static rule to freeze-frame fact'.[393]

This rule-to-fact correspondence chimes with positivists, but clashes with Hayden White. If 'law' is objective and reified, as positivists believe, White assists here in suggesting that law cannot exist outside of narrative when he explores what a 'non-narrative representation of historical reality' would look like.[394] Judges reading previous cases are, like historians, reading historical texts. They share with other readers of history that it is not enough that an historical account deal in real events in chronological order; the events must also be narrated, 'revealed as possessing a structure, an order of meaning, that they do not possess as mere sequence'.[395] The example he gives is of a medieval annalist merely listing events: 709 Hard winter. Duke Gottfried died. 710 Hard year, deficient in crops. 712 Floods everywhere, *etc*. This would be similar to merely listing the results of previous judgments. The annalist's account 'remains something less than a proper history if he has failed to give to reality the form of a story'.[396]

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[391] *Ibid.*, p. 217.
[392] *Ibid.*, p. 218.
[393] Denvir, J., *William Shakespeare and the jurisprudence of comedy*, p. 838.
[394] White, H. V., *The content of the form*, p. 4 and generally pp 1-25. There is also useful commentary in Bruner, J. S., *The culture of education*, pp. 143-146.
[395] White, H. V., *The content of the form*, p. 5.
[396] *Ibid.*, p. 5.

Even in these seemingly bald statements there is subjectivity. The winter of 709 may not have been 'hard' to a polar bear, why is Duke Gottfried's death deemed important enough to record, at what cut-off point do crops become 'deficient', would 710 be a 'hard' year if one's barns were full of grain, the absence of an event in 711 is in itself a subjective decision, *etc*. The positivists would have a discourse where the rulings appear chronologically, unadorned of narration, speaking for themselves. But surely objective 'law' should not have to speak for itself, but should simply be? Viewed this way, law becomes as enigmatic as Descartes' triangle: '[w]hereas Descartes, speaking of the properties of triangles, stated, "No one can say that I have invented or imagined them", mathematicians today say precisely this'.[397] Has the law always 'been there' just like a triangle, or does a judge, like Descartes, have to imagine it into being?

So far I have considered what is included in a judgment, the 'facts', the opinion and the ruling. However, judges also leave things out of their judgments. It is more difficult to comment on what is not said in a judgment but the insights this exercise reveals are rewarding. I conclude this section with a comment on the significance of this silence. Specific gaps which I have found in the corpus are discussed in the commentary and conclusions chapter.

Stanford Levinson and Steven Mailloux emphasize the centrality of text: 'ascertaining

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[397] Rimmon-Kenan, S., *A glance beyond doubt*, pp. 10-11.

the meaning of texts is a central reality of any legal system'.[398] However, they also encourage questions such as: What does the judgment leave out?, What is repressed in the judgment?, What does the judgment disregard?, What does the judgment consider unimportant?, and What does the judgment put in the margins? [399]

For Terry Eagleton it is in the exclusion and repression of text that ideology presents itself most strongly – 'It is in the significant *silences* of a text, in its gaps and absences that the presence of ideology can be most positively felt. It is these silences which the critic must make "speak"'.[400] A technique to draw out these silences is the use of counterfactuals (if-then statements or contrary-to-fact speculations), as suggested by Hirsch.[401] Not just idle speculation, '[i]nterpreters sometimes need to imagine what a text from the past *would* mean if it were being reauthored in the present'.[402] J B White acknowledges, without expanding, that looking at the text out of context affords, 'no reliable way for talking about what is left out or for criticizing the cultural context in which these forms occur: their unstated premises, their enacted but implicit values, their relation to their larger world …. [W]hat is needed is …. a responsible way of paying attention to … the social and cultural context of the text … to the 'unsaid'…. What is needed is a cultural or ideological criticism'.[403] We are again, therefore, led back to the importance of placing a text within a context.

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[398] Levinson, S. & Mailloux, S., *Interpreting law and literature*, p. ix.
[399] *Ibid.*, p. ix, paraphrased and made applicable to court judgments.
[400] Eagleton, T., *Marxism and literary criticism*, p. 34.
[401] Hirsch, E. D., *Counterfactuals in interpretation*, pp. 55-68.
[402] *Ibid.*, p. 55.
[403] White, J. B., *Heracles' bow*, p. 122.

The grammar of sexuality

Naming

The choice of terms which judges use shows that ideological decisions are behind each choice. Categories do not arise naturally or randomly, says Mark Kessler, 'but rather reflect social relations and power. Unstated norms … are consistent with the values, interests, and "mode of living" shared by dominant groups'.[404]

The words 'heterosexual' and its derivatives are used seventy-four times in the corpus and mainly relate to 'normal' sex as being heterosexual, or to differentiate between male-male and male-female anal intercourse:

'… normal heterosexual relationships'[405]

'A heterosexual norm was established'[406]

'… heterosexual hegemony'[407]

'… heterosexual anal intercourse'[408]

'Heterosexual intercourse *per anum* falls outside the definition of sodomy'[409]

The term 'straights' for heterosexuals is used only twice in the corpus, both by Sachs J – 'there is no evidence before us that gays are either wealthier or poorer than the rest

[404] Kessler, M., *Legal discourse and political intolerance*, p. 566.
[405] *S v M* 1990 (2) SACR 509 (E), 514.
[406] *Constitutional Court National Coalition*, 68.
[407] *Constitutional Court National Coalition*, 56.
[408] *S v Kampher* 1997 (4) SA 460 (C), 478.
[409] *High Court National Coalition*, 109.

of society. Nor are they as individuals necessarily less represented than straights in the corridors of political, economic, social, cultural, judicial or security force power', and 'catching and prosecuting criminals who prey on gays and straights alike'.[410] Dictionaries still flag 'straight' as informal which shows his willingness to be *avant garde*.

The word 'gay' or 'gays' is used nearly a hundred times in the corpus. All its uses are from 1995 to 1999. The *Constitutional Court National Coalition* case uses the word 'gay' eighty-seven times; eighty-eight percent of the use of the word is in this one case. The distribution of the word between the judgments of Ackermann and Sachs JJ is equal in proportion to the length of their judgments. The popularity of the term gay 'testifies to its potential as a non-clinical descriptor unburdened by the pathologising history of sexology'.[411]

The word 'gay' is first used in a reported judgment in 1990 in *S v M*[412] – 'It is common knowledge that so-called gay clubs are formed, where homosexuals openly meet and have social intercourse'. It is used with the adjective 'so-called', indicating that such clubs are generally referred to by the term 'gay' but that not everyone accepts this name. This quote is then repeated by Ackermann J in *S v H*[413] and this is how it first came to be used in the *South African Law Reports*.

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[410] *Constitutional Court National Coalition*, 65 & 67.
[411] Jagose, A., *Queer theory*, p. 73.
[412] 1990 (2) SACR 509 (E), 514.
[413] 1995 (1) SA 120 (C), 123.

The next time it is used is in the same case, by Ackermann J in direct reference to an article by Cameron, which is quoted in the judgment – 'Even when these provisions are not enforced, they reduce gay men and women to what one author has referred to as "unapprehended felons"'.[414] It is used elsewhere in the same judgment, again from quoting from Cameron's article.[415]

After this, in *S v Kampher*,[416] Farlam J quotes from academic law journals which use the word 'gay'.[417] Farlam J does not use the term himself in this judgment of over 16,000 words. Similarly, in the *High Court National Coalition* case, the only time the word 'gay' is used is because it happens to form part of the name of the applicant. Like Farlam J, Heher J does not use it once in a judgment of some 16,500 words. This indicates a conscious effort by both judges not to appropriate the term.

In the *Constitutional Court National Coalition* case, the word 'gay' is embedded fourteen times in six of the holdings alone.[418] Again, Cameron is quoted in relation to the use of gay – 'In what follows I rely heavily on an influential article written by Prof Edwin Cameron. Edwin Cameron 'Sexual Orientation and the Constitution: A Test

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[414] *S v H* 1995 (1) SA 120 (C), 127, quoting Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450, p. 455.
[415] *S v H* 1995 (1) SA 120 (C), 128, quoting Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450, p. 464.
[416] 1997 (4) SA 460 (C).
[417] On pp. 467, 483 & 485 all by way of quotations from Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450.
[418] *Constitutional Court National Coalition*, 7-10.

Case for Human Rights' (1993) 110 *SALJ* 450 .... I have followed Cameron's use of the expressions 'gay', 'lesbian' and 'homosexual''.[419]

Homosexuality is first mentioned in the *SALR* in 1952, but not in its own right.[420] The first time homosexuality debuts in its own right is in 1954 drum-rolled by the adjective 'disgusting'.[421] The law has encountered 'intractable difficulties' in its efforts to write 'coherent definitions of the homosexuals upon whom legal burdens may be placed', especially when referring to lesbians, says Janet Halley.[422] Lesbians are referred to as homosexuals only three times in the corpus, each time marked with the adjective 'female'.[423] The unmarked term 'homosexual' refers to males, for example, 'anal intercourse between men and women is not penalised by law, while between males it is a criminal offence, which in the nature of things strikes only at homosexuals'.[424] Several cases which are clearly about homosexuality do not mention the word at all.[425]

The terminology is sometimes loose and indiscriminate, for example, 'No legitimate

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[419] *Constitutional Court National Coalition*, 25.
[420] *R v C* 1952 (1) SA 635 (C), a female prostitution case which referred to *Horton v Mead*, 1913 (1) KB 154 concerning homosexual soliciting.
[421] *R v E* 1954 (4) SA 501 (SR), 501 ('a disgusting act of homosexuality').
[422] Halley, J. E., *The politics of the closet*, p. 948.
[423] *S v Kampher* 1997 (4) SA 460 (C), 475; *High Court National Coalition*, 128 (twice).
[424] *High Court National Coalition*, 103.
[425] For example, *R v Gough & Narroway* 1926 CPD; *R v Curtis* 1926 CPD 385; *R v L* 1951 (4) SA 614 (A); *S v K* 1973 (1) SA 87 (RA).

basis for treating homosexual men and women differently from heterosexuals'.[426] Since homosexuals can only be men or women, there was no need to spell this out. Also, 'To protect children from being exposed to anything which might connote approval of homosexuality or lesbianism'.[427] This is like distinguishing between flowers or roses. By 1993 it was nuanced to such a degree that a man who persuaded a 15-year-old boy to engage in fondling and masturbation, was 'neither a homosexual nor a paedophile but that he suffered from an inferiority complex which led to his inability to form sexual relationships with people of his own age'.[428]

The word 'lesbian' is referred to ninety times and 'lesbianism' eleven times. It is mostly referred to in the context of motherhood.

Words and metaphors

A large part of the constitutive nature of rhetoric is in the choice of words and metaphors. Anti-homosexual rhetoric uses pejorative words and metaphors. This changes under constitutional discourse where the informing metaphors are of the acknowledgment of scarring caused and whether healing can take place.

Words

Words, especially adjectives, carry value judgments. Adjectives are usually subjective

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[426] *High Court National Coalition*, 102.
[427] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 325.
[428] *S v R* 1993 (1) SA 476 (A), 479.

and indicate the subjective feelings of the speaker. There are many ways of 'wording' a meaning. There are always alternative ways of giving meaning to a situation which entails interpreting from a particular ideological perspective. From 1926 through to 1990, judges used a number of pejorative words to refer to homosexuality.

The following words are used in the extracts below: abhorrent (3), depraved (2), disapproval, disgust(ing) (5), filthy (2), horrible, odious, perversity, profoundly repulsive, reprehensible (2), repugnant to nature, revulsion, sexually perverted, shame, and unacceptable.

The following are extracts from the judgments showing the context in which these words are used.

'[A]cts of indecency' between two consenting adult men 'of so disgusting a nature that I refrain from repeating them'.[429]

For one young man to try and touch the penis of another man, outside of his clothing, is 'odious and reprehensible'.[430]

'[U]nnatural acts …. These offences were regarded as so abhorrent to all ideas of

[429] *R v Baxter & another* 1928 AD 430, 431.
[430] *R v S* 1950 (2) SA 350 (SR), 351.

decency, that they ought to be punished'.[431]

Of male-male intercrural sex, in three separate cases:

'There has been no change in public opinion, which would cause such conduct to be regarded as otherwise than abhorrent'.[432]

'I imagine that most people would consider the defendant's conduct in the present case much more abhorrent than adultery …. the gross conduct of the defendant was ... sexually perverted and depraved'.[433]

'… the horrible nature of the act'[434]

Of homosexual acts in general, 'it is the attribution of perversity and shame to spontaneous bodily affection'.[435]

'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

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[431] *R v Gough & Narroway* 1926 CPD 159, 162.
[432] *R v Gough & Narroway* 1926 CPD 159, 163.
[433] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170 & 171.
[434] *R v Taylor* 1927 CPD 16, 19.
[435] *Constitutional Court National Coalition*, 66.

remain invisible'.[436]

'… conduct … profoundly repulsive as depraved and repugnant to nature'[437]

'… acts of sodomy unacceptable and reprehensible'[438]

'Where a male performed this disgusting act upon himself'[439]

'… a disgusting act of homosexuality'[440]

'the court should suppress its dismay and disgust at the nature of the offence'[441]

'This [letter] contains a filthy story …. a disgusting story, and a filthy allusion to the private parts'.[442]

Metaphors

Judges use several metaphors in relation to homosexuality. To draw attention to a judge's metaphors might be considered disparaging, like praising his ability to use

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[436] *Constitutional Court National Coalition*, 66.
[437] *S v C* 1987 (2) SA 76 (W), 79.
[438] *S v M* 1990 (2) SACR 509 (E), 514.
[439] *R v Curtis* 1926 CPD 385, 386.
[440] *R v E* 1954 (4) SA 501 (SR), 501.
[441] *Baptie v S* 1963 (1) PH H96 (N), 225.
[442] *R v Curtis* 1926 CPD 385, 387.

long words. This would be so if by metaphor I mean the simplistic definition schoolchildren learn, that a metaphor is a similarity or comparison without using 'as' or 'like'. This implies that metaphors can be translated into a literal paraphrase without any loss of cognitive content. Metaphors are not just superficial stylistic adornments.

A metaphor brings together in a single word or phrase the image of two or more things or relationships and out of them creates a third. Metaphors result from a 'cognitive process that juxtaposes two or more not normally associated referents, producing a semantic conceptual anomaly, the symptom of which is usually emotional tension'.[443] A metaphor is part of a rhetorical process by which factual narrative can be refashioned in the same way as fiction can. Metaphors are pervasive and are not only limited to fiction.

When a judge signifies something through one metaphor rather than another, he is constructing reality in one way rather than another. The metaphors used for homosexuality are mostly pejorative, for example depicting homosexuals as diseased. Metaphors structure the way we think and the way we act, and our systems of knowledge and belief, in a pervasive and fundamental way. People in power, like judges, get to impose their metaphors. They therefore get to define what society considers to be true. The idea that a judge, through metaphors, can create a reality

[443] MacCormac, E. R., *Cognitive theory of metaphor*, p. 5.

goes against most traditional views of metaphor. The reason is that a metaphor has traditionally been viewed as a matter of mere language rather than primarily as a means of structuring our conceptual system. It is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it.[444]

An uncontrollable appetite

The phrase 'gratify sexual lust' and associated adjectives ('perverted', 'depraved' and 'unnatural'), together with the word 'carnal',[445] form a metaphor that homosexual sex is a purely physical, strong, uncontrollable sexual appetite. The appetite is in need of constant gratification. This metaphor is even embedded in legislation.[446]

The following are extracts from the corpus:

'gratify his sexual lust by … handling the private parts of …'[447]

'habitual gratification of a particular perverted lust'[448]

'he did gratify his sexual lust by …'[449]

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[444] Lakoff, G. & Johnson, M., *Metaphors we live by*, p. 158.

[445] In the corpus, 'carnal' is used in the following contexts: carnal intercourse, carnal connection, carnal acts contrary to the order of nature, unnatural carnal acts, carnal knowledge had against the order of nature (*per anum*).

[446] S20A(1) of the *Sexual Offences Act* 23 of 1957 – 'A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence'.

[447] *R v S* 1950 (2) SA 350 (SR), 350.

[448] *Thompson v K* (HL) [1918] A.C. 221, 235. The same phrase from the *Thompson* case is used in *R v L* 1951 (4) SA 614 (A), 620 and *S v R* 1977 (1) SA 9 (T), 13. This is the last time 'lust' is used in the corpus.

'to stimulate the depraved lusts of those given to such practices'[450]

'gratification of sexual lust'[451]

'unnatural lust'[452]

'unnatural gratification of lust'[453]

Disease

Homosexuality is likened to a disease in need of curing. In some of the extracts it is a biological condition whereas in others it is a mental disease. The metaphor is dismantled under two constitutional cases.

One man gave another man a lift. The driver propositioned the passenger who took offence at the suggestion. On sentencing the judge said, 'It may be that the appellant is more in need of a physician than a gaoler and, indeed, Mr Young has undertaken on his behalf that he will leave the Colony to return to his own country for the purposes of treatment'.[454]

A man was said to have committed sodomy with an adult male and two boys. He was sentenced to 12 months prison with hard labour, partly suspended provided that he

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[449] *S v V* 1967 (2) SA 17 (E), 17.
[450] *Thompson v K* (HL) [1918] AC 221.
[451] *R v Gough & Narroway* 1926 CPD 159, 161.
[452] *R v Gough & Narroway* 1926 CPD 159, 161.
[453] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[454] *R v E* 1954 (4) SA 501 (SR), 502.

submit himself to medical treatment. According to Ramsbottom J, this was a 'biological condition which … is very difficult to cure – very difficult indeed …. although Dr Pienaar holds out little hope for the redemption of this man, he does not say that there is no hope'.[455]

A man, looking for a woman, instead had sex with another man. He was sentenced to fifteen months' imprisonment with hard labour, partly suspended provided that he undergo psychiatric treatment and not commit a similar offence. The 'appellant was prepared to submit to psychiatric care and in fact had actually consulted one Dr. Baker, a psychiatrist'.[456] The 'desire to commit these unnatural offences stems from some form of mental disease. Where, therefore, the reformation of the accused, in the sense that he may be cured of his disease, can be combined with the other aspects of punishment, some consideration may in an appropriate case be given to suspending a portion of the sentence on condition that the accused undergoes suitable treatment'.[457]

Two men engaged in unspecified consensual sex, referred to a 'gross indecency'. According to the judge, 'I think it is now well understood as a result of the recent advances in medical knowledge that offences of this kind, involving perversity, are offences which have a background in the disordered mental condition of the

[455] *R v C* 1955 (2) SA 51 (T), 52 & 53.
[456] *S v K* 1973 (1) SA 87 (RA), 90.
[457] *S v K* 1973 (1) SA 87 (RA), 90.

perpetrators and that they can usually be cured by psychiatric treatment'.[458]

In two judgments,[459] Ackermann and Heher JJ dismantle the disease metaphor. Both do so by quoting from an article by Edwin Cameron: 'More enlightened current attitudes approach homosexuality as a natural sexual variant unlinked to any pathology, part of what Susan Sontag refers to as "the ineradicable variousness of expression of sexual feeling"'.[460] 'Cameron's article continues: "This implies .... that homosexual orientation is not in itself evidence of illness or depravity" .... I respectfully agree'.[461]

In fact extensive use is made of Cameron's article,[462] first by counsel for the National Coalition in the *High Court* case[463] and by Ackermann and Sachs JJ in the *Constitutional Court* case. This is a good example of intertextuality. Ackermann J said, 'In what follows I rely heavily on an influential article written by Prof Edwin Cameron. Edwin Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450. The article is a revised version of an inaugural lecture delivered by the author on 27 October 1992 on the acceptance by him of an *ad*

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[458] *S v Baptie* 1963 (1) PH H96, 225.
[459] *S v H* 1995 (1) SA 120 (C) and *High Court National Coalition*.
[460] *S v H* 1995 (1) SA 120 (C), 128. Ackermann J quoting Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450, p. 458.
[461] *High Court National Coalition*, 112. Heher J quoting Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450, p. 465.
[462] Cameron, E., *Sexual orientation and the constitution*, p. 450.
[463] *High Court National Coalition*, 111 ('Counsel, following Cameron, 'Sexual Orientation and the Constitution: A Test Case for Human Rights' 110 (1993) SALJ 450-72, submitted that, …').

hominem professorship in law at the University of the Witwatersrand. Despite the fact that it was conceived some 18 months prior to the adoption of the interim Constitution, its depth and lucidity of analysis is just as instructive in the present era when sexual orientation has indeed achieved constitutional protection'.[464] Cameron's credentials are specifically noted. He is not referred to as a professor of law, but has an *ad hominem* professorship in law at the University of the Witwatersrand. Sachs J also held this article in high regard, 'This special vulnerability … is well brought out by Cameron in the germinal article to which my learned Colleague refers'.[465]

Exposure to contamination

Another metaphor likens homosexuality to something contagious, or something which causes harm when exposed, like radioactive material.

In a 1968 parliamentary report, homosexuals are referred to as 'unpredictable pestilence …. as with every virulent infection, it spreads'.[466]

Homosexuals 'are seen as especially contagious or prone to corrupting others. None of these factors applies to other groups traditionally subject to discrimination'.[467]

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[464] *Constitutional Court National Coalition*, 25.
[465] *Constitutional Court National Coalition*, 66.
[466] Select Committee, Republic of South Africa. (1968). Report of the Parliamentary Select Committee into the Immorality Amendment Act (Report 7-1968), p. 26.
[467] *Constitutional Court National Coalition*, 66 (per Sachs J).

'… persons indulging in the conduct therein contemplated [homosexual acts] are required … not to expose others thereto'.[468]

'… books on 'male bonding' which lie exposed to the inspection of all and sundry, including children, in the reputable bookshops of Johannesburg'.[469] The reference to children ties in with the popular belief that homosexuality corrupts children and adolescents. Gay men in particular are 'accused of child-abuse, with its associated implication of contamination and infectious spread of the condition'.[470]

The metaphor is even embedded in a judge's order – 'The applicant is ordered to take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism'.[471]

The exposure metaphor is also found in the section 20A cases which deal with privacy issues.[472] The first case involving s20A gives an oblique acknowledgment of privacy between males. Gordon J says, 'The object of the section is clearly not to punish acts performed in private, as long as no more than two persons are present on any such

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[468] *S v C* 1987 (2) SA 76 (W), 77.
[469] *High Court National Coalition*, 110.
[470] Gevisser, M. & Cameron, E., *Defiant desire*, p. 93.
[471] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 332.
[472] S20A of the *Sexual Offences Act* 23 of 1957: '(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence. (2) For the purposes of ss (1) 'a party' means any occasion where more than two persons are present.'

occasion'.[473] Ackermann J also interpreted this section as affording privacy, 'It … indicates that the Legislature has accepted in principle that insofar as certain sexual acts between consenting males are concerned privacy is recognised, albeit obliquely, as a right, inasmuch as it serves to ward off the intrusions of the criminal law in this protected sphere'.[474]

However, the next (and last) time a s20A case is heard, Schabort J quotes Gordon J to give privacy a different spin in keeping with the exposure metaphor – 'It seems likely … that the Legislature's intention in introducing 20A was to stamp out homosexual gatherings …. It also seems likely, I would add, that it was intended to prevent the obtrusion of conduct which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature …. As I perceive the intention of the Legislature according to the nature, purpose and scope of s20A, persons indulging in the conduct therein contemplated are required to do so with due foresight and care as not to impose their behaviour upon others and as not to expose others thereto. They are in a position to determine the time and venue for their intimate actions and they can ensure that they will take place in private'.[475]

Heher J also favours the containment interpretation, 'When two persons submit what would normally be regarded as an act of intimacy to the gaze of others with the

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[473] *S v C* 1983 (4) SA 361 (T), 364.
[474] *S v H* 1995 (1) SA 120 (C), 123.
[475] *S v C* 1987 (2) SA 76 (W), 79 & 80.

intention to debauch, I seriously doubt whether the privacy which the Constitution seeks to protect arises at all, even though the doors be barred to unrestricted public access'.[476]

A cancer in society

Justice Minister PC Pelser, speaking in Parliament on 21 April 1967 said, 'And who can deny that this was also the canker that afflicted the Biblical Sodom? No, Sir, history has given us a clear warning and we should not allow ourselves to be deceived into thinking that we may casually dispose of this viper in our midst by regarding it as innocent fun. It is a proven fact that sooner or later homosexual instincts make their effects felt on a community if they are permitted to run riot .... Therefore we should be on the alert and do what there is to do lest we be saddled later with a problem which will be the utter ruin of our spiritual and moral fibre'.[477]

Branding

There is a metaphorical branding similar to Hester's in Nathaniel Hawthorne's *Scarlet letter* where she was branded with an 'A' for adultery. Examples of this metaphor are found in the following extracts. The first two are actual instances of the branding metaphor whilst the last recognizes how branding stigmatizes.

This quote comes from an English case but is repeated in two *SALR* cases: 'Persons,

[476] *High Court National Coalition*, 130.
[477] Quoted in Gevisser, M. & Cameron, E., *Defiant desire*, p. 98.

however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity'.[478]

One young man placed his hand, outside the clothing, on the penis of another young man causing Tredgold J to remark: 'it is most undesirable that a young man should be unjustifiably branded with a conviction for a crime which is generally regarded as particularly odious and reprehensible'.[479]

Ackermann J, 'in the eyes of the legal system all gay men were criminals. The stigma thus attached to a significant proportion of the population was manifest'.[480] Sachs J, 'difference should not be the basis for exclusion, marginalisation, stigma and punishment'.[481] Both judges address 'those stigmas that are not yet unfashionable, those hatreds that are still countenanced, those prejudices that are still fostered by those in authority, and those discriminations that are still widely licensed'.[482]

Scarring

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[478] *Thompson v K* (HL) [1918] A.C. 221, 235. This same quote is repeated in *R v L* 1951 (4) SA 614 (A), 620 and *S v R* 1977 (1) SA 9 (T), 13.
[479] *R v S* 1950 (2) SA 350 (SR), 351.
[480] *Constitutional Court National Coalition*, 8.
[481] *Constitutional Court National Coalition*, 67.
[482] Cameron, E., *Constitutional protection of sexual orientation*, p. 650.

In pre-constitutional discourse the metaphors are ones of disease, cancer, contamination and branding. Under constitutional discourse the metaphor is one of scarring and healing – what scars were caused and can healing take place?

'The objective is to determine … if the group concerned is subjected to scarring'.[483]

'Inequality is established … through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group'.[484]

'In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility'.[485]

'… gay men were a permanent minority in society and had suffered in the past from patterns of disadvantage. The impact was severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurred at many levels and in many ways and was often difficult to eradicate'.[486]

'The discrimination had gravely affected the rights and interests of gay men and

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[483] *Constitutional Court National Coalition*, 58.
[484] *Constitutional Court National Coalition*, 65.
[485] *Constitutional Court National Coalition*, 66.
[486] *Constitutional Court National Coalition*, 7.

deeply impaired their fundamental dignity'.[487]

'The common law prohibition on sodomy criminalised all sexual intercourse *per anum* between men: regardless of the relationship of the couple who engaged therein, of the age of such couple, of the place where it occurred, or indeed of any other circumstances whatsoever. In so doing, it punished a form of sexual conduct which was identified by the broader society with homosexuals. Its symbolic effect was to state that in the eyes of the legal system all gay men were criminals'.[488]

'As a result of the criminal offence, gay men were at risk of arrest, prosecution and conviction of the offence of sodomy simply because they sought to engage in sexual conduct which was part of their experience of being human. A law which punished a form of sexual expression for gay men degraded and devalued gay men in broader society'.[489]

'… the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity'.[490]

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[487] *Constitutional Court National Coalition*, 8.
[488] *Constitutional Court National Coalition*, 8.
[489] *Constitutional Court National Coalition*, 8.
[490] *Constitutional Court National Coalition*, 28-29.

'… the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been'.[491]

'… 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'.[492]

'The crime forbids the satisfaction of that basic need and deprives a person of that sexual orientation of physical, emotional and psychological outlets while his heterosexual compeers face no such obstacle'.[493]

Choice of perspective

The choices of descriptors (such as homosexual or gay) and the different adjectives and metaphors used are the outward manifestation of certain perspectives which judges held. These are discussed under the headings abnormal sex vs. normal sex, essentialism vs. constructivism, and choice vs. immutability.

Abnormal sex *vs.* normal sex

The pre-constitutional discourse indicates that homosexual acts are abnormal by referring to them as 'against the order of nature'. The concept of abnormal is also found in the use of the term 'unnatural', which adjective involves 'a value judgment

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[491] *Constitutional Court National Coalition*, 30.
[492] *Constitutional Court National Coalition*, 59.
[493] *High Court National Coalition*, 103.

varying from country to country, race to race, and age to age: it has little if any objective content'.[494] 'Unnatural' is 'colourless and is no indication of an offence',[495] 'does not even have a sexual connotation',[496] and its meaning is 'by no means clear'.[497]

According to one judge, it is sex other than *per vaginam* which renders the act against the order of nature. The 'act legislated against involves the entry of the male organ into some orifice in the body of a man, woman or animal, the words "against the order of nature" however excluding from the operation of the section, entry into a woman's vagina'.[498] This is the most explicit statement in the corpus to indicate this. The other extracts are about acts between males. There are no cases which relate to sex between females. The control of sex is effected by means of a sexual norm – heterosexual monogamy – and any form of sexuality that threatens that norm is designated 'against nature'.

In some cases the phrase 'against the order of nature' is embedded in the charge:
The 'accused [was] convicted ... with "committing an unnatural offence" .... in that [he] did wrongfully and unlawfully and against the order of nature have a venereal affair with one T [a male], to wit, did insert his penis between the thighs of the said T

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[494] Hunt, P. & Milton, J. (3rd ed.), *SA Criminal Law and Procedure Vol. II*, p. 227.
[495] *R v Gough & Narroway* 1926 CPD, 159.
[496] *S v C* 1988 (2) SA 398 (ZH), 399.
[497] *S v C* 1988 (2) SA 398 (ZH), 400.
[498] *S v M* 1977 (2) SA 357 (TkS), 358.

and move it backwards and forwards'.[499]

The accused 'did wrongfully and unlawfully, and against the order of nature, gratify or attempt to gratify his sexual lust by placing his hand upon, and by handling the private parts of a certain [male]'.[500]

The 'appellant was guilty of an unnatural offence in that he did gratify his sexual lust by an act against the order of nature, to wit, performing masturbation on the complainant and allowing the complainant to perform masturbation on him'.[501]

There were two pre-constitutional cases brought by lesbian mothers which relate to normality and abnormality. Surprisingly, the 1960 *Marais* case[502] does not raise normality or abnormality whereas the 1994 *Van Rooyen* case[503] mentions it explicitly. The *Van Rooyen* case was heard just before the 1993 interim constitution[504] and was presided over by Flemming DJP. De Villiers AJ's comments in 1960 indicate that it was possible to approach homosexuality from a fair, unbiased point of view, despite no constitutional backing. These two cases are analyzed in more detail in Chapter Five.

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[499] *R v Gough & Narroway* 1926 CPD, 161.
[500] *R v S* 1950 (2) SA 350 (SR), 350.
[501] *S v V* 1967 (2) SA 17 (E), 17.
[502] *Marais v Marais* 1960 (1) SA 844 (C).
[503] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).
[504] *Constitution of the Republic of South Africa Act* 200 of 1993.

The *V v V* case[505] was heard in terms of the 1996 Constitution and is a useful contrast to the *Van Rooyen* case because the facts are similar yet the treatment is different. This is also a child custody case where the father tried to limit the access of the mother because she was in a lesbian relationship.

Here Foxcroft J states that the judge in the *Van Rooyen* case should not have designated homosexuals as abnormal: '*Van Rooyen v Van Rooyen* ... where the Court made a moral judgment about what was normal and correct insofar as sexuality was concerned. It was clear that the Judge in that case had regarded homosexuality as being *per se* abnormal …. It was thus, in law, wrong to describe a homosexual orientation as abnormal (as had been done in the *Van Rooyen* case)'.[506]

A 1995 case straddles the pre- and constitutional periods when Ackermann J, criticizing Jansen J, challenged the heterosexual norm for the first time in a reported judgment.[507]

In 1990 Jansen J said, 'The majority of people, who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible'.[508] In response Ackermann J said, 'In the … passages from *S v M* …, reference is made to "normal heterosexual relationships" in a context which implies that homosexual

[505] *V v V* 1998 (4) SA 169 (C).
[506] *V v V* 1998 (4) SA 169 (C), 171.
[507] *S v H* 1995 (1) SA 120 (C).
[508] *S v M* 1990 (2) SACR 509 (E), 514.

relationships are abnormal in a sense other than the mere fact that they are statistically in the minority. In my respectful view the use of the word "normal" in this context is unfortunate, as it might suggest a prejudgment of much current psychological and sociological opinion which is critical of various conventions and assumptions regarding human sexuality. It may also suggest a wrong line of enquiry when coming to re-evaluate the status of homosexual relationships'.[509]

Sachs J goes the furthest in analyzing normal and abnormal sexuality. He shows that heterosexuality is the embedded norm against which all other sexuality is compared. He debunks the entrenched heterosexual norm by referring to it as 'spartan normality',[510] whilst still acknowledging that it is the 'heterosexual hegemony'[511] against which homosexuals are 'treated as failed heterosexuals'.[512]

In doing so, Sachs J is drawing on queer theory which attempts to dismantle the dominant/subordinate dichotomy altogether. In order for heterosexuality to be the norm, there has to be a sexuality abnormal to it: its existence is dependent on differentiation from the 'other'. A binary division is thus established between heterosexuals and others. Since most of the population is (nominally) heterosexual, all other sexual minorities will be failed heterosexuals. By suggesting that heterosexuality is should not be the norm, Sachs J is questioning the norm-giving

[509] *S v H* 1995 (1) SA 120 (C), 124.
[510] *Constitutional Court National Coalition*, 62.
[511] *Constitutional Court National Coalition*, 56.
[512] *Constitutional Court National Coalition*, 67.

category itself.

In the *National Coalition* case he says, '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'.[513]

Essentialism *vs.* constructivism

There are two schools of thought about the nature of sexuality and sexual identity, the essentialists and the constructionists.[514] Essentialists regard one's sexual identity as transhistorical, fixed and culture-independent while constructionists assume sexual identity is fluid, the effect of social conditioning and culture-dependent. Same-sex

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[513] *Constitutional Court National Coalition*, 68-69.
[514] These comments are made with reference to de Vos, P., *Gay and lesbian legal theory*, and Jagose, A., *Queer theory*, pp. 7-18.

sexual acts have different cultural meanings in different historical contexts to constructionists. Although such acts have occurred throughout history, the people performing these acts were not necessarily viewed as 'homosexuals' by either others or themselves.

To those who hold postmodern views, the constructionist view appeals, based largely on Foucault's observations that, while there have always been same-sex sex acts, there had not always been a corresponding category of identification, until the late nineteenth century: 'The nineteenth century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, a morphology, with an indiscreet anatomy anti possibly a mysterious physiology …. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration, the homosexual was now a species'.[515]

According to this line of reasoning, prior to designating homosexuals a 'species', same-sex acts were condemned but a condemnatory name was not assigned to the person committing the act, 'complete with an aberrant psychology and a unique character'.[516] However, towards the end of the nineteenth century, mainly in medical discourses, the concept of the homosexual as an identifiable type of person emerges.

[515] Foucault, M., *The history of sexuality, vol. 1,* p. 43.
[516] de Vos, P., *Gay and lesbian legal theory*, p. 335, quoting Foucault.

He is ‘no longer simply someone who participates in certain sexual acts, the homosexual begins to be defined fundamentally in terms of those very acts’.[517]

Deciding who is a ‘homosexual’ is clear-cut for the transhistorical, transcultural essentialist who would react incredulously to a comment from a man such as, ‘I’m not gay. If I was gay I would kiss the men I have sex with. I never kiss men’.[518] A constructionist would accommodate the idea that different meanings can attach themselves to the same sexual acts. A few examples from the corpus illustrate the futility of trying to pigeon-hole erotic attraction.

In one case Schabort J says, ‘The Lebane Steam Baths attracts and is frequently visited by, homosexual men. It is, however, also visited by heterosexual men’.[519] The flynote refers to ‘homosexual acts’.[520] Cameron refers to Lebane as ‘a well-known gay sauna in Johannesburg’.[521] Lebane was a male-only sex-on-premises venue. It attracted any male who wanted to have sex with another male. Why, then, does Schabort J distinguish between homosexuals and heterosexuals, and why does Cameron designate it ‘gay’?

According to Heher J, s20A of the *Sexual Offences Act* was ‘wide enough to strike at

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[517] Jagose, A., *Queer theory*, p. 11.
[518] Bartos, M., *Meanings of sex between men*, p. 29.
[519] *S v C* 1987 (2) SA 76 (W), 78.
[520] *S v C* 1987 (2) SA 76 (W), 76.
[521] Cameron, E., *Sexual orientation and the constitution*, p. 455.

conduct by heterosexual men in the presence of women only or in the presence of other heterosexual men'.[522] He concludes that 'the likelihood is that it was aimed at conduct directed by and at homosexuals …. the target of the section is plainly men with homosexual tendencies albeit that the wording is wide enough to embrace heterosexuals'.[523] Both he and Schabort J suppose that heterosexual men perform same-sex sexual acts.

Ackermann J is nearer the mark when he refers to 'erotic attraction between adult members of the same sex'[524] without distinguishing between homosexuals and heterosexuals. Ackermann J specifically acknowledges that he is using Cameron's definition of sexual orientation, 'As to "sexual orientation", I adopt the following definition put forward by Cameron – "sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex'.[525]

However, this definition is also not ideal because it associates same-sex attraction with people, 'homosexual' or 'gay or lesbian'. There are people who are attracted to

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[522] *High Court National Coalition*, 110.
[523] *High Court National Coalition*, 110.
[524] *S v H* 1995 (1) SA 120 (C), 128.
[525] *Constitutional Court National Coalition*, 25, quoting Cameron, E. 1993, 'Sexual orientation and the constitution: a test case for human rights', *SALJ*, vol. 110, p. 450, p. 452.

the same sex but who would not call themselves gay or homosexual. While many would describe themselves more or less unproblematically as homosexual, a number of ambiguous circumstances cast doubt on the precise delimitations of homosexuality as a descriptive category. For example, is the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual? Some men in this situation do not identify themselves as homosexual, for example, 'It's not important to me. I do it with men on occasions. It's more important that I am married and love my wife .... It's no one's business what I do on my odd afternoon off'. Or another man who also rejected a gay identity, 'I am also not really gay. Gay sex is something that I do 2-3 times a week. It amounts to so little of my time. If you were to add up the time I spend looking for and having sex with men it would total 1-2 hours weekly. The rest of the time I am heterosexual, married, a family man'.[526] Is this the kind of man Schabort J had in mind when he said, 'The Lebane Steam Baths attracts and is frequently visited by, homosexual men. It is, however, also visited by heterosexual men'?[527] Janet Halley comments that the term 'homosexual' is 'an even less accurate indicator of individuals who entertain homoerotic desires or have had homosexual experiences without labelling themselves gay or lesbian'.[528]

To the observation that these men are 'in denial', once can counter 'Who is to say'? It

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[526] Jagose, A., *Queer theory*, pp. 6-7, footnotes omitted.
[527] *S v C* 1987 (2) SA 76 (W), 78.
[528] Halley, J. E., *The politics of the closet*, p. 947.

would be preferable to say that sexual orientation is to either the same sex or the opposite sex, or to both, without further labeling. And how many times does one have to have same-sex sex before being designated 'homosexual'? Ackermann J favoured a 'once only' approach – '[t]he concept "sexual orientation" as used in s 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies ... to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex'.[529]

In the extract above Ackermann J is trying to be generous in his approach but in *S v S* a mean-spirited magistrate labelled a man a homosexual despite only one instance of a homosexual act and overwhelming evidence of his heterosexuality. This case is an instance where men who are mostly attracted to women sometimes use men as makeshift women. The facts were as follows. A man, whilst looking for a woman with whom to have sex, in a drunken state picked up a male and had intercrural sex. The magistrate refers to the man as a homosexual even though he himself said that 'he was unable to ignore the appellant's statement that his search originally was for a Bantu woman and that the fact that he achieved his purpose with a male instead of a female seemed to be purely the result of circumstances'.[530] Despite this acknowledgment of preferred heterosexuality, the magistrate suspended his sentence on condition that 'the accused is not convicted of any offence involving *an act of a homosexual nature*

[529] *Constitutional Court National Coalition*, 25-26.
[530] *S v S* 1965 (4) SA 405 (N), 409.

committed during such period of suspension'.[531]

The man was married ('his wife informed him that she was leaving him'[532]), was looking for a woman (… '"ek wil 'n Bantoevrou hê". It was apparent that his purpose was to obtain a Bantu woman in order to have sexual relations with her'),[533] and stated that he had no homosexual tendencies ('ek het nooit neigings gehad om sodomie te pleeg').[534] The man used the male as a makeshift woman. The male asked 'the appellant whether he still wanted a girl and then said that this was not necessary 'aangesien hy net so goed was as 'n meisie'.[535] This man would have retained his heterosexual status had he been in the USA Navy which regards as heterosexual, 'all those whose homosexual acts are not committed on a current basis reasonably close in time to the filing of the application shall be deemed to be heterosexual'.[536]

Race and apartheid add a uniquely South African flavour to the mix. In the mines in South Africa young black males took on the role of 'mine wives'. They were 'not merely sexual partners, but … also "wives" in other ways, providing domestic services for their "husbands" in exchange for substantial remuneration …. [The] relations on the mines seem to take place almost exclusively between senior men (men with power in the mine structure) and younger men. There is in fact an entire set

[531] *S v S* 1965 (4) SA 405 (N), 406 (italics added).
[532] *S v S* 1965 (4) SA 405 (N), 406.
[533] *S v S* 1965 (4) SA 405 (N), 406.
[534] *S v S* 1965 (4) SA 405 (N), 408 (I have never had an inclination to commit sodomy.)
[535] *S v S* 1965 (4) SA 405 (N), 406.
[536] Halley, J. E., *The politics of the closet*, p. 950.

of rules'.[537] The 'wives' often went on to marry, using the money earned to pay *lobolo* for their brides. The sex act was nearly always intercrural sex. What, then, do we call these men? They are neither homosexual nor gay in the Western sense of the word. And what do we call a white married miner who had intercrural sex with a fellow black miner, as happened in the *Cunningham* case?[538]

This is not to say that there is an easy correspondence between essentialists as out-dated conservatives and constructionists as enlightened liberals. Where expedient, the essentialist claim that some people are born homosexual has been used in campaigns to secure legal recognition for homosexuals; on the other hand, the constructionist view that homosexuality is somehow or other acquired has been aligned with homophobic attempts to suggest that homosexual orientations can and should be corrected. Combinations of the two positions are often held simultaneously by both sides.[539]

The debate around these schools of thought foregrounds homosexuality, where in fact heterosexuality should rather be in focus. To foreground homosexuality implies that heterosexuality is somehow the more 'self-evident, natural or stable construction'.[540] Heterosexuality is the background norm, against which homosexuals are 'failed

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[537] Moodie, D., *Migrancy and male sexuality on the South African gold mines*, p. 413.
[538] *Cunningham v Cunningham* 1952 (1) SA 167 (C) (discussed in Chapter 5).
[539] Jagose, A., *Queer theory*, p. 9.
[540] Jagose, A., *Queer theory*, p. 16.

heterosexuals'.[541] Attempts to establish a homosexual family grouping, for example, elicits responses such as Judge Flemming's, 'The fact is that many people ... would frown upon the idea of calling the relationship created on the basis of two females a "family". Quite clearly she regards what she is doing or what she has been doing but also what she intends doing as normal and acceptable'.[542] Although heterosexuality is represented as the unmarked norm, once the 'species' homosexual emerged during the second half of the nineteenth century, by dint of this the heterosexual comes under the spotlight since in this group we find the absence of homosexuality, the non-homosexual. Or do we?

Janet Halley deliberately complicates this neat binary. Whereas homosexuals and other sexual minorities have to deliberately categorize themselves, the category of heterosexual includes anyone 'wavering anxiously at the threshold of sexuality …. despite his confusion about his sexual orientation. The resulting class of heterosexuals is a default class, home to those who have not fallen out of it. It openly expels but covertly incorporates the homosexual other, an undertaking that renders it profoundly heterogeneous, unstable, and provisional. It can maintain its current boundaries and even its apparent legitimacy only if the … [silent non-heterosexual] remains silent …. When … judges undertake actual instantiations of the definitional categories homosexual and heterosexual, we might, then, think it fair to ask how the judge' can

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[541] *Constitutional Court National Coalition*, 67.
[542] Flemming DJP, *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 326.

make such a call.[543] And what of bisexuals who make no claim to either side? 'Much is invested culturally in representing homosexuality as … unproblematic, and in maintaining heterosexuality and homosexuality as radically and demonstrably distinct from one another. Yet modern knowledges about the categories of sexual identification are far from coherent'.[544]

Choice *vs.* immutability

A parallel debate to essentialism *vs.* constructivism is choice *vs.* immutability. The general belief nowadays is that sexual orientation is immutable from a very early age, possibly even genetic. Despite this current thinking, Flemming DJP favours choice, 'The choice, as in regard to her bedroom life, is hers. She cannot, however, make a choice which limits what should be appropriately done in regard to the children'.[545]

In the mid-1950s Ramsbottom J speaks of 'congenital homosexuals, congenitally disposed towards having relations with others of their own sex …. a biological condition which it is very difficult to cure'.[546] However, as will be discussed in the section on sexual abuse of underage boys, there is a distinct possibility he is actually referring to paedophilia. This is a case concerning allegations of sodomy with boys and an adult male. It is uncertain whether it is paedophilia or homosexuality which needs curing.

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[543] Halley, J. E., *The construction of heterosexuality*, pp. 85-86 & 89.
[544] Jagose, A., *Queer theory*, p. 18.
[545] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.
[546] *R v C* 1955 (2) SA 51 (T), 52-53.

Regrettably Ackermann J also falls into the trap of confusing homosexuality with paedophilia. In *S v H* he said, 'There are cases in our Courts where it has been accepted that, in particular cases, homosexual orientation is congenital and that it might be well-nigh impossible to change such orientation. (See *R v K* referred to in *R v C* 1955 (2) SA 51 (T) at 52-3 and *S v S* 1965 (4) SA 405 (N) at 409E-G.) One would however have to examine more fully all the available evidence before making a positive judicial pronouncement that all homosexual orientation is immutable. There does however appear to be a growing body of psychological opinion … that such orientation is immutable and a product of psychological or genetic factors. Whilst immutability of homosexual orientation would make the criminalisation of adult, private, consensual homosexual acts even more undesirable'.[547]

The first case Ackermann J refers to (*R v K*) is definitely a paedophile case – '*R v K* .... In that case the accused was a young man of 26 years who was charged with sodomy on a little European boy 8 years old .... a whipping ... would not alter the accused's inherent sex nature'.[548] The second case he refers to (*S v S*) is about a married man who got very drunk and went looking for a woman. An opportunistic young male took advantage of his state. The passage cited by Ackermann J is at the part where the judge is considering whether this was 'a tendency to perversion' versus

[547] *S v H* 1995 (1) SA 120 (C), 128.
[548] *R v C* 1955 (2) SA 51 (T), 52.

'a temporary aberration'.[549] A full reading of the case clearly shows that it was a temporary aberration. It is not a suitable reference to support immutability.

The full quote from the article by Cameron mentioned in Ackermann J's judgment favours immutability: 'The fact that homosexual orientation is generally immutable … is widely accepted by psychologists: recent research may indicate that sexual orientation is a product of physiological or genetic factors. Yet the idea of non-immutability continues to contribute to blame and rejection. These stem from moral and physical aversion, in that people assume that gays and lesbians can by volition remove the conduct or condition giving rise to disapproval …. it remains particularly repugnant and arbitrary from a moral point of view to discriminate against a person solely on the ground of a characteristic over which he or she has no choice. This is the case with sexual orientation'.[550]

Speech acts – private and public verbs

Referring back to Foucault's rules of formation, the enunciation of the subject 'judge' is usually effected by public verbs also referred to as speech acts. However, as this section shows, the speech acts are not always expressed in the traditional way. This section begins with the observation that judges also use private verbs which, by their nature, remain hidden from analysis.

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[549] *S v S* 1965 (4) SA 405 (N), 409.
[550] Cameron, E., *Sexual orientation and the constitution*, p. 460 (footnotes omitted).

Private verbs

Two private verbs often used by judges are 'agree' (and 'disagree), and 'think (and 'do not think'). A number of examples follow which show how difficult it would be to contest the privately-held views of a judge.

Agree and disagree

'I agree that he must be regarded as an accomplice.'[551]

'If this is what the magistrate meant, I agree with him.'[552]

'I agree with the Attorney-General's submission'[553]

'I agree with Professors Milton and Snyman'[554]

'I agree with the following comment made by Mr Justice Cameron'[555]

'I agree with counsel that this analysis is helpful'[556]

'I disagree with applicant's counsel that …'[557]

'I disagree. I think the Court's duty is …'[558]

'I disagree with counsel …[559]

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[551] *R v Gough & Narroway* 1926 CPD 159, 164.
[552] *S v C* 1965 (3) SA 105 (N), 110.
[553] *S v M* 1979 (2) SA 406 (RA), 408.
[554] *S v Kampher* 1997 (4) SA 460 (C), 466.
[555] *S v Kampher* 1997 (4) SA 460 (C), 467.
[556] *Constitutional Court National Coalition*, 126.
[557] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 328.
[558] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 328.
[559] *Constitutional Court National Coalition*, 130.

Think and do not think

'I think it would be very extraordinary if that were the law.'[560]

'The Court of Criminal Appeal dismissed the appeal, and I think they were right.'[561]

'I think when examined this will be found to be a fallacy.'[562]

'I think that all this is material corroboration'[563]

'I think that the magistrate was entitled to accept the corroboration as sufficient.'[564]

'I think that all the authorities would agree that …'[565]

'Now I think it was rightly contended that Riley was an accomplice.'[566]

'I do not think that there can be any doubt that …'[567]

'I think that this is a case where …'[568]

'I do not think that he took too conservative a view of what Dr. Pienaar had said.'[569]

'I do not think it would be wholly accurate to say that this is the case.'[570]

'I do not think there has been any misdirection in this case.'[571]

'I think the magistrate's sentence was too severe and, as I think the sentence …'[572]

'I do not think that the magistrate's stated reason for including this wording …'[573]

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[560] *Vermaak v Van Der Merwe* 1981 (3) SA 78 (N), 82.
[561] *Thompson v K* (HL) [1918] AC 221, 225.
[562] *Thompson v K* (HL) [1918] AC 221, 233.
[563] *R v Gough & Narroway* 1926 CPD 159, 164.
[564] *R v Gough & Narroway* 1926 CPD 159, 164.
[565] *R v Curtis* 1926 CPD 385, 386.
[566] *R v Curtis* 1926 CPD 385, 386.
[567] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.
[568] *R v V* 1953 (3) SA 314 (A), 323.
[569] *R v C* 1955 (2) SA 51 (T), 53.
[570] *R v M* 1969 (1) SA 328 (R), 333.
[571] *S v K* 1973 (1) SA 87 (RA), 88.
[572] *S v K* 1973 (1) SA 87 (RA), 90.

'Nor do I think that sodomy occurring between two adult male persons …'[574]

In one example Ogilvie Thompson J speaks for Innes CJ, who in turn interprets the minds of two Dutch jurists. The effect of this is that the thinking is twice removed. Ogilvie Thompson J says, 'It was, I think, this particular form of sexual infidelity – viz. where there has been penetration – that Innes CJ, had in mind when in *Kat v Kat*, supra, he said "our law allows divorce for sexual infidelity": and it is important to notice that the learned Chief Justice expressed himself as being satisfied that Schorer and van der Linden in referring to the crime of sodomy had in mind its commission "under circumstances analogous to those of adultery"'.[575]

Other examples are, 'The magistrate, I think, felt that it was necessary to punish this man in the hope that other people would be deterred from committing this kind of crime',[576] and 'It is clear, in my view, that what the learned Judge had in mind was …'[577]

Dorrit Cohn makes an interesting point. She quotes John Searle who says, 'There is no textual property, syntactic or semantic, that will identify a text as a work of fiction …. The utterance acts in fiction are indistinguishable from the utterance acts in

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[573] *S v C* 1988 (2) SA 398 (ZH), 399.
[574] *S v Kampher* 1997 (4) SA 460 (C), 467.
[575] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.
[576] *R v C* 1955 (2) SA 51 (T), 53.
[577] *S v Kampher* 1997 (4) SA 460 (C), 487.

serious discourse'. However, in the example Searle gives to illustrate this, the quote begins, 'So thought Second Lieutenant'. Cohn asks, 'What "serious" discourse ever quoted the thoughts of a person other than the speaker's own?'[578] This is what the judges do in the above extracts which, in effect, should render these texts fictional.

Public verbs - speech acts

Speech acts sometimes use public or reporting verbs. In some cases, however, the speech acts are framed in ways not readily recognized as a such and yet they still have the same effect of passing sentence and of branding homosexuals as criminals. Robert Cover says that a judge's judgment 'takes place in a field of pain and death …. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life …. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another'.[579]

The following order is given by using the private verb 'think' and the modal 'should': 'I therefore think that the appeal should succeed and the convictions and sentences of both appellants should be set aside'.[580] Although introducing uncertainty, this case

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[578] Cohn, D., *Signposts of fictionality*, p. 784 (footnotes omitted).
[579] Cover, R. M., *Violence and the word*, p. 1601.
[580] *R v K & F* 1932 EDL, 77.

became the founding precedent to distinguish between male-male and male-female unnatural acts.

In the following examples, the violence of the order is hidden amongst the technical language.

'The appeal will be allowed in regard to counts 3 and 4, but dismissed in regard to the other counts. The convictions and sentences on counts 3 and 4 will be set aside, the convictions and sentences on counts 1, 2, 5 and 6 will be confirmed'.[581] Perhaps being pedantic, but even the use of 'will be' (used three times) is incorrect. The order is not being made in the future and 'is' or 'are' should have been used. Technically, the order has not yet been made. This order had the following effect. One man received a total of eight months imprisonment with hard labour: four for mutual masturbation, where the other party was not convicted even though the act was consensual, two months for handling another's penis, and two months for trying to touch another's penis.

'The result is that the first question is answered in the negative, the second falls away, the third is answered in the affirmative and the appeal on the special entry is dismissed. The convictions and sentences are confirmed'.[582] The effect of this is that a male was convicted of sodomy and attempted sodomy with youths deemed old

[581] *R v Curtis* 1926 CPD 385, 390.
[582] *R v L* 1951 (4) SA 614 (A), 623.

enough to be accomplices. He was sentenced to twenty-one months imprisonment with hard labour.

'It follows that the appeal against the conviction on the first count fails, and it is dismissed. The conviction and the sentence are confirmed. The conviction and the sentence on the second count are set aside'.[583] The effect of this order was that a man who had tried to have oral sex with another man was sentenced to five months imprisonment.

In the next two examples the violence is evident in the anti-homosexual rhetoric:

'It is said that the sentence on count 5 [handling another male's penis] is out of proportion to the sentences passed in respect of the far more serious offences disclosed in counts 1 and 2 [mutual masturbation]. This may be so, but it is not because the sentence on count 5 is too severe, but because the sentences on counts 1 and 2 are too light. The magistrate could not help himself; under the letter of remit he was limited to 12 months in all. It is quite possible that if his jurisdiction had not been so limited, he would have passed heavier sentences in respect of counts one and two. If the case had been indicted, *I personally, should have inflicted sentences much more severe in respect of these counts. I see no good ground for interfering with the*

[583] *S v C* 1965 (3) SA 105 (N), 110.

sentence in count 5'.[584]

One young man placed his hand, outside the clothing, on the penis of another young man. He was charged with *crimen injuria* which meant that he could not be given the sentence of eight cuts with a light cane. He could have been charged with indecent assault in which case he would have been caned. The judge's bias shows in the adjective 'unfortunate', and the verb 'escape'. His tone shows in the adverb 'clearly' and the phrase 'I cannot understand' – 'The accused in this case was clearly guilty of an indecent assault and I cannot understand why he was not charged with this offence. It is unfortunate he should escape punishment in respect of his offence'.[585]

This is an example where a judge uses a typical reporting verb – declare – is used in a typical speech act:

'In the result I make the following orders:

1. It is declared that the common law offence of sodomy …

2. It is declared that the common law offence of … an unnatural sexual act…

3. It is declared that s 20A of the *Sexual Offences Act* …

4. It is declared that the inclusion of sodomy …

5. It is declared that the inclusion of sodomy …

6. The aforementioned orders, in so far as they declare provisions of Acts …'[586]

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[584] *R v Curtis* 1926 CPD 385, 389 (italics added).
[585] *R v S* 1950 (2) SA 350 (SR), 351.
[586] *High Court National Coalition*, 131.

It is noteworthy that this overt declaration is made in terms of constitutional discourse. Previously the speech acts are not obvious. They are couched in private verbs, hidden in technical language or accompanied by observations about how the judge would have liked the sentence to be more severe.

When judicial orders, which are speech acts, involve criminal sanctions, Elaine Scarry describes how these speech acts become encoded in the defendant's body, or as Janet Halley says, become the 'criminalization of certain bodily acts':[587]

'Each major speech act by the state in a criminal case comes to define the defendant. Each becomes a verb that acts on the defendant. An accusation is made and the defendant becomes the accused. A verdict is reached and the defendant becomes the verdicted, or, as we more often say, the convicted. A sentence is announced and the defendant is sentenced. To be sentenced, to be physically punished, is to be directly acted on by a verbal sentence …. The sentence is inscribed into the defendant's body'.[588] The speech acts engrave guilt onto the defendant's body like the scarlet letter 'A'.

[587] Halley, J. E., *Reasoning about sodomy*, p. 1743.
[588] Scarry E., *Speech acts in criminal cases*, p. 166.

Chapter 5: The construction of homosexuality: sexual act or person?

Sexual act or person?

Determining whether it is the sexual act which is punishable or whether it is punishable because one gender rather than another has performed the act lies at the heart of most of the cases in this corpus. The thrust of this study is to demonstrate the employment of rhetoric in a specific area of law. The previous chapters have considered the judge as a rhetorician. It has placed him in a context to try and account for why cases are constituted in the way they are depending on the period they were heard. This section provides a close examination of certain sexual acts and the people who performed them. In doing so it provides proof that criminality definitely attached to the person and not the act.

According to Gore Vidal there are no such things as homosexual or heterosexual people, 'The words are adjectives describing sexual acts, not people'.[589] This may be so, but as Sachs J notes, until recently in South African law anal intercourse between men and women was not penalised by law, while between males it was a criminal offence, 'which in the nature of things strikes only at homosexuals'.[590] (In fact it struck only at homosexual men.) This led him to ask whether the sodomy laws were punishing an act or a person: 'what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? …. In the case of male homosexuality … the perceived

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[589] Gore Vidal, *The second American revolution and other essays (1976 – 1982)*, (1982) 161.
[590] *High Court National Coalition*, 122.

deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony'.[591]

This reference to heterosexual hegemony coincides with Janet Halley's hierarchical view. Sodomy laws, she says, 'maintain themselves in part by their equivocal reference to identities and/or acts. The duality of the sodomy statutes – sometimes an index of identity, sometimes an index of acts – is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity. Designating homosexual identity as the personal manifestation of sodomy confirms its subordination …. The criminalization of sodomy is crucial to the ordering of sexual-orientation identities, particularly to the subordination of homosexual identity and the superordination of heterosexual identity'.[592]

Anne Goldstein critiques Halley for not clearly distinguishing between acts and people. A problem 'hovering unspoken over Halley's article' is what is the relationship between 'homosexuals' and 'homosexual acts'? Or, to put the problem more generally, what is 'homosexuality' and who is a 'homosexual'?

[591] *Constitutional Court National Coalition*, 56.
[592] Halley, J. E., *Reasoning about sodomy*, pp. 1722 & 1731.

'Homosexuality' is a word 'at least as mutable, shifting, plastic and volatile as "sodomy"'.[593] She lists a number of valid questions to show how difficult it is to assign homosexual acts to homosexuals, and says that Halley's article does not achieve its purpose since these questions remain unanswered.

But Goldstein will search in vain for these answers, because this is not Halley's argument. Halley is suggesting that homosexuals and other sexual minorities hold in abeyance the identities they assign themselves, and concentrate instead on the sexual acts *any* person may perform. Working within a 'register of acts', is an exercise of power, she asserts, because it will collapse homosexual and heterosexual identities – 'Resisting power in this form provides gay men, lesbians, bisexuals, and their allies with a political opportunity. We can form new alliances along the register of acts. From that vantage point the instability of heterosexual identity can be exploited, and indeed, undermined from within. To be sure, adopting this approach requires that lesbians, gay men, and bisexuals place their identities as such in abeyance at least from time to time. This is dangerous, but it may be the only way that lesbians, gay men, and bisexuals can gain some kind of rhetorical leverage in a rhetorical system whose instability normally places us in a double bind'.[594]

Whether the word homosexual is an act or person, metonymically sodomy is to homosexual identity as burglary is to burglars. Sodomy is such an intrinsic

[593] Goldstein, A. B., *Reasoning about homosexuality*, p. 1797.
[594] Halley, J. E., *Reasoning about sodomy*, pp. 1722-1723.

characteristic of homosexuality that it constitutes a 'rhetorical proxy'.[595] In other words, sodomy can receive its definitive characteristic from the 'homosexuals' who do it, or it can stand free of persons and be merely an act. Heher J said that 'anal intercourse is the homosexual man's form of sexual expression, equivalent to heterosexual intercourse *per vaginam*'.[596] This is simply not true; 'many resolute homosexuals never do any acts that could be called sodomy, while many resolute heterosexuals are, where sodomy is concerned, avid recidivists'.[597] According to Halley, 'Not knowing what sodomy is, not naming it at all, not describing it accurately, not acknowledging its presence, are all important parts of its historical profile. Obscurity is part of what sodomy is, a means by which it attains its social effects'.[598]

With this ambivalence in mind, I now turn to a consideration of the sexual acts themselves as portrayed in the corpus. Most of this section deals with sodomy because it is the clearest example of the ambivalence at work between act and person and yields the most interesting example of rhetoric. By tracing the historicity of sodomy we can follow the rhetoric used to distinguish between male-male and male-female anal intercourse. The lesser offences of intercrural sex and masturbation also show how it was only males who were punished. Statutes in the form of the introduction of s20A and the amendment to s14 of the *Sexual Offences Act* also shows how

[595] *Ibid.*, pp. 1734 (burglar analogy) & 1737.
[596] *High Court National Coalition*, 103.
[597] Halley, J. E., *Reasoning about sodomy*, p. 1722.
[598] *Ibid.*, p. 1756.

parliament legislated against homosexual men. Unwittingly, these sections also brought heterosexual men into their ambit. A short note follows which shows how bestiality has always been associated with male 'unnatural acts'. The section ends with a review of lesbianism within the corpus. Since no sexual acts are specifically mentioned in these cases, it is the lesbian as a female homosexual person which the court scrutinizes.

Sodomy

What is sodomy?

If sodomy is under consideration then exactly what is sodomy? In the foreword to his *The Order of Things*, Michel Foucault discusses a short story by Jorge Borges who refers to 'a certain Chinese encyclopedia'[599] in which animals are divided into: '(a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camel-hair brush, (l) *et cetera*, (m) having just broken the water pitcher and (n) that from a long way off look like flies'. In a later work, Foucault would refer to sodomy as 'that utterly confused category'.[600] Is sodomy one of (a)-(n) above, or (a)-(n) below?

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[599] Borges, J. L. 1981, 'The analytical language of John Wilkins' in *Borges, a reader: a selection from the writings of Jorge Luis Borges*, Monegal E. R. & Reid A. (eds.), New York, Dutton pp. 141-143. Some users of this quote believe that such an encyclopedia actually exists! George Lakoff ascribes this gullibility to how Westerners think non-Westerners think.
[600] Foucault, M., *The history of sexuality, vol. 1*, p. 101.

Because as described in the corpus, the category 'sodomy' is utterly confusing: (a) anal coitus, (b) anal intercourse, (c) anal penetration, (d) between the buttocks, (e) heterosexual anal intercourse, (f) homosexual sexual intercourse, (g) intercourse *per anum*, (h) same-sex and opposite-sex anal intercourse, (i) sexual intercourse between males, (j) sexual intercourse contrary to the order of nature, (k) sexual intercourse *per anum* between human males, (l) sexual intercourse *per anum* between men, (m) sodomy in the accepted sense of that term, and (n) unnatural intercourse between two males.[601]

There has never been a stable definition of sodomy. It seems to involve anal penetration, but even that basic element is contested. It is not clear as to whether the act itself is the crime, or that it is between males. Throughout the cases there is this ambivalence between punishment of the act or the person. In the *National Coalition* case Sachs J said, 'Only in the most technical sense is this a case about who may penetrate whom where'.[602]

I write this section in the form of a narrative based on Hayden White's view that history is portrayed in a narrative form.[603] Critics of the historical narrative view

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[601] (a) *R v K & F* 1932 EDL 71; (b), (e) & (f) *S v Kampher* 1997 (4) SA 460 (C); (c), (h), (k) & (l) *Constitutional Court National Coalition*; (d) *S v M* 1984 (4) SA 111 (T); (g), (i) & (n) *R v H* 1962 (1) SA 278 (SR); (j) *R v N* 1961 (3) SA 147 (T); (m) *R v Gough & Narroway* 1926 CPD 159.

[602] *Constitutional Court National Coalition*, 55 per Sachs J.

[603] Much of this section is an application of the section on historiography which appears in the literature review chapter, and where references are specifically cited. I again acknowledge

challenge how its advocates merge fiction and non-fiction. Factual narrative, such as judgments, should be separated from fiction because non-factual writing is based on reliable, verifiable documentation. In other words there needs to be a reliable reference upon which the text is based. However, by presenting a narrative of sodomy over some seven decades, I draw attention to how techniques of fiction writing are used notwithstanding that the cases are based on verifiable documentation.

Critics of the historical narrative form seem content to identify a referential source, such as verifiable documentation, without going any further. There are, however, other issues. What if there are several referential sources of similar standing? How did those sources come to be incorporated into the text? Pre-existing material is always contestable as writers endow it with meaning expedient to their ideology. Writers of non-fiction can select what to include and what to exclude, and where to begin and end. We see this happening when judges decided which Dutch jurists they should rely on and over what period in order to support the criminalization of homosexuality. The assertion that the law regarding sodomy deals with the 'real' and 'actual' derives largely from the reliance on these pre-existing documents. However, just because these documents are verifiable does not mean that they are any clearer or more reliable. Each Dutch jurist only added to the number of possible texts a judge could choose from. The views of the jurists vary to such an extent that there is no certainty

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ideas introduced to me by Cohn, D. 1990, Lemon, M. C. 2001, Mink, L. O. 2001, White, H. V. 1978, 1987, 1989, 2001, Amsterdam, A. G. & Bruner, J. 2000, Toolan, M. J. 2001; de Vos, P. 2001.

as what gender sodomy relates to, whether the religion of the parties makes a difference, or even whether the act needs to be between humans.[604]

Sodomy carries freight from the past

Even after the 1996 Constitution leading academics were maintaining that sodomy laws should still apply in certain circumstances: 'In so far as heterosexual sexual intercourse is punishable if is occurs in public or without the consent of one of the parties, or where one of the parties is under the age of consent, it follows that homosexual sexual intercourse which is not private, or without the consent of one of the parties, or with a person who is under the age of consent may be punished as sodomy'.[605]

Ronald Louw disagrees, advocating that the offence should be removed entirely because 'probably more than any other offence, [sodomy] is set in a history and context that is wider than that of criminal law alone'.[606] Sodomy carries the freight of centuries of Judeo-Christian intolerance. The seventeenth century in Holland, the socio-legal context in which sodomy laws found their way to South Africa, imbibed this religious intolerance. Akin to a biblical stoning, sodomites were publicly executed after which 'the bodies of the persons executed shall be immediately burned to ashes,

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[604] According to Hunt *et al*, 'some jurists regarded ordinary sexual relations between Jews and Christians as "sodomie"' – Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 268, and sodomy could even be committed with pictures and statues according to Von Quistorp.

[605] Burchell, J. & Milton J., *Principles of criminal law*, p. 634.

[606] Louw, R., *Sexual orientation, the right to equality*, p. 115.

thrown into the sea, or exposed on a gibbet'.[607] Even in the *High Court National Coalition* case male-male sexual acts are still associated with disapproval.[608] It is naïve to believe the disapproval disappeared after the *Constitutional Court National Coalition* case; merely that it is no longer permissible in public discourse.

Because of this freight, '[s]ocietal condemnation is inextricably bound up with the offence. To decriminalise sodomy only in respect of consensual adult sexual intercourse does not elide its history …. The constitutional guarantee of non-discrimination on the ground of sexual orientation will not be given its fullest effect until the offence of sodomy is removed without exception from our law'.[609] Louw reasons further that there is no need to retain the offence for non-consensual anal penetration of a male since there is no need to make a gender distinction at all; either way it is indecent assault.

This campaign has not been helped with the attempt to introduce a sub-species of rape called male rape, similar to the way date rape has become a marked form of rape. In the corpus it is variously called: 'male rape' (with or without quotes),[610] 'a new crime of 'male rape' (if such be thought necessary)',[611] '"male" anal rape',[612] and 'so-called

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[607] *Ibid.*, p. 112, quoting Van der Linden.
[608] Heher J: 'orgiastic practices to which homosexuality seems often to fall prey' (*High Court National Coalition*, 110).
[609] Louw, R., *Sexual orientation, the right to equality*, pp. 116 & 117.
[610] *High Court National Coalition*, 107.
[611] *High Court National Coalition*, 126.
[612] *Constitutional Court National Coalition*, 22.

'anal rape' or 'male rape''.[613] Such designations deliberately gender non-consensual anal intercourse which should be treated as indecent assault no matter the gender. When males do this to females it is indecent assault so why does male rape have to be emphasised? It reinforces the thinking that anal intercourse is the homosexual's form of sexual expression.

Writing this before the *National Coalition* cases, Louw was vindicated in that these cases did strike down sodomy in its entirety, declining to draw a distinction between private and public acts and those with or without consent.[614]

Dutch jurists as basis for common law

Sodomy was a common law offence which meant that its legal basis was not found in legislation but in various 'old authorities'. Generally, in South African common law these authorities were either Roman jurists or Dutch jurists who either glossed Roman law or wrote their own treatises. The common law on sodomy in particular falls into the Dutch treatises category. It is not a definitive treatment but is made up of the views of many individuals. In some instances judges divided Dutch jurists into an older period – sometimes made even more distant by calling it 'ancient' – and a later period. Sometimes the law is not divided into periods at all but is compared in its totality to modern *practice* as opposed to modern *law*. The word practice indicates a

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[613] *Constitutional Court National Coalition*, 40.
[614] Louw, R., *Specific crimes*, p. 92, notwithstanding Louw's criticism of retaining a residual category of 'unnatural sexual acts' on p. 96.

greater choice of freedom as to what is appropriated as current law. This shows that the law in this regard was malleable.

Perhaps the most honest admission by a judge regarding the inconsistency of the common law of sexual acts is when Pittman J said, 'The real reason for its non-employment [i.e. common law] is that it has become out of harmony with modern views and unsuited to modern conditions'.[615] The implication is that distinguishing between earlier and later Dutch writers, or deeming certain parts of Dutch law as having fallen into disuse are not the real reasons for making the distinction between male-female and male-male sexual acts. The real reason is that society wants it so.

In the male-female anal intercourse cases, a distinction is made between old and more recent Dutch writings. This is because old Dutch law clearly stated that male-female anal intercourse fell within the ambit of a crime. Until then everyone who practiced anal intercourse was a sodomite, but this did not sit well with a heterosexual majority. Such earlier law was then deemed to have fallen into disuse, to be out of keeping with modern practice. This deeming was effected by a 'speech act of silence', which allowed heterosexual sodomy to drop silently out of the picture.[616] The dominant class (of heterosexuals) silently (mis)read themselves out of the target group of sodomites by means of rhetoric.

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[615] *R v K & F* 1932 EDL, 75.
[616] Eve Kosofsky Sedgwick, *Epistemology of the closet*, Berkley, Univ. of California Press, 1990, 3.

By contrast, male-male sodomy is deliberately anchored to ancient times, times immemorial, past millennia. Being steeped in history serves as a justification for preserving these time-honoured laws; who are modern-day judges to tamper with the sacred ancient law? This rhetoric is used in *Bowers v Hardwick* – 'the proscriptions against sodomy have very "ancient roots". Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards .... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching'.[617]

Schabort J used this same distancing device in a case brought in terms of s20A of the *Sexual Offences Act*. He says that s20A 'was intended to prevent the obtrusion of conduct which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature'.[618] This judge had at his disposal De Wet's *Strafreg* which says, 'We no longer live in the middle ages and the history of Sodom lies in ancient times'.[619] Schabort J chooses to hold onto an Old Testament worldview and he states that many people would agree with him that to not do so would mean

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[617] *S v Kampher* 1997 (4) SA 460 (C), 481. Farlam J quoting, but not with approval, from *Bowers v Hardwick* 478 US 186 (1986).
[618] *S v C* 1987 (2) SA 76 (W), 79.
[619] Quoted in *S v H* 1995 (1) SA 120 (C), 122. The above is an approximate translation of De Wet, J. C. & Swanepoel, H. L. 1975, *Strafreg*, (3rd ed.), Butterworths, Durban, p. 270.

that a repulsive, depraved and repugnant activity would surface. De Wet was suggesting in the mid-1970s that we take up anchor from the past.

There is evidence of this distinction between ancient law and modern practice in a number of cases:

– '… "unnatural offence" …. The phrase was not in use by the ancient authorities and has not been adopted in our law'.[620]

– 'In the old Roman-Dutch law, any gratification of sexual lust in a manner contrary to the order of nature was regarded as a crime. In modern practice the limits of the offence have been very much restricted, and many acts which were undoubtedly crimes under the old law are no longer so regarded'.[621]

– '… but at best a disputed provision of the ancient criminal law'.[622]

– '... and a third category into which fell certain residual, sexually abnormal acts .... It is in respect of this third category that difficulties arise in modern practice ...'[623]

– '… such old writers of the Roman-Dutch law as …'[624]

– '… these later writers'[625]

– '… unwillingness of writers like van Leeuwen and van der Linden to accept the views of those earlier …' [626]

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[620] *R v Gough & Narroway* 1926 CPD, 159.
[621] *R v S* 1950 (2) SA 350 (SR), 350.
[622] *R v K & F* 1932 EDL 71, 75.
[623] *S v C* 1988 (2) SA 398 (ZH), 400.
[624] *R v M* 1969 (1) SA 328 (R), 328.
[625] *R v M* 1969 (1) SA 328 (R), 328.
[626] *R v M* 1969 (1) SA 328 (R), 330.

– ‘The phrase was not in use by the ancient authorities’[627]

– ‘Later Roman-Dutch authorities, however, do not mention such an act as a crime’.[628]

In addition to this timing differentiation, in the corpus all references to the Dutch jurists are made in the plural, either as ‘authorities’ or ‘writers’. Only when working with plurals can the determiners ‘some’, ‘several’ and ‘others’ (as an adjective) be used. When there is this subdivision of the whole, there can be no definitive common law. A judge could choose which jurist he wished to quote according to what view he adopted. The following extracts illustrate this.

– ‘… some of the Roman-Dutch writers did not consider sodomy the appropriate term’[629]

– ‘Some of the Roman-Dutch writers …’[630]

– ‘… several of the ancient writers…’[631]

– ‘Other writers, however, take the view that sodomy ... ‘[632]

– ‘some of the old writers’[633]

– ‘was considered by some Roman-Dutch authorities as an unnatural offence. Other

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[627] *R v Gough & Narroway* 1926 CPD 159, 159.
[628] *R v M* 1969 (1) SA 328 (R), 328.
[629] *R v Gough & Narroway* 1926 CPD 159, 163.
[630] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[631] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[632] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[633] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.

writers, however, thought otherwise …'[634]

– '... though the greater number of the authorities ... imply that conduct ... was criminal, there are others, who seem to state the contrary'.[635]

– '… some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices'.[636]

Judges' appropriation of Dutch jurists

With so many jurists, it is not surprising that judges used different jurists as their basis to rule on the same issue.

For example, in a 1952 case counsel for the plaintiff 'whose argument and full reference to the authorities have been very helpful to the Court – based his argument .... that her husband has committed sodomy, and that defendant's above described actions constitute sodomy as that word is used by the Roman-Dutch writers'.[637] The sexual act referred to in the phrase 'defendant's above described actions' was male-male intercrural sex.[638] Plaintiff's counsel held that intercrural sex was sodomy 'as that word is used by the … Dutch writers'. On the same page as calling counsel's reference to the authorities 'helpful', the judge refers to his own research where he

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[634] *R v Curtis* 1926 CPD 385, 386.
[635] *R v K & F* 1932 EDL, 72.
[636] *S v C* 1988 (2) SA 398 (ZH), 400.
[637] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[638] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 167 – 'the defendant inserted his penis between the thighs of the native as the latter lay with his back on the ground, and that, in that position, defendant by friction induced in himself an ejaculation: the defendant neither penetrated, nor made any attempt to penetrate, the native'.

states that 'Schorer and van der Linden ... do not attempt to define what precisely they mean by the term sodomy'.[639]

Another case illustrates the indeterminacy of Dutch law. In 1932 Pittman J ruled that 'even if unnatural lewdness between man and woman of the kind in question in this particular case had been criminal as recently as the early part of last century, such conduct is no longer so, and the force of this conclusion in favour of modern-day immunity is not lessened by the apparent unwillingness of writers like van Leeuwen and van der Linden to accept the views of those earlier ones …. [I]n view of the uncertainty that obtains on this particular question, in view of the obsolescence or rather desuetude in South Africa of a considerable portion of the Roman-Dutch criminal law and further in view of the clear elimination from the list of sexual offences of a number of crimes that were recognised by van der Linden in 1806 – as for example adultery, concubinage and fornication – it seems that no definite conclusions can be formed from a study of those earlier commentators'.[640]

The language judges used suggest that they are not confident in relying on the Dutch jurists. They often use the verbs 'appear' and 'seem' in their judgments. These are private verbs which a judge would use when he was not sure of the truth of what he believed or had been told. Alternatively, it is a way of making his statement less forceful. Either way, the words introduce uncertainty and ambiguity into the discourse

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[639] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[640] *R v K & F* 1932 EDL, 74.

and undermine the certainty of common law. The following are examples from the corpus.

– 'the authorities … seem to state …'[641]

– 'The passages quoted seem sufficiently to show that …'[642]

– 'It would seem, however, that in South African law the crime of sodomy is …'[643]

– 'There seemed to be some doubt whether in Roman-Dutch law …'[644]

– 'several of the ancient writers .... appear to use the term "sodomy"'[645]

– 'from those authorities it appeared that sodomy …'[646]

– 'It seems to be correct to say that ….This appears to have been the approach of the later Roman-Dutch authorities …'[647]

Sometimes the adjective 'clear' is used with 'seems' which effectively sets up a contradiction. 'Clear' means obvious and impossible to be mistaken about whereas 'seems' is used by the judge when describing his own thoughts in order to make his statement less forceful. For example, 'It seems to me clear, from the text writers …',[648] and 'It seems clear enough that such old writers of the Roman-Dutch law as …'.[649] Sometimes 'clear' and 'seems' are used near each other to indicate that it is

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[641] *R v K & F* 1932 EDL 71, 72.
[642] *R v K & F* 1932 EDL 71, 73.
[643] *R v H* 1962 (1) SA 278 (SR) , 279.
[644] *R v M* 1969 (1) SA 328 (R), 328.
[645] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.
[646] *S v M* 1979 (2) SA 406 (RA), 407.
[647] *S v Kampher* 1997 (4) SA 460 (C), 465.
[648] *R v Gough & Narroway* 1926 CPD 159, 161.
[649] *R v M* 1969 (1) SA 328 (R), 328.

obvious that there is no agreement amongst earlier jurists – 'It is clear that among the expositors of the Roman, Roman-Dutch, and old German laws there is no complete agreement as to whether the act which is the subject of this charge is a punishable offence .... it seems that no definite conclusions can be formed from a study of those earlier commentators'.[650] The use of 'clear' in the negative also reinforces the uncertainty of relying on common law – 'the limits of the crime called "an unnatural offence" are by no means clear. *A fortiori*, the meaning of an "unnatural act" is even more ill-defined'.[651] The use of 'clear' in the negative is later used in constitutional discourse: 'it becomes clear that a proscription on private acts of sodomy should not survive'.[652]

One judge thinks on behalf of the Dutch jurists – 'but I think that all the authorities would agree that …'[653] – whilst another imputes a meaning to the Dutch jurists which may or may not be correct – 'None of these writers, however, deals with this question at all. The most that can be inferred from what they say is that ...'.[654]

Finally, but perhaps most significantly of all, the two *National Coalition* cases[655] do not mention Dutch jurists once in a combined total of some 50,000 words. The two cases that dealt the final blow to the common law crime of sodomy do not once

[650] *R v K & F* 1932 EDL 71, 74-75.
[651] *S v C* 1988 (2) SA 398 (ZH), 400.
[652] *S v H* 1995 (1) SA 120 (C), 126.
[653] *R v Curtis* 1926 CPD 385, 386.
[654] *R v M* 1969 (1) SA 328 (R), 329.
[655] *High Court National Coalition*; *Constitutional Court National Coalition*.

mention the 'authority' so many past judges had manipulated to justify their own views. They are unlike previous South African judges who 'adopted with zeal the ample and unrestricted ambit of the common law definitions so as to criminalize conduct the status of which was at least open to interpretation as uncertain'.[656]

Common law not always taken from source

Dutch jurists did not always find their way into judgments directly from source. Sometimes they are mediated though textbook writers, and sometimes the judges are themselves the authors of the textbook. At other times judges think on behalf of the Dutch jurists, or impute meanings which may not be there.

Various judges accepted textbook writers' views on Dutch jurists.[657] In some cases the judge is also a textbook writer, such as Gardiner JP. He penned the definition of sodomy which later judges such as Ogilvie Thompson J would use and endorse – 'I do not think that there can be any doubt that Gardiner JP correctly stated the modern law when he said in *Rex v Gough and Narroway* … "in our practice sodomy has come to mean that particular kind of unnatural offence where there is penetration *per anum*'".[658] However, on two occasions judges have called the section on sodomy in

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[656] Botha, K. & Cameron, E., *South Africa*, p. 7.
[657] *S v M* 1979 (2) SA 406 (RA), 407 – 'Hunt … takes the view that the crime of sodomy is not committed if the passive party is a woman. The same view is expressed by De Wet … in *Strafreg*'. *R v H* 1962 (1) SA 278 (SR), 279 – 'It would seem, however, that in South African law the crime of sodomy is confined to sexual intercourse between males. The learned authors of … *Strafreg* … examine the matter fully …, and they define the crime as follows …'
[658] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.

Gardiner's textbook vague and indecisive.[659]

Because of the reliance by judges on textbooks when considering sodomy cases, it is useful to look at the different editions of the textbook they most widely used, *South African Criminal Law and Procedure*. The first edition was written by Professor P Hunt. On his death, Professor John Milton edited the second and third editions.

The definition of sodomy in the second edition is retained from the first edition: 'Sodomy consists in unlawful and intentional sexual relations *per anum* between two human males'.[660] The footnote to the definition cites as 'authority' two previous textbooks, in particular Gardiner's one which judges had called vague and indecisive. Neither Hunt nor Milton could provide a sounder reference than textbooks, themselves secondary sources. It is significant that they did not cite any Dutch authority.

Milton then amplifies each of the points in the definition, beginning with 'unlawfulness'. Under this section he says, 'Coercion, for example, might deprive the act of unlawfulness'.[661] Directly after stating that sodomy is between two human males, the footnote to the above sentence, to substantiate unlawfulness, refers to a

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[659] *R v H* 1962 (1) SA 278 (SR), 279 – 'See too Gardiner & Lansdown, 6th ed., p. 1227, where, however, the matter is left somewhat vague' and *R v M* 1969 (1) SA 328 (R), 329 – 'Modern text-book writers are indecisive. See, for example, Gardiner & Lansdown, 6th ed., vol. 2, pp. 1227-1228'.
[660] Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 271.
[661] Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 271.

case where a husband forced his wife to submit to sexual intercourse with a dog, thus introducing the discourses of marriage and bestiality.[662] This reference is removed in the third edition with no explanation.

Under the section 'intention', the precedent cited is about a man who attempted to rape a woman, thus introducing male-female discourse.[663] Under the section 'between two human males' Milton states, 'Our practice has apparently come to recognize that if the passive party is a female the crime of sodomy is not committed'.[664] The use of the word 'apparently' indicates there is no definitive authority, and the cases he cites as precedent are not authoritative.[665] The *R v N* case is short and does not explore the gender issue with any rigor. It is an unconvincing, ambivalent decision. *S v M* has no precedential value. In this case, the magistrate had misgivings, after the case was concluded, that he had upheld a charge referring to male-female anal intercourse as 'sodomy' instead of 'indecent assault'. Amongst the 'certain authorities'[666] the magistrate used to arrive at this decision was in all likelihood only the first edition of Hunt, and that edition is definitely the one the judge consulted ('Hunt … takes the view that the crime of sodomy is not committed if the passive party is a woman').[667] After adding nothing new, the judge regarded the matter as 'settled law'.[668] This is an

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[662] R v Bourne (1952) 36 Cr App Rep 125.
[663] *R v H* 1962 (1) SA 278 (SR).
[664] Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 272.
[665] *R v N* 1961 (3) SA 147 (T) and *S v M* 1979 (2) SA 406 (RAD).
[666] *S v M* 1979 (2) SA 406 (RA), 407.
[667] *S v M* 1979 (2) SA 406 (RA), 407.
[668] *S v M* 1979 (2) SA 406 (RA), 408.

example of incestuous iteration.

Earlier in the chapter, Milton's comments on unnatural acts recognize that Dutch writers 'concern themselves more with punishment than the niceties of definition, [and] are not always *ad idem* as to just what conduct falls within this description'.[669] By way of example, he mentions how 'some jurists regarded ordinary sexual relations between Jews and Christians as "sodomie"'.[670] Farlam J refers to this reticence of earlier jurists to spell out what they meant by sodomy – 'In his lectures in the nineteenth century on the subject of what was then known as "sodomy", Professor Van der Keessel, for example, expresses this type of sensitivity. He wrote: "[T]he turpitude of this unspeakable crime is so great that it ought, it seems, to be passed over in silence rather than to be expounded to the ears of the chaste, and hence many commentators on the criminal law too have merely touched on it with very few words". (Beinart and Van Warmelo's translation at 857)'.[671]

Cameron criticized Milton for retaining from the first edition comments about how society was not yet ready to accept homosexuality: the 'most authoritative English textbook on the criminal law in South Africa – edited by an otherwise liberal academic – remarks that the "real reason" for the criminal proscription of sodomy "is the extreme disgust and abhorrence such conduct arouses". On law reform, this book,

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[669] Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 267.
[670] *Ibid.*, p. 268.
[671] *S v C* 1988 (2) SA 398 (ZH), 401.

in wording left unrevised since its first edition in 1970 expresses the view that … "South African mores are not yet ready … to accept the abolition of sodomy (and other 'unnatural' acts) as criminal [even] when practised in private between consenting adults".[672]

This comment is removed from the third edition, attributable perhaps to Cameron's criticism. In fact, there is a general change in tone and emphasis in the third edition. It was published in 1996 at the time the interim constitution[673] was in place. It is also contextually wider. There are new sections on pre-Christian Roman Law and on Canon Law. Milton comments on unnatural acts in the context of a predominantly Christian society and a changing attitude of society towards unnatural acts – 'The concept of the unnatural sexual act in Western legal systems derives from the teachings of the Christian Church, which pronounced that sexual intercourse between humans should be confined to heterosexual intercourse *per vaginam*. The proscription by the criminal law of other forms of sexual gratification as unnatural, and thus unlawful, represents an effort by the state to compel sexual partners to engage only in vaginal intercourse'.[674]

and

'If there is a rationale for the crime, it is the notion that the acts contemplated by this crime are so deeply disgusting as to deserve the sanction of the criminal law. Whether

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[672] Cameron, E., *Sexual orientation and the constitution*, p. 458 (referring to pp. 270-1 of the 2nd ed.)
[673] Act 200 of 1993.
[674] Hunt, P. & Milton, J. (3rd ed.), *South African Criminal Law and Procedure Vol. II*, p. 223.

this rationale in fact expresses contemporary views in relation to the acts in question is seriously to be questioned. This is a prime example of a "victimless" crime and there seems to be no sufficient or convincing reason for subjecting those who engage in the "unnatural" sexual acts here defined to prosecution and punishment. South African law would be better off without this crime'.[675]

South African Criminal Law and Procedure was the most authoritative textbook on male sexual offences. It was used by judges in making decisions that led to men serving prison sentences with hard labour. And yet a critical look at the entry on sodomy shows that section to be a house of cards. One would have expected to at least see references to Dutch jurists in the definition of sodomy but instead there are references to other textbooks. The authors cannot find suitable male-male examples to illustrate the elements of the crime and resort to female-dog and male-female examples, which examples quietly disappear in the third edition. It is only after criticism from respected quarters that derogatory, value-laden comments about homosexuality are omitted suggesting unreflecting editors.

The actual cases

Nearly all of the cases relating to sodomy are rendered seriously flawed because they are not specifically about sodomy. For example, they are about intercrural sex where sodomy is mentioned *obiter*, or about police entrapment case, or about male-female

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[675] *Ibid.*, p. 224.

rape or men having sex with underage girls.

The first case in the corpus relating to sodomy – *R v Gough and Narroway*[676] – occurred in 1926. This case is in fact about intercrural sex but parts of the judgment refer to sodomy. There is in fact no flagship case dealing with male sodomy. All the significant cases which have the most to say about male sodomy are, curiously, about intercrural sex. It is this case which coins the definition of sodomy to be used henceforth in South African textbooks and judgments. Many of the references in this case to the common law are not relevant to the facts of the case (intercrural sex between males), yet some of them relate to sodomy, if only to show how vague the law was on this issue.[677]

In his review of the common law Gardiner J (the next year JP) touches on a number of jurists. His reference to Von Quistorp on sodomy is not gender-specific – sodomy could even be committed with pictures and statues according to Von Quistorp. The reference to Carpzovius on sodomy is also not gender-specific. Both Von Quistorp and Carpzovius were German jurists, not Dutch and it is debatable whether they had legal standing in South African law. The reference to Emperor Charles V relates to English law which was also not part of South African common law, but even then only vaguely mentions 'unchaste behaviour'.

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[676] 1926 CPD 159.
[677] *R v Gough & Narroway* 1926 CPD 159, 161.

Gardiner J then diverges to tell a story about heterosexuals. As a defence against adultery, a man stated that he had performed *coitus interruptus* ('followed the example of Onan').[678] Instead of the fine he would have received for adultery, he was 'flogged and banished, some of the judges at first thinking that the death penalty should be inflicted'.[679] This story is then followed by a quote in Latin before linking it back to the present case – 'This affords me a convenient opportunity of saying that the accused in the present case are not in so unfortunate a position, for the advocate appointed by the Court to argue on their behalf, has certainly been of assistance to them, and by his researches has been of great help to us'.[680]

This superfluous story is told for its shock value, a story to make the layman shake his head in amazement at 'the law'. The lengthy Latin quote (naturally not translated) adds to the mystique of 'the law'. The way the story is linked back to the present case is patronizing: the present accused are fortunate to have such a good lawyer who will not get them flogged or banished. Although Gardiner J refers to the defence attorney's great help in research, he does not use any of his references, nor does he state why he discounts them. Instead, he supplies his own references. The prosecution have only one reference, the judge's own textbook.[681]

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[678] *R v Gough & Narroway* 1926 CPD 159, 162.
[679] *R v Gough & Narroway* 1926 CPD 159, 162.
[680] *R v Gough & Narroway* 1926 CPD 159, 162.
[681] *South African Criminal Law and Procedure*, Gardiner and Lansdown. The other references concern procedural aspects.

Bernard Jackson makes an interesting point regarding judges who conduct their own research. He maintains that judges ought not to refer, in their judgments, to precedents or old authorities unless they have been cited in the argument by counsel. Increasingly this convention is 'honoured in the breach, and there is little doubt that many judges do independent research on the legal issues presented to them'.[682] This challenges the suggestion that judges are *tabula rasa*; they are not the mere vessels they purport to be. Just how far, and in what direction, their independent research goes is entirely up to them.

Were the defence attorney's references to the writings of Damhouder not ignored, the law regarding sodomy could well have taken a different course.[683] It would take seventy years until Damhouder was again aired, tellingly under constitutional discourse – 'Joost Damhouder (1507-1581), one of the earliest writers in the Netherlands on criminal law, divided sodomie into three categories: self-masturbation, unnatural sexual acts between one human being and another (not just between persons of the same sex) and bestiality'.[684]

This odd categorization shows just how arbitrary the classification was. In the 1920s Gardiner J was afforded the opportunity to incorporate this reference but chose rather to use his own inapplicable German and English references. Since Searle JP and

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[682] Jackson, B. S., *Law, fact and narrative coherence*, p. 113.
[683] *R v Gough & Narroway* 1926 CPD 159, 160 ('For sodomy so-called, see Damhouder, Criminal Practice (Ch. 89)).
[684] *S v Kampher* 1997 (4) SA 460 (C), 464-465.

Louwrens J concurred, one can only surmise that they were also selective as to what they included based on whether or not it promoted their view. These judges were intellectually dishonest. Comparing this case to the *High Court National Coalition* case, the reader knows that the judge in that case personally did not accept homosexuality, but he avoided being swayed by his own moral convictions. To Catherine Albertyn, 'It is this "intellectual honesty" and courage that is such a valuable feature of this judgment',[685] and which by comparison makes the *Gough* case intellectually dishonest and not of much value.

Gardiner J refers to reasons why 'carnal acts contrary to the order of nature' were punished.[686] The first reason is that the acts could not lead to procreation. Sterility has more of a male-female connotation and is certainly not male-male specific. Another reason was that the acts were 'so abhorrent to all ideas of decency, that they ought to be punished'.[687] The use of the modal verb 'ought' makes this a moral obligation, not a prescriptive rule (not that the miscellany of references he provided could have made punishment prescriptive). Both reasons are value calls. Since none of the references are gender-specific, the assumption is that male-female acts should also be punishable.

Gardiner J then gives his take on sodomy: 'in our practice sodomy has come to mean

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[685] Albertyn, C., *The decriminalization of gay sexual offences*, p. 469.
[686] *R v Gough & Narroway* 1926 CPD 159, 162.
[687] *R v Gough & Narroway* 1926 CPD 159, 162.

that particular kind of unnatural offence where there is penetration *per anum*'.[688] He refers to 'practice' rather than 'law' and provides no explanation as to how sodomy *has come to* mean what he says it does. By way of a blind-spot, perhaps, his definition is genderless, emphasizing the act not the person.

Twenty-six years later, in 1952 in *Cunningham v Cunningham*, sodomy is mentioned again, and again within the context of intercrural sex between males.[689] Ogilvie Thompson J endorses Gardiner J's interpretation of sodomy: 'I do not think that there can be any doubt that Gardiner JP [listed as J in the records], correctly stated the modern law when he said in *Rex v Gough and Narroway*, ... that "in our practice sodomy has come to mean that particular kind of unnatural offence where there is penetration *per anum*"'.[690] This case endorses the gender-neutral definition. The 'unnaturalness' of the act is that it is not *per vaginam* and not that it is specifically between males.

So far there is very little to go on. In 1926 one judge coins a definition of sodomy not based on any convincing common law. It outlaws anal penetration between *anybody*. The definition is made *obiter* since this was in fact a case about intercrural sex. Some twenty-five years later another judge endorses this 'definition'. The endorsement is also *obiter* since this case is again about intercrural sex.

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[688] *R v Gough & Narroway* 1926 CPD 159, 163.
[689] *Cunningham v Cunningham* 1952 (1) SA 167 (C).
[690] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.

A year later, in 1953, there is an entrapment case concerning attempted sodomy.[691] The charge is extremely vague: '... in that ... the ... accused being a male person did wrongfully and unlawfully and against the order of nature have a venereal affair with ... R ..., and the accused did then and there carnally know the said R ..., a male person'.[692] This vague and imprecise charge resulted in a criminal conviction. Neither *Gough* nor *Cunningham* are referred to.

The male-male sodomy narrative stops here until 1973 and the courts hear cases involving male-female sodomy, except in these cases the word 'sodomy' is not used.

In 1961 a man sodomised a woman.[693] There was no conviction as anal intercourse with a woman was held to no longer be an offence under South African law. This short case of some 600 words is the first case used to justify not indicting for male-female sodomy. The term 'sodomy' gives way to 'venereal intercourse with a woman … contrary to the order of nature by inserting his penis into her anus and penetrating it'.[694]

The following extract is not a convincing justification for not bringing a charge of sodomy. Gardiner J's definition of sodomy, being genderless, should have been used

[691] *R v V* 1953 (3) SA 314 (A).
[692] *R v V* 1953 (3) SA 314 (A), 315.
[693] *R v N* 1961 (3) SA 147 (T).
[694] *R v N* 1961 (3) SA 147 (T), 147 (The judgment is in Afrikaans.)

as authority but was not. Rather than mention the *Gough* case, Marais J states, 'In South African law there is no reported incidence where a man has been condemned for sodomy in conjunction with a female person, and the indications are, as e.g. *The Crown v K and F* in 1932 EDL 71, is rather in the opposite direction; in that instance an unnatural crime was committed between a man and a woman in regards to sexual gratuitousness, although not of the nature of sodomy, and the Court came to the conclusion that in that instance no crime had been committed, as sodomy could not be used as a charge'.[695]

The story of sodomy could have taken a different turn at this stage. Speculating, if Marais J had relied on Gardiner J's view of sodomy – 'in our practice sodomy has come to mean that particular kind of unnatural offence where there is penetration '*per anum*'[696] – he would have acknowledged that the act of sodomy had been committed no matter the gender since Gardiner J's definition is genderless. Instead, he relies on *R v K & F* which is about oral sex between a male and a female. He is essentially saying that because male-female oral sex was not regarded as a crime, neither should male-female anal intercourse. He chose to align himself with a male-female case of a weaker legal basis than a male-male case where anal penetration is specifically mentioned.

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[695] *R v N* 1961 (3) SA 147 (T), 148 (approximate translation).
[696] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.

Male-female sodomy was considered a year later in 1962.[697] A man attempted to rape a woman. Because of the physical positions they were in (she was seated on him, and later he attempted to rape her from behind), he inadvertently penetrated her anus. A conviction of attempted sodomy was set aside. This was an appeal from a magistrates' court and is used as authority that male-female sodomy is not a crime. The fact that it was really a case of attempted rape is not given the foregrounding it warrants.

The attempted sodomy occurred whilst the man was trying to achieve his 'real purpose' which was to have 'normal sexual intercourse' with her.[698] The normal sexual intercourse consisted of first placing her 'on his lap and attempting intercourse in that position'.[699] The woman called a girl into the room to try and stop this. The man tried to bribe the girl away. The woman then fled to the kitchen where 'he pressed her against the wall, lifted up her dress and attempted to have intercourse with her from behind'.[700]

Despite indications of non-consent on the woman's part, there are a number of contradictory statements. The 'magistrate ... found that the complainant had not been a consenting party to intercourse of any kind',[701] and yet he had earlier used the

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[697] *R v H* 1962 (1) SA 278 (SR).
[698] *R v H* 1962 (1) SA 278 (SR), 279.
[699] *R v H* 1962 (1) SA 278 (SR), 278.
[700] *R v H* 1962 (1) SA 278 (SR), 278.
[701] *R v H* 1962 (1) SA 278 (SR), 279.

phrase 'he attempted to make love to her'[702] with the connotation of consent. A charge of attempted rape was not brought against the accused and there is no further mention of rape until the end of the case where the judge says: 'In the present case the magistrate found that the penetration *per anum* was accidentally done in the course of an attempted rape …. It is quite probable in the circumstances of this case, that the complainant did consent to normal intercourse, but that it was the unnatural intercourse which distressed her'.[703]

Once the attempted rape is sent to the background, the case then turns on these questions: '(i) Can the crime of sodomy be committed with a woman? If so, (ii) Was there the necessary *mens rea* present here to support a conviction?'[704] Young J found that as there was no *mens rea*, he did not have to answer the question whether sodomy could be committed with a woman.[705] Despite this unsatisfactory result, the case is used as authority for legalizing male-female sodomy.

A few years later, in 1968, a medical doctor testified before a parliamentary committee that heterosexual sodomy, when used as a contraceptive method, 'often seems to confuse their whole sexual approach and they afterwards prefer the rectum to the vagina for sexual purposes'. He then confirmed that gender did not matter to some

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[702] *R v H* 1962 (1) SA 278 (SR), 278.
[703] *R v H* 1962 (1) SA 278 (SR), 280.
[704] *R v H* 1962 (1) SA 278 (SR), 279.
[705] *R v H* 1962 (1) SA 278 (SR), 280 ('If a man has no intention of having intercourse *per anum*, I do not think he can be convicted of sodomy if while attempting to rape a woman he by mischance penetrates her anus'.)

men, 'Yes, they often use anybody's rectum'.[706] But through judgments such as those heard in 1961 and 1962 'anybody's rectum' became gendered.[707] Under the constitutional dispensation, judges acknowledged that there was 'different treatment accorded by the law to anal intercourse according to whether the partner was male or female',[708] where 'heterosexual intercourse *per anum* falls outside the definition of sodomy'.[709]

In 1969 another case was heard concerning male-female sodomy.[710] It is rendered defective because it was really about sex with an underage girl and anal penetration is not proved. A man had an 'unnatural affair' with a girl under the age of twelve. Although not proved, this was taken to mean sodomy. Male-female sodomy was held to be abrogated by disuse and the conviction was set aside.

The charge is vague about the sexual act but at the same time makes it explicit that the girl is under 12 years old: 'accused is charged with the crime of committing an unnatural offence, in that … [he] did wrongfully, and contrary to the order of nature, have an unnatural affair with … a female juvenile … under the age of twelve years ... being then a child of tender years, that is to say, under the age of twelve years'.[711]

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[706] Select Committee, Republic of South Africa. Report of the Parliamentary Select Committee into the *Immorality Amendment Act* (Report7-1968, p. 293).
[707] *R v N* 1961 (3) SA 147 (T); *R v H* 1962 (1) SA 278 (SR).
[708] *Constitutional Court National Coalition*, 63.
[709] *High Court National Coalition*, 109.
[710] *R v M* 1969 (1) SA 328 (R).
[711] *R v M* 1969 (1) SA 328 (R), 328.

Sodomy is not mentioned in the charge. The only time the word is mentioned is in the context of male-male sodomy.[712] However, the prosecutor does not use this word. He stated that 'the accused had had sexual intercourse with the complainant *per anum*. This was explained to the accused ... and to this charge ... he pleaded not guilty'.[713] The judgment contains nothing about proof of penetration.

The terminology used throughout the whole case is vague and studiously avoids the 'S' word: 'unnatural offence',[714] 'unnatural affair',[715] and 'unnatural intercourse of a man with a woman'.[716] The terms then used are 'such an act' and 'such acts' (twice)[717] before returning to 'unnatural intercourse of a man with a woman'.[718]

Beadle CJ's argument goes like this. Earlier Dutch writers had held that male-female unnatural intercourse was a crime. Later Dutch writers were silent on the matter and it would not be a 'cogent argument' to say that it had ceased to be a crime: 'I would hesitate, therefore, to express any firm opinion as to whether or not in Voet's day the Roman-Dutch law regarded unnatural intercourse of a man with a woman as a crime. I would prefer to approach the matter on the basis that, if it was a crime in those days,

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[712] *R v M* 1969 (1) SA 328 (R), 330.
[713] *R v M* 1969 (1) SA 328 (R), 328.
[714] *R v M* 1969 (1) SA 328 (R), 328 (in the charge and elsewhere another four times).
[715] *R v M* 1969 (1) SA 328 (R), 328 (in the charge).
[716] *R v M* 1969 (1) SA 328 (R), 329.
[717] *R v M* 1969 (1) SA 328 (R), 329.
[718] *R v M* 1969 (1) SA 328 (R), 329.

the crime has since been abrogated by disuse'.[719] He makes a choice between two legal arguments. By relying on the abrogation by disuse approach, he does not have to decide whether it is a crime. In the previous example, Young J had also been able to sidestep the issue once he had found that *mens rea* was absent.

Beadle CJ relies on *R v K and F* as authority: 'The matter is in South Africa covered by authority. In *R v K & F* [1932 EDL], the subject was exhaustively considered ... and both these learned Judges came to the conclusion that the crime had in South Africa been abrogated by disuse. See the remarks of Pittman J, at p. 74, where he stated: "... even if unnatural lewdness between man and woman of the kind in question in this particular case had been criminal as recently as the early part of last century, such conduct is no longer so, and the force of this conclusion in favour of modern-day immunity is not lessened by the apparent unwillingness of writers like van Leeuwen and van der Linden to accept the views of those earlier ones, from (which) the passages quoted have been taken"'.[720]

The judge says that 'the matter', 'the subject', and 'the crime' was exhaustively considered. It is correct that there is a comprehensive review of Dutch writers in *R v K & F*, but it ranges over all kinds of unnatural acts, including bestiality. In fact 'the subject' of *R v K & F* ('the kind in question in this particular case') was about oral sex between consenting male and female adults. The judge is using this case to support

[719] *R v M* 1969 (1) SA 328 (R), 329-330.
[720] *R v M* 1969 (1) SA 328 (R), 330.

abrogation by disuse of male-female sodomy. He states that *R v K & F* was followed in other cases concerning male-female sodomy: 'It [the ruling in *R v K & F*] has been followed in the Transvaal in *R v N* 1961 (3) SA 147 (T). In this country Young J, in *R v H* 1962 (1) SA 278 (SR), stated that the crime of sodomy in South Africa seemed to be confined to sexual intercourse between males'.[721] In fact *R v N* did not support *R v K & F* and *R v K & F* is not mentioned in *R v H*.

The reference to *R v H* indicates that Beadle CJ still has sodomy in mind. However, he then switches to intercrural sex – 'there have been numerous prosecutions in Rhodesia for what might be regarded as unnatural sexual acts committed by males upon females'.[722] The claim that he is speaking of intercrural sex is supported by the fact that he quotes Gutsche J in *R v K & F* who said 'dozens of cases every year pass through [the courts] in which the ancient and notorious native custom of metsha (perineal connection or coitus inter femora), practised between males and females, forms a prominent feature'.[723]

Beadle CJ conflates intercrural sex and anal intercourse whereas other judges go to lengths to separate the two.[724] In one case, for example, Ogilvie Thompson J granted judicial separation instead of divorce on the grounds that the defendant had

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[721] *R v M* 1969 (1) SA 328 (R), 330.
[722] *R v M* 1969 (1) SA 328 (R), 330.
[723] *R v M* 1969 (1) SA 328 (R), 330.
[724] For example, 'There is no suggestion in his evidence that the accused's penis was anywhere in the region of the complainant's anus or that any attempt was made to penetrate or direct it towards that orifice'. (*S v M* 1977 (2) SA 357 (TkS), 357)

participated in intercrural sex and not anal sex – 'It would be very difficult to determine exactly where to draw the line if unnatural sexual offences falling short of penetration were to be recognized as a ground for divorce. Penetration is required to establish adultery, and in my judgment that same criterion should be applied when in a divorce action the sexual infidelity complained of takes the form of an unnatural offence'.[725]

After stating that male-female sodomy has been abrogated by disuse, the next part of his argument focuses on terminology. He uses *crimen injuria* as an analogy. Whereas *crimen injuria* was originally a generic crime, he says, over time specific *injuria* came to be known by specific names. In modern times 'a charge which describes one of these specific injuries as the [generic] crime of *criminal injuria* is bad'.[726] Based on this reasoning, he is 'on firm ground' if he follows *R v K & F* – 'I accordingly express the view that an unnatural offence consisting of an unnatural sexual act committed by a male upon a female is not the crime of an unnatural offence in Rhodesia to-day'.[727]

The *crimen injuria* analogy fails in that although specific names were given to specific *injuria*, this does not follow through to sodomy. It is still called by its vague terms 'unnatural offence' and 'unnatural sexual act' and there is no support for making it gender-specific. An unnatural sexual act does not necessarily mean sodomy,

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[725] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 171.
[726] *R v M* 1969 (1) SA 328 (R), 331.
[727] *R v M* 1969 (1) SA 328 (R), 331.

it could mean any other type of intercourse other than vaginal sex.

Beadle CJ also manipulates the girl's age because it inconveniently mars the point he wants to make that male-female sodomy was not illegal. The charge clearly refers to her young age: 'an African female juvenile ... being then a child of tender years, that is to say, under the age of twelve years'.[728] However, when Beadle CJ refers to the charge, he does not refer to her as a juvenile, but as a 'female': 'as the charge in this case clearly alleged that the act was committed by a male upon a female'.[729] In fact, what the charge clearly alleges is that she was under 12 years of age. Elsewhere in Beadle CJ's judgment he refers to her as a female: 'it was alleged that the unnatural offence was committed by a male upon a female'.[730] The holding makes no mention of her age or lack of consent. It now carries forward stripped of these facts: 'Held, as an unnatural sexual act committed on a male by a female was not the crime of an unnatural offence to-day, that the conviction could not stand'.[731]

By trading up the description to *female*, Beadle CJ makes this female equal and comparable to the female in *R v K and F*, except that in that case, the female is a consenting adult, 'a woman ... with the woman's consent'.[732] Having attained this parity, he can now drive home his point: 'I come to the conclusion that I will be on

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[728] *R v M* 1969 (1) SA 328 (R), 328.
[729] *R v M* 1969 (1) SA 328 (R), 331.
[730] *R v M* 1969 (1) SA 328 (R), 328.
[731] *R v M* 1969 (1) SA 328 (R), 328.
[732] *R v K & F* 1932 EDL, 71.

firm ground if I follow the decision of ... *R v K & F* [1932 EDL]. I accordingly express the view that an unnatural offence consisting of an unnatural sexual act committed by a male upon a female is not the crime of an unnatural offence'.[733] It is the other judge, Greenfield J, who draws attention to the girl's age and how 'being a child of tender years was deemed incapable of consenting'.[734] This observation did not affect the outcome of the case, however.

The sodomy narrative now returns to males. In 1973 a man had 'a venereal affair against the order of nature' with another man.[735] He was sentenced to fifteen months' imprisonment with hard labour, partially suspended provided that he undergo psychiatric treatment and not commit a similar offence. Sodomy is not specified in the charge sheet but has to be inferred. The flynote boldly states sodomy – 'Criminal law – Sodomy'[736] – and the headnote interprets a venereal affair as sodomy – 'The appellant had pleaded guilty to and been convicted of having a venereal affair against the order of nature .... The magistrate's court had found that the complainant had not consented to this act, i.e. an act of sodomy'.[737]

The flynote and headnote are editorial embellishments. The charge itself only

[733] *R v M* 1969 (1) SA 328 (R), 331.
[734] *R v M* 1969 (1) SA 328 (R), 333.
[735] *S v K* 1973 (1) SA 87 (RA).
[736] *S v K* 1973 (1) SA 87 (RA), 87.
[737] *S v K* 1973 (1) SA 87 (RA), 87.

mentions ‘having a venereal affair against the order of nature, with a male’.[738] ‘Venereal’ is a general term associated with sexual desire or intercourse. The judgment does not contain ‘penetrate’ or ‘penetration’, and nowhere is it proved that penetration took place. Despite this he received fifteen months hard labour. According to the facts as per the judgment, there was an act of sodomy – ‘He then told the complainant to kneel down and remove his trousers .... The appellant then removed his penis and committed sodomy on the complainant’.[739] When considering sentence, the judge refers to three (unreported) cases which were about sodomy.[740] However, when he returns to the present case, he calls the act an ‘unnatural offence’.[741]

In 1977 another case about intercrural sex between men mentions sodomy.[742] The charge was made in terms of a statute which required penetration. Since this did not occur, the conviction was set aside. The ‘act … involves the entry of the male organ into some orifice in the body of a man, woman or animal, the words “against the order of nature” however excluding from the operation of the section, entry into a woman’s vagina. The placing of a man’s penis between the thighs of a woman or of another man cannot constitute penetration within the ordinary meaning of the latter word’.[743] ‘There is no suggestion in his evidence that the accused’s penis was anywhere in the region of the complainant’s anus or that any attempt was made to penetrate or direct it

[738] *S v K* 1973 (1) SA 87 (RA), 87.
[739] *S v K* 1973 (1) SA 87 (RA), 88.
[740] *S v K* 1973 (1) SA 87 (RA), 89.
[741] *S v K* 1973 (1) SA 87 (RA), 90.
[742] *S v M* 1977 (2) SA 357 (TkS).
[743] *S v M* 1977 (2) SA 357 (TkS), 358.

towards that orifice'.[744] This case highlights the importance of the actual site of penetration and reinforces the gender-neutral act not the person.

In 1979 a man raped and sodomised a young girl.[745] On review from a magistrate's court, the sodomy charge was changed to indecent assault because sodomy only applied to male-male anal intercourse. This case was definitely about anal penetration – 'in addition to raping the complainant, a young African girl, the appellant had also forcibly effected penetration of the complainant *per anum*'.[746] Yet the flynote telegraphically states that this is not sodomy: 'Male having intercourse *per anum* with a female - Such not sodomy ... - Conviction of indecent assault substituted in circumstances'.[747] The judge does not reveal that this charge was part of a rape case, nor that the accused 'forcibly effected penetration of the complainant *per anum*'. The fact that the complainant was a young girl who could not be deemed to give her consent anyway is also ignored.

Why is penetration by a penis of an anus not sodomy? Why is it a lesser charge of indecent assault? Because the anus is gendered female. This is a case about terminology, sodomy for male-male anal intercourse, and indecent assault for male-female anal intercourse. This is reinforced given that it was only the conviction and not the sentence which was challenged. That the term 'sodomy' had been used

[744] *S v M* 1977 (2) SA 357 (TkS), 357.
[745] *S v M* 1979 (2) SA 406 (RA).
[746] *S v M* 1979 (2) SA 406 (RA), 406.
[747] *S v M* 1979 (2) SA 406 (RA), 406.

worried the magistrate to the extent that 'after the case was concluded he had consulted certain authorities and that from those authorities it appeared that sodomy can only be committed by males and not by a male on a female. He asked accordingly that the conviction for sodomy be set aside'.[748]

The judge in the present case (*S v M*) also refers to *R v M* 1969 (1) SA 328 (R) but does not mention Greenfield J's concern over how the nomenclature used to describe a crime led to a conviction being set aside. In that 1969 case Greenfield J says, 'The point which disturbs me, however, is the state of the law, which apparently is that, if the prosecutor delves into the past and uses to describe a crime nomenclature which has become obsolete, the effect is to invalidate the proceedings'.[749]

In *R v M* – a male-female sodomy case by any other name – the concern was that the charge had been framed as an 'unnatural offence', whereas it should have been framed as 'indecent assault'. In fact, it was this very concern which led to the *Criminal Procedure and Evidence Amendment Act* 37 of 1975 (of Rhodesia) which inserted the words 'whether or not it discloses an offence'. Davies JA could now use that amendment to call male-female sodomy 'indecent assault' in the present case – 'That section permits a court to correct any error in a charge where there is no prejudice to the accused and this power can now, as pointed out, be exercised even

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[748] *S v M* 1979 (2) SA 406 (RA), 406.
[749] *R v M* 1969 (1) SA 328 (R), 333.

though the charge as originally framed does not disclose an offence'.[750] The 'error' in this case was using 'sodomy' instead of 'indecent assault' when it came to male-female anal intercourse.

Relying on *R v M,* Davies JA says that he hopes that the dissociation with sodomy will become the settled law: 'I consider, with respect, that the view expressed by Beadle CJ is correct and that it should now be regarded as settled law in this country that the crime of sodomy is not committed when a male has intercourse *per anum* with a female'.[751] The 1970s see the last of the male-female cases.

But his wish for it to be 'settled law' would be unsettled twenty years later. Things come full circle when Sachs J once again emphasizes the act, not the person: 'what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? …. In the case of male homosexuality … the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony'.[752]

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[750] *S v M* 1979 (2) SA 406 (RA), 407.
[751] *S v M* 1979 (2) SA 406 (RA), 408.
[752] *Constitutional Court National Coalition,* 56.

In 1984 a charge of sodomy was laid but not upheld because no penetration took place.[753] Like the 1952 *Cunningham* case, this judge is also careful to specify when penetration takes place. He mentions the difference between the buttocks and anus with almost medical precision: 'The act was performed by the accused by directing his penis between the buttocks of the complainant but there was no direct evidence of penetration *per anum* nor of any attempt at penetration …. On these facts the conduct of the accused is consistent with seeking gratification by some practice not involving penetration'.[754]

The final two cases involving male sodomy were heard in 1995 and 1997 in terms of the South African constitution.

In 1995 a man in his twenties was convicted of sodomy which took place with another consenting male adult.[755] He was sentenced to twelve months' imprisonment, the whole of which was conditionally suspended. On review before Ackermann J, the conviction was confirmed but the sentence was replaced with one of a caution and discharge. This is the first case that deals with sodomy in a constitutional discourse, namely the right not to be discriminated against on the grounds of sexual orientation. The charge of sodomy still had to stand at that stage but Ackermann J exercised

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[753] *S v M* 1984 (4) SA 111 (T).
[754] *S v M* 1984 (4) SA 111 (T), 111-112.
[755] *S v H* 1995 (1) SA 120 (C).

discretion with the sentence.

The second case, which occurred in 1997, is not a 'typical gay' situation like the above case.[756] This was an act of sodomy between two prison inmates awaiting trial. We are told that the one man was unmarried with two children. He had completed standard four and was a bricklayer currently unemployed. Even though this was not the ideal case in which to attack the sodomy laws, the time was ripe and it was therefore pressed into service. He was convicted by a magistrate on a charge of sodomy and sentenced to twelve months' imprisonment suspended for three years. On review, the conviction and sentence were set aside by Farlam J. The 1996 constitution states that judges may take into account foreign law. In this case of some 16,000 words, Farlam J devotes almost seventy-five percent to direct quotations from foreign law. Further quotations from articles by Edwin Cameron, and extracts from common law take this up to eighty-six percent of the judgment.

The history of sodomy, as far as it occurs in the *SA Law Reports*, ends in the late 1990s with the two *National Coalition* cases.[757] These cases were brought to challenge common law sodomy which criminalized anal intercourse between men. To this extent it was declared unconstitutional.

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[756] *S v Kampher* 1997 (4) SA 460 (C).
[757] *High Court National Coalition*; *Constitutional Court National Coalition*.

Other 'unnatural acts'

Cases heard in connection with 'unnatural acts' include intercrural sex and masturbation. These two sexual acts also reinforces that the person, and not the act, was being punished. A certain sexual act, called intercrural sex (situated or occurring between the legs), occurs when a male places his penis between the thighs of a male or a female and achieves orgasm by friction. This particular term will be used although it is not used in the corpus where it is referred to as 'metsha', 'perineal connection' or 'coitus inter femora'.[758] An examination of the applicable cases follows.

The first instance occurred when two men were found guilty of an unnatural offence, specifically intercrural sex with another male. The court held that this act, when between two males, was a crime. The 'accused [was] convicted ... with "committing an unnatural offence" .... in that [he] did wrongfully and unlawfully and against the order of nature have a venereal affair with one T, to wit, did insert his penis between the thighs of the said T and move it backwards and forwards until he ... had an emission of semen'.[759]

Gardiner J specifically distinguishes this act from sodomy – 'there was no penetration *per anum* nor any attempt at penetration, and therefore no question arises as to the

[758] *R v K & F* 1932 EDL 71, 75.
[759] *R v Gough & Narroway* 1926 CPD, 161.

offence of sodomy'.[760] He then considers whether the act committed by the men was a crime.[761] After citing various common law authorities Gardiner J concludes, 'there can be no reason for exempting from penalty the acts set forth in the charge-sheet in the present case …. Is there then any reason to think that the commission of the acts charged has ceased to be an offence? There has been no change in public opinion, which would cause such conduct to be regarded as otherwise than abhorrent'.[762] It is not clear from this case whether the act of intercrural sex is a crime, or whether it is a crime because it is between two men. On face value it seems to be genderless because the authorities he cites refer also to male-female sexual relations.

Six years later, in 1932, male-female intercrural sex is condoned. This case is actually about male-female oral sex but intercrural sex is referred to.[763] It is specifically within a black male / black female context and is referred to by its African name, metsha.[764] Thus, intercrural sex is made race-specific and gender-specific. It is 'their' practice and the thighs are gendered female: 'their practice of metsha, in which sexual gratification is afforded as a result of the male organ being inserted between the female's thighs'.[765] Pittman J regarded intercrural sex between blacks as an everyday occurrence[766] which is non-indictable.[767] If male-female intercrural sex is not a crime,

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[760] *R v Gough & Narroway* 1926 CPD, 161.
[761] *R v Gough & Narroway* 1926 CPD, 161.
[762] *R v Gough & Narroway* 1926 CPD, 163.
[763] *R v K & F* 1932 EDL 71.
[764] *R v K & F* 1932 EDL 71, 75 ('the ancient and notorious native custom of metsha').
[765] *R v K & F* 1932 EDL 71, 73-74.
[766] *R v K & F* 1932 EDL 71, 73 ('almost daily experience in our criminal courts').

but male-male intercrural sex is, then it is the person and not the act which is being punished.

The case in which metsha is discussed is actually about consensual oral sex between a white male and a white female.[768] The judge referred to the custom of metsha in his judgment because he regarded both types of sexual acts as being the same – achieved by friction, whether it be by mouth or thigh: 'It is true that the present case is different from one of metsha, but the difference is not of such a character, that we should go out of our way to make it the basis of a distinction between criminality and immunity'.[769]

By introducing the African custom of metsha to justify male-female oral sex, Pittman J is in effect saying that it does not matter what race the parties are; both acts are legal provided it is between a male and female. After relying (in the *Gough* case) on the common law (which is not gender-specific) to make this act criminal between men, in this case (heard only six years later) the common law is again used, but this time to condone the act: 'The passages quoted seem sufficiently to show that, although under the earlier Roman-Dutch law the conduct here under investigation would have

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[767] *R v K & F* 1932 EDL 71, 73 & 74 ('such conduct is not in these days indictable', 'definitely outside the range of criminal responsibility').
[768] The case does not specifically mention their race, but the oral sex took place in 'a private sitting-room at an hotel in Port Elizabeth' (*R v K & F* 1932 EDL 71, 71-72). It is unlikely that blacks, in 1932, would have been in the hotel.
[769] *R v K & F* 1932 EDL 71, 74.

constituted a crime, still towards the end of the eighteenth century at any rate a less comprehensive view was taken of the species of unnatural vice, that were, proper for prosecution'.[770]

Apart from the selective reliance on common law, intercrural sex between males and females is 'definitely outside the range of criminal responsibility' when it is being referred to as metsha, something which blacks do and which is not prosecuted under white law. However, this race-justified exemption is then applied to white males and females by way of making oral sex analogous to intercrural sex. The only conclusion is that prosecuting male-male intercrural sex was definitely based on the person and not the act. Common law was used as justification to both prosecute same-sex acts and exempt male-female acts.

The next time intercrural sex is mentioned in a judgment is in the *Cunningham* case in 1952 where it is between two men.[771] Instead of being the 'generally accepted and relatively innocuous'[772] act which males and females engage in, because it is between men, it is 'sexually perverted and depraved'.[773] Ogilvie Thompson J also refers to it as 'some erotic act', perhaps to avoid using the term metsha with its crime-free connotation.[774]

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[770] *R v K & F* 1932 EDL 71, 73.
[771] *Cunningham v Cunningham* 1952 (1) SA 167 (C).
[772] *S v M* 1977 (2) SA 357 (TkS), 358.
[773] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 171.
[774] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.

Cunningham is compared to another case involving male-male intercrural sex, *S v S*, where the use of 'merely' and 'going through the motions' suggests that intercrural sex is not 'real' sex: 'he was ... seen ... to be going through the motions of sexual intercourse, … the appellant merely inserted his penis between his legs'.[775] This description contrasts to Ogilvie Thomson J's one of 'sexually perverted and depraved'.[776]

In both these cases race is introduced by the judges. In both cases the one person is black and the other white. In *S v S* it was the magistrate who introduced race into the discourse. The review judge comments – 'the fact that the appellant a White person consorted with a Bantu youth aggravates the immoral or indecent act he committed with such youth', and it seems clear from his [the magistrate's] judgment that this was the main reason why he declined to give effect to the request by the appellant's counsel that a wholly suspended sentence should be imposed'.[777] According to the judge, however, 'the race of the victim of the offence is quite irrelevant'.[778]

Despite what the judge says here about race being irrelevant, it is specifically foregrounded in the *Cunningham* case. Two male miners, one white and married, one black, had intercrural sex whilst down a mine. Cunningham's wife sought a divorce

[775] *S v S* 1965 (4) SA 405 (N), 406.
[776] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 171.
[777] *S v S* 1965 (4) SA 405 (N), 407.
[778] *S v S* 1965 (4) SA 405 (N), 408.

because of this. The white man is referred to as a 'European' and as the 'defendant'. The black man is referred to as 'an adult male native' and 'a native subordinate'.[779] The parts of the black man's body are specifically referred to by race, the 'thighs of the native'.[780] Whereas the white man is referred to as the defendant, again the race of the other man is mentioned: 'the defendant neither penetrated, nor made any attempt to penetrate, the native'.[781] Referring to the black miner as a subordinate introduces a hierarchy of power and authority based on race. This is made explicit in that intercrural sex 'was not only sexually perverted and depraved, but it was all the more shameful because committed by a European upon a native subordinate'.[782]

Yet when talking about the act within the discourse of marriage, the black 'native', male miner is referred to as a race- and gender-neutral 'partner': 'the husband has committed an unnatural sexual act with a partner'.[783] This shows how much latitude the judge has when describing the parties.

In 1977 a case was heard concerning two males who had intercrural sex.[784] In this example I again emphasize race but this time not because it was first raised by the judges. In this case race is only introduced by implication where a case involving

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[779] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 167 & 171.
[780] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 168.
[781] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 168.
[782] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 171.
[783] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 170.
[784] *S v M* 1977 (2) SA 357 (TkS), 357 ('whilst the said KJ was asleep force his penis between the thighs of KJ and discharged').

male intercrural sex between whites is used to condone the same act between blacks.

The charge was made in terms of a statute which required penetration. Since this did not occur, the conviction was set aside. The charge was made under The Transkei Penal Code of 1886 which read, 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment .... The offence is complete upon penetration'.[785]

Significantly, this is the only case that invokes this particular part of the code, and it happened to be between two males.[786] A statute dating back to 1886 invoked in 1977 suggests gender bias. This suggestion is reinforced by comments made forty-five years earlier in *R v K & F* where intercrural sex in a male-female context is referred to as an 'almost daily experience in our criminal courts …. which so frequently obtrudes itself in the actual course of criminal trials'.[787]

Munnick CJ specifically introduces the *Gough* case into his judgment to rule that intercrural sex is not sodomy: 'In *R v Gough and Narroway* 1926 CPD 159, the [Court] ... held that a charge sheet wherein it was alleged that one of the accused, a male, had "committed an unnatural offence in that he did wrongfully and unlawfully and against the order of nature have a venereal affair with one T to wit did insert his

[785] *S v M* 1977 (2) SA 357 (TkS), 357.
[786] The Transkei Penal Code is referred to in two other cases involving forgery and damage to property.
[787] R v K & F 1932 EDL 71, 73 & 74.

penis between the thighs of the said T and move it backwards and forwards until he, the said N, had an emission of semen" disclosed an offence, although not amounting to sodomy in the accepted sense of that term'.[788]

By introducing *Gough*, the judge is acknowledging that sodomy is not the issue. However, at the same time he is acknowledging, by implication, that race is not an issue because the present case is about black males in rural Transkei whereas *Gough* is about white males in suburban Cape Town.[789] Having established that the act is not sodomy, the judge quotes, *inter alia*, from *R v K and F*, a case referring to the African custom of metsha. The balance of his statement aligns male-male intercrural sex with its female counterpart, and makes Pittman J's reference to *female* thighs now seem strange: 'one must assume that the lawgiver was acquainted with the general prevalence in the Transkei of the practice of Metsha in which, as Pittman J, put it in R v K & F …, "sexual gratification is afforded as the result of the male organ being inserted between the female's thighs" and it cannot be contended with any justification that in a penal code enacted especially for the "Transkeian Territories" it was intended to legislate against a generally accepted and relatively innocuous custom extant among the peoples of those territories. This, since the section refers to both men and women, affords further evidence of the fact that the prohibition was against the penetration of an orifice, not against the placing of the male organ between the

[788] *S v M* 1977 (2) SA 357 (TkS), 357.
[789] *S v M* 1977 (2) SA 357 (TkS), 357 ('a Bantu youth').

legs of another, be it male, female or animal'.[790]

Munnick CJ reasons in the following way. Since the writers of the penal code must have known about the custom of metsha, the assumption is that the code must have been introduced to forbid anal penetration of any male, female or animal. The judge makes the bold statement that male-male intercrural sex is not contrary to the penal code. He confines his observations to Transkei which was almost wholly black. His opinion de-genders intercrural sex but confines it to a particular race. This is accepted since he is ruling only in terms of a penal code applying only to blacks. However, he has also introduced *Gough* as a supporting case which de-races his argument. Yet in 1932 Pitman J had referred to this 'black' custom to support his view that male-female oral sex should be decriminalized.[791] He had no problem in de-racing the act. Between these two cases, therefore, intercrural sex is de-gendered and de-raced. Equalizing race and gender, therefore, male-male acts similar to those performed by male-females (but falling short of male-male sodomy) should have been legally allowable since 1977.

All the cases dealing with masturbation are between males only. In the mid-1920s, two men masturbating was called a crime by Gardiner JP.[792] He purports to speak on

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[790] *S v M* 1977 (2) SA 357 (TkS), 358 (italics added).
[791] In *R v K & F* 1932 EDL which probably involved non-blacks: the act took place 'in a private sitting-room at an hotel in Port Elizabeth' in 1932 (pp. 71-72).
[792] *R v Curtis* 1926 CPD 385, 386 (This Court had occasion recently … to discuss very fully this crime').

behalf of Dutch-writers-past when he says, ‘masturbation was considered by some Roman-Dutch authorities as an unnatural offence. Other writers, however, thought otherwise, but their reason for holding that masturbation was not a crime was that an unnatural offence required … an active party and a passive party. Where a male performed this disgusting act upon himself, his conduct, according to the latter view, would not be a crime, but *I think that all the authorities would agree* that, when the act was performed by one person upon another, an offence was committed’.[793]

Gardiner JP equates masturbation with intercrural sex, ‘there can be no distinction between the case where sexual gratification is obtained by friction between the legs of another person, and the case where it is obtained by friction against another’s hand’.[794] He is not gender-specific here which means that male-female masturbation and intercrural sex should also have been a crime. However, the judges in *R v K & F* to be heard six years later would disagree, making only male-male sex acts a criminal offence.[795]

Forty years on from *Curtis*, in 1969, another case concerning masturbation came to court.[796] Counsel for the defendant argued that whilst ‘the conduct disclosed by the facts might well have been regarded by the old Roman-Dutch writers as an unnatural

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[793] *R v Curtis* 1926 CPD 385, 386 (italics added).
[794] *R v Curtis* 1926 CPD 385, 386.
[795] *R v K & F* 1932 EDL 71.
[796] *S v V* 1967 (2) SA 17 (E).

offence, it should not be and is not regarded so to-day'.[797] Counsel referred to two cases[798] where this argument had been used successfully, but Jennett JP disagreed saying that that was because in 'those cases the Court was concerned with conduct committed on a female and it seems to me that that was the basis on which those decisions were founded'.[799] Despite the *Curtis* case not being gender-specific, the judge concluded, 'I see no reason to think that where conduct … occurs between two males the present outlook has developed to the stage of regarding such conduct as not constituting an unnatural offence'.[800]

By the 1990s, male masturbation was not only no longer disgusting, the Appellate Division regarded it as no big deal, even when performed by a man and a 15 year-old boy. The man was sentenced to correctional supervision, and Nesdadt AJ regarded as a mitigating factor the fact that the other party was 'not a defenceless child but a boy of 15 for whom masturbation was probably no shocking revelation'.[801]

Section 20A Sexual Offences Act

Background

The sexual acts of anal intercourse, intercrural sex and masturbation were common law acts. Section 20A of the *Sexual Offences Act* was the only attempt at legislating

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[797] *S v V* 1967 (2) SA 17 (E), 17-18.
[798] *R v K & F* 1932 EDL 71 and *R v N* 1961 (3) SA 147 (T).
[799] *S v V* 1967 (2) SA 17 (E), 18.
[800] *S v V* 1967 (2) SA 17 (E), 18.
[801] *S v R* 1993 (1) SA 476 (A), 479.

against homosexuality and it was an embarrassing failure. The background to its promulgation is as follows.

In January 1966, the police raided a house in the affluent suburb of Forest Town, Johannesburg where, to their 'disgust and repulsion', they found a party in progress, 'the like of which has never been seen in the Republic of South Africa'. There were approximately 300 men present who were all 'obviously homosexuals .... Males were dancing with males to the strains of music, kissing and cuddling each other in the most vulgar fashion imaginable. They also paired off and continued their love-making in the garden of the residence and in motor cars in the streets, engaging in the most indecent acts imaginable with each other'.[802]

The South African Police immediately sent a circular to all divisional commissioners warning that it appeared that homosexuality and gross indecency 'is being practised between male persons throughout the country and that offenders are now pursuing an organised *modus operandi*'. The circular also recommended that informers be used to infiltrate 'queer parties' and that effective action be taken.[803] The police noted that the events 'filled even hardened members of the Criminal Investigation Department with disgust and revulsion'. This description portrays same-sex activity as being amongst

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[802] Gevisser, M. & Cameron, E., *Defiant desire*, p. 101, quoting from the Report of the Parliamentary Select Committee into the *Immorality Amendment Act* (Report 7-1968), footnotes omitted.

[803] Gevisser, M. & Cameron, E., *Defiant desire*, p. 101, quoting from the Report of the Parliamentary Select Committee into the *Immorality Amendment Act* (Report 7-1968), footnotes omitted.

the worst activity police officers had ever had to deal with. The police regarded this kind of activity as 'constituting a threat to the moral basis of the populace'. Within weeks of the raid, police wrote to the Minister of Justice complaining that 'stringent measures cannot be taken against homosexuals in terms of existing legislation'.[804]

The 1966 raid was the largest, most publicised the police had ever attempted. Glen Retief offers a possible explanation, 'led by Prime Minister Verwoerd's clampdown on the liberation movements and his formalisation of apartheid, the South African authorities were consolidating Afrikaner "Christian National" control over the country, expelling from the laager anything that was deemed threatening to white civilisation'.[805]

The raid led to a proposed amendment to the *Sexual Offences Act* which sought to make male and female homosexuality an offence punishable by compulsory imprisonment of up to three years. This would have had the effect not only of bringing lesbians into the scope of the law, but of making homosexuality itself statutorily illegal, whereas previously, only public male homosexual acts had been regulated by statute.[806] The proposed amendment was considered so harsh that it was

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[804] Botha, K. & Cameron, E., *South Africa*, quoting from the Report of the Parliamentary Select Committee into the Immorality Amendment Act (Report 7-1968), footnotes omitted.
[805] Glen Retief, 'Keeping Sodom out of the laager', in Gevisser, M. & Cameron, E., *Defiant desire*.
[806] Gevisser, M. & Cameron, E., *Defiant desire*, p. 31.

referred to a Parliamentary Select Committee which reported back in 1968.[807] Homosexuals formed the Homosexual Law Reform Fund and made a submission to this committee, after which it disbanded.[808] As a result of this committee's findings, the wording of the amendment was modified.

Wording of S20A

Section 20A was inserted into the *Sexual Offences Act* 23 of 1957 in 1969.[809] It remains legislation but has been declared inconsistent with the constitution.[810]

It reads as follows:

(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.

(2) For the purposes of ss (1) 'a party' means any occasion where more than two persons are present.

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[807] Select Committee, Republic of South Africa. (1968). Report of the Parliamentary Select Committee into the *Immorality Amendment Act* (Report 7-1968).

[808] Anecdotal evidence is that funds left over were used in the *National Coalition* cases.

[809] By s3 of Act 57 of 1969.

[810] The section is invalid to the extent set out in the Constitutional Court Order published under Government Notice No 1354 in Government Gazette 19349 of 23 October 1998 and Government Notice No R588 in Government Gazette 21266 of 15 June 2000.

Commentary on S20A

An article written in 1970, entitled 'The Third Sex', criticized section 20A.[811] Despite its unflattering title, this is the only criticism at the time. Barend van Niekerk called this provision 'an unfortunate throwback to times when legal concepts were crude and criminal law steeped in the taboos of a superstitious age. It is also in sharp contrast to criminal policy elsewhere in the civilized world …. Because [it] is so widely framed, because it contains a serious inroad upon an individual's private sphere, and because finally it seeks to punish acts which are progressively regarded by medical science and enlightened legal systems as symptoms of an illness and not of criminal conduct, our courts would serve justice well if the narrowest possible meaning is put on it'.[812]

Cases heard in terms of S20A

Only two cases were heard in terms of s20A and neither led to convictions. The first case was brought fourteen years after its enactment, an irony in itself given the haste in which the amendment was pushed through.

In the first case, two men were charged under s20A of the *Sexual Offences Act*. They were convicted and sentenced to R200 or two months' imprisonment with a further four months' imprisonment suspended for five years on certain conditions. The conviction was later dropped because the charge had not included the phrase 'at a

[811] Van Niekerk, B., *The third sex*, p. 87. Not mentioned anywhere in the article, the term 'the third sex' was coined by a German philosopher Ulrich whose term was Uranian (Urning in German) meaning a woman's mind in a man's body.
[812] Van Niekerk, B., *The third sex*, pp. 88-89.

party'.

An extract from the questions put to the men, and their answers reveals confusion surrounding the interpretation of 'at a party':

[The court] 'There were a number of people there and is it a condition that they pair off two-two in a cubicle?

Accused No 1: Yes, depending on their sexual preferences, yes.

By the court: Were there more than the two of you at this place?

Accused No 2: I really could not tell you how many were there to be honest.

It is clear from this line of questioning and the replies, that neither accused was aware of the significance of the questions as to the number of persons present. Both assumed that the questions related to the number of persons who were present in the building, not in the cubicle'.[813]

It was not only the accused who did not understand the implications. It was the magistrate who decided to drop the charge but only after the men had pleaded guilty, and even then, he did not himself understand the meaning of 'a party'. The 'magistrate convicted the accused, on the basis of the presence of other persons, not in the cubicle, but in the clinic itself'.[814]

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[813] *S v C* 1983 (4) SA 361 (T), 363-364.
[814] *S v C* 1983 (4) SA 361 (T), 363.

In the second case, two men were engaged, in private, in an unascertained sexual activity. When a policeman entered the area, they stopped and ran. It was held that this was not 'a party' in terms of s20A of the *Sexual Offences Act* and the conviction was set aside.

Schabort J's reasoning about who is deemed present at the 'party' is confusing. He favours a definition of 'present' that includes a mental element: 'in my view … the presence of persons was intended to have a mental element. The commission of acts of this kind in the physical presence of persons who are asleep or for some other reason not aware of them (e.g. owing to darkness or blindness or deafness)'[815] would not meet this mental requirement. According to Schabort J's reasoning, a deaf person who sees two people engaged in any activity would not be mentally 'there', nor would a blind person who heard the activity.

He then contradicts himself a few lines later by saying that 'proper perception remains feasible whether by eye or by ear',[816] and reinforces this when he says, 'as a matter of "presence" under the section, the reason why people may happen to find themselves within eyeshot or earshot of conduct as contemplated in the section, can make no difference'.[817] How can a deaf or blind person not be present mentally? A bizarre presupposition would therefore be that deaf or blind people are not mentally present

[815] *S v C* 1987 (2) SA 76 (W), 79.
[816] *S v C* 1987 (2) SA 76 (W), 80.
[817] *S v C* 1987 (2) SA 76 (W), 81.

when they are having sex; they are in the same category as those who are asleep.

In the *National Coalition cases* this section was challenged and declared unconstitutional. Two examples from these cases lead me to conclude that the intention behind this section was never understood.

When discussing s20A in the *High Court National Coalition* case, Heher J makes the strange observation that, as worded, the section could equally apply to heterosexual men. The section is 'wide enough to strike at conduct by heterosexual men in the presence of women only or in the presence of other heterosexual men'[818] but he concludes that 'the likelihood is that it was aimed at conduct directed by and at homosexuals'.[819] Why would heterosexual men perform with each other (either in front of women or heterosexual men) acts calculated to stimulate sexual passion or give sexual gratification?

His hypothetical illustration as to how the section might apply to heterosexual men casts doubt on his grasp of the section. In his example, the act that would fall foul of s20A is 'the sort of stupid romp that sometimes results from excessive indulgence in liquor by sportsmen'.[820] S20A forbids more than two males to engage in an act which is calculated to stimulate sexual passion or to give sexual gratification. This means

[818] *High Court National Coalition*, 110.
[819] *High Court National Coalition*, 110.
[820] *High Court National Coalition*, 110.

that the 'romp' would have to stimulate sexual passion or gratification. Seventy years earlier, a man witnessed two men get into bed 'and that they skylarked there'.[821] Skylark is a quaint term meaning to romp and indulge in horseplay, much like Heher J's sportsmen. Back in 1926, to 'skylark' suggested nothing sexual but in fact it was used as a euphemism for an unspecified sexual act between men that resulted in eight months imprisonment with hard labour.

To emphasize their heterosexuality, the men are 'sportsmen'. To condone their antics, they are drunk. Nonetheless, unless Heher J's sportsmen have a fetish for towels, they had to be doing something more than towel-flicking in the locker-room. He then goes on to say that 'the target of the section is plainly men with homosexual tendencies albeit that the wording is wide enough to embrace heterosexuals'.[822] The presupposition here is that the heterosexuals embraced also have homosexual tendencies, something many lads down at the sports club would be appalled to hear.

Ackermann J also tried to illustrate the absurdity of s20A in the *Constitutional Court National Coalition* case, but his example only conjures up an unusual cocktail party. It starts in the manner of a joke: 'A gay couple attend a social gathering attended by gay, lesbian and heterosexual couples. The gay man, in the presence of the other guests, kisses his gay partner on the mouth in a way "calculated to stimulate" both his and his partner's "sexual passion" and to give both "sexual gratification". They do no more. A

[821] *R v Curtis* 1926 CPD 385, 388.
[822] *High Court National Coalition*, 127.

lesbian and a heterosexual couple do exactly the same. The gay couple are guilty of an offence. The lesbian and heterosexual couples not'.[823] This is a contrived example. Even in 1970 Barend van Niekerk did not envisage 'tongue-kissing' as infringing S20A.[824] To use the term 'social gathering' suggests something like a cocktail function. It would be unlikely to find a couple at such an event, no matter of what sexual orientation, tongue-kissing each other intent on sexual arousal. When he says 'They do no more', what more need they do?

Male homosexuality associated with sexual abuse of boys

Introduction

Homosexual men are often accused of sexually interfering with boys. Section 14 of the *Sexual Offences Act* was enacted to protect all children against sexual abuse no matter from what quarter. This legislation was not always used, however, with some cases being brought under common law, under *crimen injuria* for example. This section looks at all the judgments concerning age, whether in terms of the Act or common law, and concludes that the outcomes do not support this man-boy abuse view. Again, it is the person rather than the act which is being targeted.

I begin with cases heard either before the *Sexual Offences Act* became law, or with cases heard in Rhodesia (which were reported in the *SALR*). Section 14 is then

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[823] *Constitutional Court National Coalition*, 43.

[824] Van Niekerk, B., *The third sex*, p. 89 – 'Acts such as 'tongue-kissing' … should not, it is submitted, fall within the scope of the prohibition, although such acts, as well as many others, can marginally be regarded as calculated to stimulate sexual passion'.

considered – the wording, background to the increase in age of consent for males, and cases heard in terms of s14. This is followed by two cases which should have been heard in terms of s14.

Background to changes to section 14

When the police raid in Forest Town led to amendments to the *Sexual Offences Act*, the age of consent was also reviewed. Although there were no underage males at the party, it has been suggested that the government used this as an opportunity to legislate against the so-called corruption of Afrikaner youth – 'gay men who were active at the time recall that, in Johannesburg, Afrikaans cultural and religious organisations were agitating about the fact that wealthier Jewish and English men were corrupting their youths: most "rent-boys" were young Afrikaners, often fresh in from the platteland, and most of their clients were wealthier English-speakers'.[825]

The suggestion to change s14 of the *Sexual Offences Act* to raise the age of consent of males to 19 years was not in the original draft bill, but was added after the Select Committee had met.[826] At the second reading of the Bill, the Minister of Justice stated that 'homosexuals are being unequivocally informed that rather than relax existing measures we are going to take stricter steps for the protection of our youth. Fortunately this amendment was not only the unanimous recommendation of Select

[825] Gevisser, M. & Cameron, E., *Defiant desire*, p. 31.
[826] Report of the Parliamentary Select Committee into the *Immorality Amendment Act* (Report 7-1968).

Committee, but it is understood that everyone who gave evidence in this connection was agreed that juveniles need to be protected. There were of course, as is understandable, disagreement on what the age between the age group 16 to 21 should be up to which young boys should be protected against immoral or improper deeds, nevertheless 19 years appears to be the most suitable age in the light of considered opinion'.[827]

Ronald Louw notes that despite the Minister's comments, the legislature was still not provided with any cogent reason as to why the age of consent should have been raised. Furthermore, when the chairman of the Select Committee reported to parliament, he disclosed his prejudice against homosexuals and thus could clearly not have had their interests in mind when drafting the legislation. He stated, 'We all felt that homosexualism cannot in any respect be excused, and we found that even the most hard-baked homosexual would give anything to be able to live a normal life'.[828]

In 1987, a link to homosexuality and youth was again made in the government-commissioned *Report on the Youth of South Africa*. This report listed homosexuality as part of a general problem of promiscuity (along with extra-marital sexual intercourse, prostitution and living together).[829] Homosexuality was classed as an

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[827] House of Assembly Debates (1969) col 4800.
[828] Louw, R., *Sexual orientation and the age of consent*, p. 132, quoting House of Assembly Debates (1969) col 4804.
[829] Report of the Committee for Social Affairs on the Youth of South Africa (Government Printer, Cape Town, 22 May 1987) para 4.3 pp 42ff as mentioned in Cameron, E., *Sexual*

'acquired behavioural pattern' and 'a serious social deviation' which was 'irreconcilable with normal marriage'.[830] The Committee classed homosexuality as something by which the potential in life of thousands of young people was being destroyed – '[T]here is cause for concern about the promising young people who fall prey to these evils [that is, including homosexuality] and have little chance of tasting the joys of achievement and of the realisation of one's own potential'.[831]

When section 14 was later considered from a constitutional view, to John Milton there were no justifying features which would render separate ages for males and females constitutional. One justification put forward under foreign law, for example in cases decided under the European Convention on Human Rights, was that '(male) homosexual persons only become fixed in this identity later in life than is the case with heterosexuals …. The contention seems to be that therefore they must be excluded from the opportunity to engage in (homo)sexual relations for a longer period'.[832] Milton could not accept this, pointing out that sexual orientation is established in children at a young age. Within the context of South Africa in the 1960s, the protection of Afrikaner youth seems the more likely explanation.

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orientation and the constitution, p. 461.

[830] Report of the Committee for Social Affairs on the Youth of South Africa , Para 4.3.4.3 p. 48.

[831] Report of the Committee for Social Affairs on the Youth of South Africa, Para 6.4 p 89.

[832] Milton, J., *Unfair discrimination on the grounds of gender*, p. 302.

Cases heard before s14 or in another jurisdiction

The *Thompson* case was about a man convicted of gross indecency with two males. The case refers to the males as 'boy' or 'boys'. These terms comprise thirty percent of the number of times 'boy' or 'boys' is used in the entire corpus, yet the case represents only four percent of total text of the corpus. This shows a heavy use of a term which connotes innocent children being preyed on by an adult. And yet these were not innocent boys. They accepted money from him and met him at pre-arranged meeting times and places on at least two occasions.[833]

Another case involved a man and various other males deemed old enough to be accomplices. The charges concerned masturbation between Curtis and Riley and Curtis handling another's penis. Curtis is described as 'a man a good deal older than Riley'.[834] Riley is described as a 'youth',[835] and, by implication, a boy.[836] However, he is also considered an accomplice: 'Now I think it was rightly contended that Riley was an accomplice'.[837] Riley 'submitted to the unnatural offences .... he offered no resistance or objection'.[838] Even though he is described as a youth and a boy, he was found to be an accomplice which means he consented to the acts.

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[833] *Thompson v K* (HL) [1918] A.C. 221, 224 ('again on the Monday, March 19. Both boys went on the Monday to the appointed place, and saw the appellant'). Although this is an English case, it is used in the corpus because it is mentioned twice in *SALR* cases: *R v L* 1951 (4) SA 614 (A), 620 and *S v R* 1977 (1) SA 9 (T), 13.
[834] *R v Curtis* 1926 CPD 385, 387.
[835] *R v Curtis* 1926 CPD 385, 386.
[836] 'with other boys than Riley' (*R v Curtis* 1926 CPD 385, 386).
[837] *R v Curtis* 1926 CPD 385, 386.
[838] *R v Curtis* 1926 CPD 385, 388.

Curtis calls the other males collectively 'The Click', '"The Click" was ... the coterie of boys who visited accused's house'.[839] A coterie is a clique, which is perhaps why the young men were called 'the Click'. A coterie is a small group of people who are close friends or have a common interest, and who do not want other people to join them, like an inner circle or pack. The idea of force or duress or corrupting the morals of innocent boys is not associated with this word. This strengthens the notion that these were not young boys.

As in cases such as *Thompson*, and *Gough* these young men also accepted gifts: 'they were given drink, given money, taken for motor rides'.[840] There is nothing in the judgment to suggest outrage that so-called 'boys' were involved. In none of the cases in the corpus where the other parties are teenagers do judges express outrage at this; 'the sole fact of relevance is homosexuality, and this was enough to trigger expressions of moralistic revulsion'.[841]

Gough is about intercrural sex between an adult man and a 'boy' deemed old enough to be an accomplice. The sentences imposed by the magistrate were confirmed but the case does not specify what these were. The other party is referred to as a 'boy' seven

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[839] *R v Curtis* 1926 CPD 385, 387.
[840] *R v Curtis* 1926 CPD 385, 388.
[841] Cameron, E., *Sexual orientation and the constitution*, p. 457.

times, once is which he is referred to as a 'school boy'.[842]

And yet the boy is regarded as an accomplice who received gifts and money – '… the boy. I agree that he must be regarded as an accomplice …. The boy said that, in return for his submission to the indecent acts, accused No. 2 gave him a fountain pen, a pair of trousers and diverse sums of money .... The two accused admit the gifts of a fountain pen and a pair of trousers, and the boy's mother testified as to these articles having come into her son's possession. She also noticed that he had lots of money. She gave him none, and as he was a school boy he was not earning his living. She also speaks as to her son having gone out in the evening with No. 1; on his return he had money'.[843]

To emphasise how imprecise the terms 'boy' and 'man' are, a later case refers to the *Curtis* case as being between a 'man and boy' and in the same sentence refers to *Gough* as being between 'man and man'.[844] Both cases are about males of a similar age. In fact, even though the youth in *Gough* is classified as an accomplice, he is referred to as a school boy whereas this term is not used in *Curtis*. The school boy is effectively called a man.

In *R v S* case one young man placed his hand, outside the clothing, on the penis of

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[842] *R v Gough & Narroway* 1926 CPD, 164.
[843] *R v Gough & Narroway* 1926 CPD, 164.
[844] *R v K & F* 1932 EDL, 73.

another young man his own age. The use of the term 'juvenile' indicates that they were young people who were not yet adults. His sentence of eight cuts with a cane was dropped but only on a technicality. 'The accused, described in the charge sheet as a juvenile, was convicted of committing an unnatural offence and sentenced to eight cuts with a light cane. The charge alleges that he "did wrongfully and unlawfully, and against the order of nature, gratify or attempt to gratify his sexual lust by placing his hand upon, and by handling the private parts of a certain juvenile"'.[845]

In *R v L* a male was convicted of sodomy and attempted sodomy with youths deemed old enough to be accomplices. He received 21 months hard labour. The parties are referred to as 'school boys'[846] who, like several other cases, accepted money and presents. The court considered them accomplices. This case illustrates that a 'young boy' can be a willing party – 'he was a young boy who was probably very reluctant to admit in Court that he was a willing party to these assaults'.[847]

In the mid-1950s, a man was suspected of having sex with boys but had never been caught. To build a case, the police sent in one of their own to spy on the man. The policeman willingly played agent provocateur with the man who was then charged with sodomy with the policeman. He was sentenced to twelve months prison with hard labour, partially suspended.

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[845] *R v S* 1950 (2) SA 350 (SR), 350.
[846] *R v L* 1951 (4) SA 614 (A), 618.
[847] *R v L* 1951 (4) SA 614 (A), 618.

This case shows the confusion between paedophilia and homosexuality. The term 'paedophile' would only be introduced into court judgments thirty-four years later in 1989.[848] The only reference to the youths is in the charge where they are called 'boys'.[849] There is no further mention of the boys other than in the charge. We are not told their ages nor what the accused did to them. No evidence is led that he actually committed sodomy with them. They may have been very young vulnerable boys, or boys in that grey area who accept gifts in return for sex. At first it appears that they were in the vulnerable category because in his judgment Ramsbottom J refers extensively to an unreported case he presided over concerning an eight year-old boy and a man.[850] And yet not in keeping with a paedophile's behaviour, the man in this case is also sexually aroused by an adult man.

Two doctors in the *eight-year-old boy* case conclude that punishment 'would not alter the accused's inherent sex nature'.[851] One assumes that the inherent sex nature that they are referring to is that the accused was a paedophile. This assumption is strengthened by this further extract: 'His offence of course makes it more difficult to decide what punishment should be meted out as he interfered with a young child …. he cannot be allowed to go about interfering with children and ruining their lives for

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[848] *S v D* 1989 (4) SA 225 (C).
[849] *R v C* 1955 (2) SA 51 (T), 51 ('sodomy upon a boy, B., and ... sodomy on a boy called L').
[850] *R v C* 1955 (2) SA 51 (T), 52 ('where Ramsbottom J refers to a review case he presided over, R v K (unreported))'.
[851] *R v C* 1955 (2) SA 51 (T), 52.

the sake of gratifying himself'.[852]

However, Ramsbottom J then refers to homosexuals as 'congenital homosexuals, congenitally disposed towards having relations with others of their own sex'.[853] Finally the judge conflates homosexuality with sex with young children: 'But whether or not punishment of this kind would deter the accused from practising homosexuality with young children, which is what he has done in this case, it may certainly deter other persons from committing crimes of this nature'.[854]

In this case homosexuals are also associated with pedophiles in an indirect but powerful way through what linguists call discourse deixis. In terms of deixis, 'this' is used as a demonstrative pronoun to refer back to a person or idea expressed or implied in a previous part of the text. Ramsbottom J's opens the case with the word 'This': 'This is a very difficult type of case'.[855] Since this case concerned sex with boys and a man, the reader is unsure whether 'this' refers to paedophilia or homosexuality. The word 'this' is used several times more, all without specific reference to what is being discussed: 'this is a biological condition', 'this kind of offence', 'away from this practice', 'the law regards this conduct as a serious crime', 'not yet reached the stage in this kind of conduct'.[856]

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[852] *R v C* 1955 (2) SA 51 (T), 52.
[853] *R v C* 1955 (2) SA 51 (T), 52.
[854] *R v C* 1955 (2) SA 51 (T), 52.
[855] *R v C* 1955 (2) SA 51 (T), 52.
[856] *R v C* 1955 (2) SA 51 (T), 52-53.

S v K was about a 52 year-old man who had non-consensual anal intercourse with a 21 year-old man. He was sentenced to fifteen months' imprisonment with hard labour, of which six months was suspended for three years on condition that he undergo psychiatric treatment and not commit a similar offence.

Beadle CJ, 'the complainant ... certainly was not fully co-operative in having this act perpetrated upon him, but was persuaded by the appellant to allow the appellant to do this to him. It must be remembered that the appellant was a European of some 52 years of age, while the complainant was a humble African domestic servant of 21 years of age, the sort of man who would be likely to yield easily to persuasion of this sort. This is the way I interpret the judgment of the magistrate, and this being so I do not think there has been any misdirection in this case'.[857]

Although in the quote above Beadle CJ refers to the 21-year-old as a man, he also refers to him as a 'youth' and specifically distinguishes him from an adult: 'one of the aggravating features of this offence is the age of the complainant. Where the complainant is a youth the offence is more serious than if the complainant is an adult'.[858]

The presupposition is that 21-year-olds are not adults. There is a paternalistic tone

[857] *S v K* 1973 (1) SA 87 (RA), 88.
[858] *S v K* 1973 (1) SA 87 (RA), 89.

which has a racial connotation. A 21-year-old black man can be persuaded to do something against his will because a 52-year-old white man forces him. The judge makes a point of stating how the complainant is 'a humble African domestic servant'. Although not law in Rhodesia, until the South African *Sexual Offences Act* of 1957 was changed in 1969, the age of consent for male homosexual acts was 16 years old, five years younger than the complainant. By his own words the judge admits that this is his interpretation. He first gives his interpretation of what the magistrate did, solidifies it ('this being so') and then states what he thinks.

Beadle CJ has a history of manipulating age for his convenience. He turns 21 year-olds into youths and turns girls under 12 into females. In a case he heard four years earlier, he referred to a girl under the age of 12 as a 'female' because the fact that she was so young inconveniently marred the point he was making that male-female sodomy was not illegal.[859] These two treatments of age by the same judge demonstrate how malleable age can be when expedient.

The paedophile-homosexual confusion finds its way back into law four decades later in cases concerning lesbian mothers and the best interests of the child. Whereas in the mid-1950s homosexuality consists of physical harm to children – 'practising homosexuality with young children'[860] – in the late 1990s there is the fear of a perceived mental and emotional harm to children living with a lesbian mother, 'from

[859] *R v M* 1969 (1) SA 328 (R).
[860] *R v C* 1955 (2) SA 51 (T), 53.

an imagined enemy or monster in the shape of a lesbian relationship'.[861] Just as 'incarceration would be the only option to safeguard children from a paedophile's predations',[862] so preventing the children from being 'exposed to a lesbian relationship in which the wife is involved'[863] would be a similar safeguard.

S14 of the Sexual Offences Act

Wording

Before the amendment, a man was guilty of an offence if he committed an immoral or indecent act with a boy or a girl under 16 years old. After the amendment, the age of the girl remains at 16 but the age of the boy is raised to 19.

The wording of section 14 (1)(a) and (b)[864] prior to amendment by Act No 57 of 1969 read:

14. Sexual offences with girls or boys under sixteen

(1) Any male person who –

(a) has or attempts to have unlawful carnal intercourse with a girl under the age of sixteen years; or

(b) commits or attempts to commit with such a girl or with a boy under the age of sixteen years an immoral or indecent act;

The wording of section 14 (1)(a) and (b) after the amendment reads:

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[861] *V v V* 1998 (4) SA 169 (C), 186.
[862] *S v D* 1989 (4) SA 225 (C), 231.
[863] *V v V* 1998 (4) SA 169 (C), 169.
[864] *Sexual Offences Act* 23 of 1957.

14. Sexual offences with girls under sixteen or boys under nineteen

(1) Any male person who –

(a) has or attempts to have unlawful carnal intercourse with a girl under the age of sixteen years; or

(b) commits or attempts to commit with such a girl or with a boy under the age of nineteen years an immoral or indecent act;

Analysis of all s14 cases

A review of all the cases heard under section 14 show that there was no justification for making this amendment. There were seventeen cases heard in terms of s14(1). Ten are between adult males and girls,[865] six are between adult males and boys[866] and one is between a woman and a boy.[867] This means that the majority of cases are between men and girls, with only thirty-five percent of the cases being between men and boys. This does not support the viewpoint that homosexual men prey on boys. Despite the preponderance of man-girl cases, Heher J in the 1998 *National Coalition* case still brackets heterosexual exploitation – 'possible homosexual (and heterosexual)

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[865] *R v M* 1957 (3) SA 282 (N), *R v H* 1959 (1) SA 343 (C), *R v H* 1959 (3) SA 583 (C), *R v V* 1960 (1) SA 117 (T), *R v Z* 1960 (1) SA 739 (A), *R v T* 1960 (4) SA 685 (T), *S v D* 1962 (2) SA 462 (N), *S v M* 1967 (1) SA 70 (N), *S v F and others* 1967 (4) SA 639 (W), *S v M* 1970 (4) SA 647 (N).

[866] *R v M* 1959 (3) SA 332 (A), *S v S* 1965 (4) SA 405 (N), *S v V* 1967 (2) SA 17 (E), *S v B* 1976 (2) SA 54 (C) (after the age limit increased to 19 years old, but dealing with 'young boys'.), *S v D* 1989 (4) SA 225 (C) (after the age limit increased to 19 years old, but dealing with 'young boys'.), *S v R* 1993 (1) SA 476 (A) (after the age limit increased to 19 years old, but dealing with 'a 15-year-old-boy'.)

[867] *S v A* 1962 (4) SA 679 (E).

exploitation'.[868] Man-girl cases cease in 1970 whereas the man-boy cases continue until 1993.

In terms of the 1969 amendment, the boy's age is increased to nineteen. The Act calls a 19-year-old male a 'boy'. None of the man-boy cases after the age was increased from 16 to 19 involve males in the 16-19 year-old range. This section is meant to 'protect the vulnerable'[869] but a 19-year-old male is not vulnerable and neither is he a boy. In several cases teenage boys were regarded as accomplices because they had received gifts in exchange for sex.[870] Putting aside the questionable morality of men who enticed teenagers this way, the law regarded those males as able to give their consent. They accordingly move out of the vulnerable category into the streetwise.

Looking back on these cases, there was no need to raise the age for males. The change was of no effect and yet it still remains as legislation in this form.

Cases where s14 used

R v M is the first male-male case heard since section 14 was promulgated in 1957. It went to the Appellate Division. This incident took place between two blacks in a

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[868] *High Court National Coalition*, 104.
[869] *High Court National Coalition*, 123 and *S v D* 1989 (4) SA 225 (C), 230 ('the paedophile's sickness ... leads to the commission of crimes against an extremely vulnerable segment of society, namely children'.)
[870] *Thompson v K* (HL) [1918] AC 221, *R v Curtis* 1926 CPD 385, *R v Gough & Narroway* 1926 CPD, *R v L* 1951 (4) SA 614 (A).

remote area.[871] An adult male had intercrural sex with a boy under the age of 16. He was sentenced to five years imprisonment with labour (because of proof of previous convictions), and six strokes. Except for the fact that the age of the boy was not mentioned in the charge, the conviction would have been enforceable. The conviction was accordingly set aside on this technicality. None of the appellate judges – Holmes AJA, Schreiner JA nor Beyers JA – mention the harsh sentence, even *obiter*. The implication is that they agreed with it.

Another case describes a boy taking the first step to initiate a sexual act with a man. A man, whilst looking for a woman with whom to have sex, picked up a male, almost 16, and had intercrural sex. He was charged in terms of s14 (1) (b) of the *Sexual Offences Act*. He was sentenced to six months, suspended for three years on condition that he did not commit an offence involving indecency or breach the *Sexual Offences Act*.

The man was 47 years old. The other party was nearly 16 years old (part of 'some Bantu males', 'a boy of between 15 and 16 years of age', 'not far short of sixteen years of age').[872] The youth was not part of the vulnerable group this section was intended to protect. He knew the man was looking for a woman, got in the car nonetheless and once they were driving he asked the appellant 'whether he still

[871] *R v M* 1959 (3) SA 332 (A), 332.
[872] *S v S* 1965 (4) SA 405 (N), 406, 409.

wanted a girl'.[873] The youth initiated the sexual act, 'the evidence shows that the appellant did not set out to pervert the morals of a young person. He accepted an invitation to commit the act which he did not even solicit'.[874] In this context he is simply referred to as a 'boy'.[875]

In 1989, a man was charged with indecent and immoral acts in contravention of s14(1)(b) of *Sexual Offences Act*. The boys were between the ages of 12 and 13. He was sentenced to six years' imprisonment of which four and a half years were suspended for five years on certain conditions. This is the first case to mention paedophilia in its own right and separate from homosexuality. It is fitting that the charge was in terms of section 14.

The psychiatrists and psychologists who gave evidence were '*ad idem* that the appellant is a paedophile'. A paedophile was described as an individual 'who experiences sexual arousal in response to children. The requisite for diagnosis as a paedophile is that the conduct should present for at least six months, that it should be recurrent and that the subject should be older than 16 himself'.[876] 'A paedophile ... may be of the same or the opposite sex as his victims. In appellant's case it is common cause that his paedophilia was entirely male-orientated'.[877]

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[873] *S v S* 1965 (4) SA 405 (N), 406.
[874] *S v S* 1965 (4) SA 405 (N), 409.
[875] *S v S* 1965 (4) SA 405 (N), 409 – 'in response to an invitation from the boy'.
[876] *S v D* 1989 (4) SA 225 (C), 229.
[877] *S v D* 1989 (4) SA 225 (C), 229.

S v R also reached the Appellate Division. In this example a man persuaded a 15-year-old boy to engage in fondling and masturbation. He was charged in terms of s14(1)(b) of the *Sexual Offences Act*. The defendant is classed as being neither a paedophile nor a homosexual: 'The accused was 'neither a homosexual nor a paedophile but that he suffered from an inferiority complex which led to his inability to form sexual relationships with people of his own age'.[878]

S14 not used when it could have been

It appears to be arbitrary as to the circumstances in which section 14 was used. In two instances in the corpus this section was not used in circumstances where one would have thought it would have been.

In what was surely a case about paedophilia, sodomy is introduced into the judgment along with the connotation of homosexuality.[879] A 34 year-old man took boys between the ages of nine and fourteen on camping trips. He would then sexually interfere with them but there was no anal intercourse: 'the method or system is always the same. The boys are at camp …, the accused gets a boy alone in a boat or in a room, sex talk and hand put into pants, private parts fondled'.[880]

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[878] *S v R* 1993 (1) SA 476 (A), 479.
[879] *S v R* 1977 (1) SA 9 (T).
[880] *S v R* 1977 (1) SA 9 (T), 14. Nicholas J quoting the magistrate.

This case called for an interpretation of a rule of evidence which is not the main focus of this discussion.[881] As part of this consideration, the judge refers to a precedent, *R v Sims* (1946) 1 All ER 697, which happens to be about sodomy (referred to as buggery in the actual case). The extract from the *Sims* case is: 'Sodomy is a crime in a special category because, as Lord Sumner said in *Thompson v R.* [*sic*] (6), 1918 A.C. 221 at p. 235: "Persons ... who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity"'.[882] The *Sims* case thus embeds Lord Sumner's strong views on homosexuality.

After introducing the *Sims* case, which introduces sodomy into the discourse, the judge now criticizes that case, but in doing so reinforces the notion that sodomy is applicable in this case. To support his criticism, he quotes from two more cases which also not only reinforce the notion of sodomy, but introduce homosexuality:

'The statement that "sodomy is a crime in a special category" has not been accepted: there is no special rule ... applicable to ... to homosexual offences',[883]

and

'to suggest that an unnatural sexual crime such as sodomy should be an exception to

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[881] Concerning the exclusionary rule.
[882] *S v R* 1977 (1) SA 9 (T), 13.
[883] *S v R* 1977 (1) SA 9 (T), 13 – quoting *R v Boardman* 1975 AC 421, 450.

the exclusionary rule would be both novel and anomalous'.[884]

The latter case is indeed about sodomy and is therefore apposite in its context, but in the present context it gratuitously reinforces sodomy where none took place. Intent on justifying his rule of evidence, sodomy is now firmly embedded in the discourse: 'Ordinarily the "nature" of an act appears from the details of the act itself ... except in the case of equivocal acts ... and there is nothing equivocal about sodomy'.[885]

The charge was *crimen injuria* but sodomy is introduced via references to other cases. That the judge does not distinguish these cases leads to the supposition that he believed the present case to be about sodomy. However, the nearest and only reference to any kind of anal intercourse is: 'he tried putting his wee-wee into my bum ... Then that was all'.[886] Given that the judge did not rely on the evidence of the boys, 'that the boys, through their talk, influenced one another, and that there was a real possibility that the similarities in their stories were due, not to the fact that they were true, but to the fact that they had a common source in talk and gossip among the boy',[887] even this allegation could have been conjecture.

In 1984, a man was charged with 'sodomising' a 14 year old male.[888] The charge was

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[884] *S v R* 1977 (1) SA 9 (T), 13 – quoting *R v L* 1951 (4) SA 614 (A), 622.
[885] *S v R* 1977 (1) SA 9 (T), 13.
[886] *S v R* 1977 (1) SA 9 (T), 10.
[887] *S v R* 1977 (1) SA 9 (T), 10.
[888] *S v M* 1984 (4) SA 111 (T).

not brought under s14(1)(b) of the *Sexual Offences Act*. In fact, the act was not sodomy but intercrural sex. In the magistrate's court he was convicted as charged and sentenced to payment of a fine of R500 or to serve 12 months' imprisonment of which the sum of R300 or a period of six months' imprisonment was suspended for a period of five years on condition that he was not convicted of an offence of which indecency is an element during the period of suspension. On appeal, the conviction on the charge of sodomy was substituted for indecent assault. The sentence imposed by the magistrate remained unchanged.

The cases heard in terms of S14 show that sixty-five percent of cases were not about men sexually abusing boys. Despite this, the section was amended to raise the age limit of boys to 19 in order to widen the net. In spite of that amendment, no cases were heard which involved a male within the 16 to 19 year range. A detailed look at all the cases involving younger males shows great latitude in the use of terms such as 'boy' and 'youth' – school boys were often deemed old enough to be accomplices, 19-year-old males are called boys, and a 21-year-old is called a youth. The homosexual and paedophile are conflated. All this indicates a contradiction to the popular belief that homosexual men are sexual predators of vulnerable boys.

Male sodomy associated with bestiality

In both legislation and court judgments, sodomy is almost always linked to bestiality. An example of this association is found in legislation where sodomy and bestiality

were collocated in the 1917 and 1955 *Criminal Procedure Acts*.[889] In judgments we read 'cognate to sodomy or bestiality',[890] and 'where a divorce was granted for bestiality. The act of sodomy … is surely no less reprehensible'.[891]

Three cases which are about bestiality refer to cases dealing with male-male sexual acts as support. In 1961 an accused 'did wrongfully and unlawfully and contrary to the order of nature have a venereal affair with a certain cow, and it [*sic*] the said cow did carnally know'. This bestiality case is then linked to gross indecency between males by reference to *R v V* 1953 (3) SA 314 (A) ('male person of any act of gross indecency with another male person').[892]

In a 1980 case homosexuals are associated with bestiality indirectly by way of discourse deixis. A man committed bestiality and was given a suspended sentence.[893] A third of the text of this case comprises quotes from *S v Baptie* 1963 (1) PH H96 (N). The reason for this is that the *Baptie* case followed a similar approach when passing

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[889] The First Schedule of the *Criminal Procedure and Evidence Act* 31 of 1917 collocated sodomy and bestiality. This Act was replaced with the *Criminal Procedure Act* 56 of 1955 which had the same wording. This Act was replaced with the *Criminal Procedure Act* 51 of 1977 where Schedule 1 splits sodomy and bestiality. Although still on the statutes, the common law offence of sodomy in Schedule 1 has been declared inconsistent with the provisions of the Constitution and invalid to the extent set out in the Constitutional Court Order published under Government Notice No R1354 in Government Gazette 19349 of 23 October 1998 and Government Notice No R588 in Government Gazette 21266 of 15 June 2000.

[890] *R v S* 1950 (2) SA 350 (SR), 350.

[891] *Cunningham v Cunningham* 1952 (1) SA 167 (C), 169.

[892] *R v M* 1961 (1) SA 534 (T), 534.

[893] *S v P* 1980 (3) SA 782 (NC).

sentence, that is, to consider the personal circumstances of the offender.

The extracts from the *Baptie* case which are contained in the bestiality case are: 'offences of this kind, involving perversity', 'offenders of this type', 'offender of this type', 'this type of crime', 'offender of this type', and 'this and similar types of cases'.[894]

The flynote contains the word 'bestiality'. The first sentence of the judgment contains the word 'bestialiteit'. The second last sentence of the judgment contains the word 'bestialiteit'.[895] It is therefore reasonable to expect the reader to think that the *Baptie* case was also about bestiality. In fact, *Baptie* was about 'gross indecency' between two men, but nowhere is this specifically stated in the bestiality case. The discourse relating to (human) male sexual acts is firmly embedded into bestiality discourse with no attempt to point out the difference. The 'perversity' applies alike to bestiality and male sexual acts. The phrase 'this and similar types of cases' also links the two. The behaviour of bestiality and homosexuality is therefore treated in the same way as: 'perversity', 'disordered mental condition of the perpetrators', 'dismay and disgust at the nature of the offence', 'perversion', 'society strongly disapproves of his conduct', 'depraved practices', and 'depraved conduct'.[896]

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[894] *S v P* 1980 (3) SA 782 (NC), 784 (all quotes are on 784).
[895] *S v P* 1980 (3) SA 782 (NC), 785.
[896] *S v P* 1980 (3) SA 782 (NC), 784 (all quotes are on 784).

In a third case a man was charged and convicted for bestiality. In reply to a request from the reviewing judge as to what the magistrate had meant by an 'unnatural' act, the magistrate replied that he had 'contemplated in addition to bestiality multifarious acts of buggery'.[897] The judge then explains that buggery is an English term not used in South African law: 'At no time, however, to the best of my knowledge, has the word 'buggery' been employed in our law. In fact, the word used in early Roman-Dutch law was 'sodomy' and this term, at that time, encompassed virtually any form of aberrant sexual behaviour.[898]

It could be argued that sodomy, bestiality and other 'unnatural acts' were indiscriminately lumped together by uncaring judges. It is telling, though, that at the same time the courts were still associating male sodomy with bestiality in 1980, in 1979 the courts were making it 'settled law' that male-female sodomy was indecent assault if it was not consensual, and non-indictable if it was consensual.[899]

Lesbianism

Introduction

Lesbianism is portrayed in a few ways in the corpus but never in terms of a sexual act. In one case it was deemed defamatory to call a woman a lesbian. Mostly it is portrayed in the context of motherhood. There is also a case which could be termed

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[897] *S v C* 1988 (2) SA 398 (ZH), 399.
[898] *S v C* 1988 (2) SA 398 (ZH), 400.
[899] *S v M* 1979 (2) SA 406 (RA), 408.

'lesbian porn' where men watched a show where women danced naked and fondled each other, acting out a fantasy many heterosexual men have. From these cases lesbianism is constructed as bad: an insult to be called a lesbian, perverted mothers and naughty-but-nice girls.

Lesbian a defamatory term

C and vdM (respondent) had a conversation in which vdM called V (appellant) a lesbian – 'die donderse lesbian'.[900] The appeal from the magistrates court was successful and referred back to that court to determine damages. In this case it was expedient for the appellant's counsel to agree that lesbian is a defamatory word: 'It is common cause that it was defamatory of the appellant to refer to her as a lesbian'.[901]

Lesbian motherhood cases

The negative construction of lesbian mothers is generated by attaching a particular significance to her sexuality which is in 'sharp contrast to "traditional motherhood" where (heterosexual) women are perceived as non-sexual beings'.[902] Lesbian mothers sexualize motherhood which some judges find problematic. Lesbianism is considered not in the interests of the child and incongruous with the construction of motherhood. There is a 'perceived dissonance between "mother" and all that the word implies, and

[900] *Vermaak v Van Der Merwe* 1981 (3) SA 78 (N), 79.
[901] *Vermaak v Van Der Merwe* 1981 (3) SA 78 (N), 79.
[902] Beresford, S., *The lesbian mother*, p. 60.

"lesbian" which carries a different set of resonances'.[903]

The legal construction of a lesbian mother is further complicated by her marital status where 'married' or 'unmarried' signify respectively 'good mother' or 'bad mother'. Since the lesbian mothers who come before the court are in the process of divorce, attributable to their sexual orientation, they are 'bad' mothers.

The identity of the woman is also constructed by enquiries into the mother's lifestyle, with invasive questioning regarding her lifestyle and shows of physical affection in front of the children, and concern about the 'minutiae of who was in which bedroom, whether or not the women slept in the same bed …. Questions such as "Will you have sex in front of the children?" or "Do you make a noise when you have sex?" are not uncommon'.[904]

There were two pre-constitution cases and one case heard in terms of the 1996 constitution. These are compared and contrasted to consider how they construct motherhood in a lesbian context.

The *Marais*[905] case, heard in 1960, was about child custody and a lesbian mother. Encouragingly, the 1960 *Marais* case does not mention normality or abnormality

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[903] *Ibid.*, p. 61.
[904] *Ibid.*, p. 62 (footnotes omitted).
[905] *Marais v Marais* 1960 (1) SA 844 (C).

whereas the 1994 *Van Rooyen* case[906] mentions it explicitly. De Villiers AJ's comments in 1960 indicate that it is possible to approach homosexuality from a fair, unbiased point of view, even without constitutional backing. In fact the words 'lesbian' and 'homosexual' are not referred to at all. Surprisingly, counsel for the mothers in both *Van Rooyen* and *V v V*[907] did not use this precedent.[908]

Mrs Marais, divorced, sought permission to have her boy with her on at least one day in each week and for one long and one short holiday in each year. The father tried to use her lesbianism as a reason to deny this. She was granted the access rights she requested. The father was ordered to pay the mother's costs. The *Marais* case was used in seven cases involving the right of access of the non-custodian parent.[909] In all instances, the lesbian aspect is not mentioned and the case is not referred to in a derogatory or judgmental way.

The mother's sexual orientation is dealt with in this way by De Villiers AJ:

'The other major objection raised by respondent related to the presence in applicant's home of a certain Miss du Toit, a person whom Beyers J [the judge in the divorce case], regarded as being really responsible for applicant's final desertion of the

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[906] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).
[907] *V v V* 1998 (4) SA 169 (C).
[908] Not using 'lesbian' or 'homosexual' may explain why it was missed by counsels.
[909] *Mohaud v Mohaud* 1964 (4) SA 348 (T) – applied; *Ex parte Scott* 1964 (4) SA 441 (E) – applied; *Du Preez v Du Preez* 1969 (3) SA 529 (D) – referred; *Segal v Segal* 1971 (4) SA 317 (C) – referred; *Botes v Daly and another* 1976 (2) SA 215 (N) – referred; *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) – referred; *Allsop v McCann* 2001 (2) SA 706 (C) – dictum, 847 approved.

respondent. This objection may have been sound, had it not been for several discounting considerations. The first of these is that Miss du Toit's presence was apparently not regarded as an objection during 1957 when week-end and holiday visits to applicant were freely permitted. The second is that it was not mentioned as an objection by respondent during the whole of the protracted correspondence to which I have referred.

Applicant herself raised the subject in a letter dated 24th February, 1959, in which her attorneys informed respondent that Miss du Toit would move to other premises …. Although Miss du Toit did not move out soon after 24th February, 1959, for reasons which do not appear from the affidavits, she eventually moved out on 6th August, 1959, and applicant states that she has nothing whatever to do with her and does not come into contact with her socially. This last factor is of course in itself sufficient to dispose of this objection on the merits. But I have mentioned the other considerations too, because they in my opinion dispose of any suggestion that costs are to be affected by the fact that Miss du Toit was still in applicant's home when the proceedings were launched and when respondent filed his opposing affidavit …. I conclude that there is no sound objection to applicant being permitted to have the child with her during holiday times and also more frequently during week-ends in term-times, and that in all the circumstances it would be reasonable and desirable to allow her such facilities'.[910]

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[910] *Marais v Marais* 1960 (1) SA 844 (C), 850-851.

The *Van Rooyen*[911] case is the first time that a lesbian identity is scrutinized within a South African legal context. It constructs lesbian motherhood as bad and perverted compared to good, normal heterosexual mothers. In this 'unnatural' setting it falls on the father to show the children what normal sexuality is. It is also the most sustained instance of judicial bias in the corpus. This is regrettable because it is also one which, in 1994, occurred on the cusp of the interim constitution.[912] The judge makes no reference to that constitution. In fairness, he need not have, but Ackermann J, who heard a case at the same time, does project forward to the constitution.[913] The case attracted strong criticism from several academics.[914]

In this case, Flemming DJP presided over a divorce where a mother challenged the access rights to her children. The mother was in a lesbian relationship. In defining the mother's rights of access, the court held that a lesbian lifestyle posed a danger to her minor children. Her right of access was defined so as to protect the children from being exposed to anything which might connote approval of homosexuality or lesbianism. It was ordered that when the children slept over at the mother's residence, the mother was not to share her bedroom with a lesbian partner. This case shows several instances of judicial bias. The following extracts by Flemming DJP indicate

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[911] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).
[912] *Constitution of the Republic of South Africa Act* 200 of 1993.
[913] *S v H* 1995 (1) SA 120 (C), 129 ('The aforegoing suggests broad consensus on eliminating discrimination against homosexuality and the likelihood that this will be entrenched in a new constitutional dispensation'.)
[914] Pantazis, A., *The problematic nature of gay identity*; Viljoen, F., *Signs of the times*; Botha, K. & Cameron, E., *South Africa*; Bonthuys, E., *Awarding access and custody to homosexual parents of minor children*; Steyn, E., *Women who love women.*

his views on what is normal sexuality:

'The fact is that many people ... would frown upon the idea of calling the relationship created on the basis of two females a "family". Quite clearly she regards what she is doing … as normal and acceptable'.[915]

'With weekends one may well argue that if the child is with the father who introduces the child to normal sexuality or guides him in the correct way for 29 days of the month, a night with their mother, two nights with their mother, will do no harm. In fact, the contrasts will serve to underscore what the father's example rightly is'.[916]

'[T]he children know that, contrary to what they should be taught as normal or what they should be guided to as to be correct (that it is male and female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment'.[917]

The judge's statements indicates that, for him, only a male-female relationship is normal. His choice of words and tone indicate this, such as, 'the fact is', 'frown upon the idea', 'two females a "family"' (family in quotes), 'she regards what she is doing',

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[915] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 326.
[916] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 330-331.
[917] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.

'underscore what the father's example rightly is' (embedding rightly), 'should be taught as normal … should be guided to as to be correct' (the use of the modal 'should' used twice in the same sentence). Examples from the corpus, however, show that it is not always easy to teach children what is 'normal' when oral sex between a male and female in a 'sitting-room at an hotel in Port Elizabeth',[918] and intercourse from behind, standing up, in the kitchen[919] have been ruled normal.

'The problem at this stage arises not with reference to the capability or the suitability of the applicant as such but with particular reference to the fact that she is a lesbian. Not only is she a lesbian but she lives in a lesbian relationship. She shares the house and the bedroom with her associate'.[920]

and

'[T]he question of sexuality of the children will in the case of the boy only commence as from now at some stage. This is not the stage yet when one can see the scars. If some damage was done, it will show in due course'.[921]

If one prunes down the first sentence, it leaves: 'The problem … she is a lesbian'. Lesbianism is a problem. He marks 'lesbian' by referring to it as 'this lesbianism' and

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[918] *R v K & F* 1932 EDL 71, 72.
[919] *R v H* 1962 (1) SA 278 (SR) , 278-279 – 'complainant went into the kitchen .... accused joined her there and … pressed her against the wall, lifted up her dress and attempted to have intercourse with her from behind .... There is little doubt that he intended to have normal sexual intercourse with her but was hindered … by the awkwardness of the position'.
[920] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 326.
[921] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 328.

'the lesbianism'.[922] There is a presupposition that her lesbianism will scar the children – 'This is not the stage yet when one can see the scars' – but there will be scars, according to the judge.

'Not only is she a lesbian but she lives in a lesbian relationship'. The implication is that not only is it bad enough being a lesbian, yet alone acting out on it. He mentions that they share a house and then specifically mentions that they share a bedroom. The use of the term 'associate' is distancing and impersonal.

'[T]he issue simply comes down to the fact of the style of living, the attitude towards living, the activities, the behaviour or whatever else is involved in living from minute to minute, all that in the context of the lesbianism'.[923]

'The fact is that many people ... would frown upon the idea of calling the relationship created on the basis of two females a "family". Quite clearly she regards what she is doing or what she has been doing but also what she intends doing as normal and acceptable'.[924] Without support, the judge asserts that it is a fact that many people would not consider two women living together with children a family. He makes this assertion in the mid-1990s when the nuclear family was already a widely disputed entity. The phrase 'quite clearly' can be read as 'unbelievably'.

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[922] 'the respondent has been concerned about this lesbianism for some time …. the role which the lesbianism' - *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 327.
[923] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.
[924] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 326.

In the next extract, the judge uses a comment made by the applicant's family advocate counselor as an opportunity to state his own opinion. The counselor stated that 'homosexuality is no longer regarded as a mental illness or as a sin. I [the judge] accept the former but nobody has brought that in issue so I do not know why she comments on that. As to whether it is a sin, I defer to her view but perhaps I would prefer to leave that to the Heavenly Father to decide'.[925]

Even though he says, 'She has launched into an attack which is of no relevance to this issue',[926] he still uses the opportunity for sarcasm and to introduce his own religious beliefs. He does so whilst at the same time stating explicitly how subjective views do not count. The counsellor 'has her own sense of values in the ascertainment of what should be dealt with or what should be ordered in regard to these parties. Her assessment is one which I think differs from my own view on certain things I but unfortunately neither her nor my subjective views are what count. I must assess according to what on prevailing views would be acceptable, desirable, preferable, and so forth'.[927] He says he cannot make his subjective views count but in the way he expresses himself throughout the judgment, he does just that. The difference between the counselor and him is that as the judge he can instruct the reader to ignore or discount her view, but his views are entrenched in his judgment.

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[925] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 327.
[926] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 327.
[927] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 327.

'[A]ny right-thinking person would say that it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop'.[928] There are two presuppositions in this statement. Firstly, male and female sexuality should develop in the way the judge believes they should, and anyone who disagrees is wrong-thinking. Secondly, in Flemming DJP's outlook 'it is male and female who share a bed'.[929] This is 'normal' and 'correct'[930] and anyone who does not do so 'signals of a separate class of male or female typing'.[931]

'The signals are given by the fact that the children know that, contrary to what they should be taught as normal or what they should be guided to as to be correct (that it is male and female who share a bed), one finds two females doing this and not obviously for reasons of lack of space on a particular night but as a matter of preference and a matter of mutual emotional attachment. That signal comes from the fact that they know the bedroom is shared. It is detrimental to the child because it is the wrong signal …. The wrong signals are given when, if that is true, the applicant wears male underclothes, apart from male apparel. The signals come when there are signs of emotional attachment, not only by kissing and hugging as counsel argues, but by the way of speaking, the words of endearment used, the manner in which there is a glance. It would take a very inexperienced person to be unable to recognise two young

[928] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 328-329.
[929] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.
[930] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.
[931] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329.

people who are fond of each other or who do have a relationship'.[932]

'The applicant is ordered to take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism'.[933]

The judge's reference to a separate class of male or female typing is misguided, 'as if sexual orientation had anything to do with gender; as if one is any less a woman for being a lesbian or any less a man for being gay'.[934] The sentence, 'It is detrimental to the child because it is the wrong signal' has no modals to suggest uncertainty and as such could not be any more emphatic.

As Elsje Bonthuys notes, 'Nowhere does the court refer to any evidence that the applicant was in fact wearing male apparel. Similarly, no facts were stated which justify the fear that the applicant would expose or had in the past exposed the children to homosexual video or photographic material .... [These comments] serve no purpose other than to reflect the ignorance and homophobia of society'.[935]

To function properly as an 'ideological litmus paper', says Sarah Beresford, 'the

[932] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 329-330.
[933] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), 332.
[934] Gevisser, M. & Cameron, E., *Defiant desire*, p. 93.
[935] Bonthuys, E., *Awarding access and custody to homosexual parents*, p. 303.

lesbian body must be instantly recognizable'.[936] The more a lesbian conforms to the conventional construction of 'woman', or feminine, the more likely she is to be successful in her court application. This mother did not pass the litmus test according to Flemming DJP who appears more concerned with the so-called butch lesbian, than with the so-called feminine lesbian. The latter presents a 'lesser threat to the dominant male ideology than the former. This is due to a greater sameness – the feminine lesbian body physically presents herself as visibly little different from her heterosexual counterpart. The butch lesbian body presents herself with a greater degree of difference'.[937]

The more she identifies her own construction of lesbianism outside the 'feminine' range, the greater the gap will be between her and the identity which law constructs for her. Correspondingly, the less likely she is to receive legal recognition of that lesbian construction and the greater will be the scrutiny, regulation and control. Viewed in this way, 'control and ownership of the sexual body and the expression of identity are separated from self-determination and autonomy'.[938]

The case reflects a 'reflexive condemnation of homosexuals' with no scientific or social authority, or judicial precedent, for its findings and assumptions.[939]

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[936] Beresford, S., *The lesbian mother*, p. 63.
[937] Beresford, S., *The lesbian mother*, p. 62 (footnotes omitted).
[938] Beresford, S., *The lesbian mother*, p. 65.
[939] Botha, K. & Cameron, E., *South Africa*, p. 29.

The *V v V* case[940] was heard in terms of the 1996 Constitution and is a useful contrast to the *Van Rooyen* case because the facts are similar yet the treatment is different. This is also a child custody case where the father tried to limit the access of the mother because she was in a lesbian relationship.

Here Foxcroft J states, '*Van Rooyen v Van Rooyen* ... where the Court made a moral judgment about what was normal and correct insofar as sexuality was concerned. It was clear that the Judge in that case had regarded homosexuality as being *per se* abnormal …. It was thus, in law, wrong to describe a homosexual orientation as abnormal (as had been done in the *Van Rooyen* case)'.[941]

This case also shows the strong association with motherhood and a domestic environment: 'the lesbian mother', 'her mother was a lesbian', 'in the best interests of the child to discriminate against the lesbian mother', 'a relationship between their mother and her partner in a lesbian relationship', 'their mother openly lives with a lesbian partner', 'emotionally and spiritually harmed by the influence of the lifestyle of their mother and her companion', and 'visits to their mother when her lesbian companion is not physically present'.[942]

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[940] *V v V* 1998 (4) SA 169 (C).
[941] *V v V* 1998 (4) SA 169 (C), 171.
[942] *V v V* 1998 (4) SA 169 (C), 172, 174 & 181.

Lesbian fantasy

One case reflects a common fantasy which some heterosexual men have of seeing two women perform intimate acts, a type of 'lesbian porn'.[943]

A man had a house in a secluded spot at the edge of a forest in Tokai. In the mid-1970s, billing himself as an entrepreneur, he converted his house into a makeshift theatre and staged shows. He put on regular shows where Coloured women performed for an all-White male audience. After the show the women would dance with the men. The men would 'flock' to the shows and there was a 'crush' on the door to pay their R10 admission fee. Up to 40 men would cram into the lounge. The stage was a metre from the front row. The room was 'dimly-lit' and 'smoke-filled'.

'When the girls stripped and did something that was especially pleasing to the audience there was shouting, cat-calls and clapping. Some men jumped up and tried to touch the girls, but they were stopped by the accused. Incidentally, the accused even had his "bouncer"'.[944]

The women danced naked with each other and participated in various acts, such as the back-to-school act. One such act was the 'lesbian' act, 'Here some of the girls – there were usually two – took off each other's tops, their breasts were then bared, they

[943] *S v M* 1977 (3) SA 379 (C), 380.
[944] *S v M* 1977 (3) SA 379 (C), 380.

fondled each other's breasts, and even kissed them'.[945]

The words 'girl' or 'girls' is used twenty-three times in this four page judgment. They are never referred to as anything else. The women are referred to in the collective as a 'batch' – 'the first batch of girls'.[946] This conforms to the metaphor that 'girls' are like tarts or cupcakes.

This nude fantasy version of 'pseudo-lesbians' is contrasted to 'real' lesbians whom Flemming DJP clads in men's apparel.

[945] *S v M* 1977 (3) SA 379 (C), 380.
[946] *S v M* 1977 (3) SA 379 (C), 380.

Chapter 6: Commentary and conclusion

Commentary

The thrust of this study has been to locate rhetoric at work within a specific sphere of law, namely sexual orientation. In my attempt to analyse rhetoric at work, I have closely examined a number of judgments in such depth that at times the main purpose of the work was backgrounded. I redress that in this final chapter where I again foreground rhetoric. I begin with comments about the judge as rhetorician and then about the judgment as a rhetorical device. In both cases I draw on illustrations from the corpus. The main thinkers chosen as the theoretical basis are not experts in law – Michel Foucault, Mikhail Bakhtin, Norman Fairclough and Hayden White, for example. The reason for this choice is to deliberately consider the language of law from insights outside of law.

The word ‘rhetoric’ is too slippery to use with precision. Rhetoric calls for us to analyse the linguistic processes by which a speaker can shape issues. The starting point in rhetoric, then, is always with the language at hand, but one cannot idealize it. If rhetoric cannot be idealized, then it is necessary to situate both speaker and text within a context. In the context of this work, the speakers are the judges and their statements are the forty-four judgments I analysed throughout this study.

A judge within a court system exercises power. He[947] can stipulate what finally appears in his judgment. If one subscribes to Foucault's rules of formation, then in a legal context only a properly trained and authorized judge, sitting in a court room and occupying the subject position of judge can enunciate statements which find their way into the prevailing discourse. The judge as rhetorician is therefore an important part of this study.

I began by placing the judge in a socio-legal context. Most of the cases occur between the mid-1920s and the mid-1990s, generally the period where the prevailing thinking of homosexuality centred around binary views of sexuality and perceptions of what was considered 'natural'. The common law and statutes criminalized homosexual conduct under the offences of sodomy and unnatural acts. The cases I reviewed to give a sense of the socio-legal context concerned entrapment, sexual policing and police intolerance to sexual 'deviance'.[948] After 1996 this attitude softened under constitutional discourse.

When the TRC reviewed the judiciary over almost this same period, they made some interesting comments about the language judge's used. Judges were asked why they implemented unjust laws without protest. Given that they had some discretion as to how to interpret or apply the law, judges decided in a way that assisted the

[947] Judges are only referred to in the masculine because all judges in the cases reviewed are males.
[948] R v V 1953 (3) SA 314 (A); R v C 1955 (2) SA 51 (T); S v C 1987 (2) SA 76 (W); S v Kola 1966 (4) SA 322 (A); Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)

government. The submissions of 'establishment-minded' judges indicated that where there was room for manoeuvre, they had interpreted in favour of liberty and equity. A sample of the cases from my corpus, however, indicate otherwise. For example, a man who, looking for a woman, instead had sex with another man was sentenced to fifteen months' imprisonment with hard labour.[949] In another case a male, convicted of sodomy and attempted sodomy with youths deemed old enough to be accomplices, was sentenced to twenty-one months imprisonment with hard labour.[950]

The TRC found that the inherent ambiguity of language and the diversity of factual circumstances allowed judges a degree of latitude in deciding cases but that this latitude was not exercised. Judges too easily made sense of the illogical and the unjust in language and too quickly accepted the word of the police or official witness in preference to that of the accused. In one police entrapment case, not only is there no judicial censure about entrapment, the judge commends the agent provocateur and wholly endorses his testimony: 'The trap R created a favourable impression on the Court of his demeanour and the manner of answering the questions put to him …. R's testimony … left the Court in no doubt as to his truthfulness'.[951]

The TRC criticized the judiciary for maintaining the *status quo* rather than exploiting ambiguity in language to effect change. This maintenance was due largely to the

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[949] *S v K* 1973 (1) SA 87 (RA).
[950] *R v L* 1951 (4) SA 614 (A).
[951] *R v V* 1953 (3) SA 314 (A), 323.

composition of the judiciary and the positivistic training such judges had. In the 1960s, the International Commission of Jurists regarded the South African judiciary as as 'establishment-minded' as the executive, prepared to adopt an interpretation that favoured the executive. In most of the cases in my corpus there is no suggestion of deliberate bias but more an uncritical reliance on mechanical, positivistic methods of interpretation. There is a sprinkling of mean-spirited, fairly biased judges within the corpus, but not enough to justify a blanket condemnation. One case of outright judicial bias can be singled out: Flemming DJP in *Van Rooyen*[952] ruling on a lesbian case. This bias is even more regrettable because occurred in 1994 on the cusp of the interim constitution. Generally, though, the language is neutral and objective and I had to consider other techniques in order to expose these inarticulate considerations.

Judges mostly do not articulate their views and one has to surmise their views though what is not said. For example, in the 1997 case of *S v Kampher*,[953] Farlam J does not use the term 'gay' in a judgment of over 16,000 words, knowing that was the preferred term of the day. Similarly, in the *High Court National Coalition* case, the only time the word 'gay' is used is because it happens to form part of the name of the applicant. Like Farlam J, Heher J does not use it once in a judgment of some 16,500 words. It is up to the judge to choose his words but this sustained effort *not* to use the word 'gay' indicates a conscious effort by both judges not to appropriate a term in wide use and thereby give their endorsement to it. In contrast, Sachs J uses the term

[952] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).
[953] 1997 (4) SA 460 (C).

'straights' for heterosexuals.[954] Dictionaries still flag 'straight' as informal which shows his willingness to be the first judge in South Africa to incorporate this word in a judgment. Because of the uncontested, privileged position the judge holds, he can choose the words that comprise his judgment.

Judges write their judgments in the form of a closed discourse, as monologues justifying a result. He must appear to be restricted and forced to an inevitable conclusion by the facts and the law. In doing so, he hides how the judging process entails hard choices among multiple perspectives. But just how restricted were these judges?

All judges are restricted in what they write. They must keep to the facts of the case, they can only rule in terms of the law, and, to a certain extent, they have to rule in keeping with the customs and behaviour of society. They are also restricted by their training. The judges of the period under review had a strong positivistic grounding. They were taught that knowledge about law is gained by the application of reason to observable phenomena, such as previously decided cases and the common law, rather than by reference to moral values. However, even within this seemingly tight structure and the mechanical method of interpretation positivism gave rise to, there were many choices they could have made.

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[954] *Constitutional Court National Coalition*, 65 & 67.

They chose to manipulate facts. For example, all the cases used to decriminalise male-female anal intercourse were in fact cases about non-consensual sex in the form of rape or sex with underage girls. These facts are forced to the background. They chose what legal principle they wanted to base their ruling on. For example, male sodomy was based on Dutch common law which was genderless. Male-female cases should have been based on the same law, therefore, but instead were based on a variety of other principles such as abrogation by disuse and indecent assault. Judges should have followed similar precedents, but they chose not to. None of the male-female cases refer to previous male sodomy cases which dealt with the same sexual act.

Within the same area of common law, they could choose which jurists to rely on. The Dutch jurists did not speak with one accord on the law of sodomy. A judge could choose a jurist who most suited his viewpoint. He could choose to ignore counsels' arguments and rely on independent research, as happened in *Gough*. He had the choice to interpret in favour of the defendant if the language was ambiguous but chose not to. There were so many variations amongst the Dutch jurists as to what constituted sodomy, for example, that judges could easily have ruled in favour of the defendant, if only to grant absolution from the instance on the grounds of ambiguity. This never happened.

Judges had the choice of being more polyphonic in their judgments. They could have included the arguments of the defendants but these are absent in their judgments. Bakhtin called this an expropriation of voices. They had the choice as to how far to test the boundaries of a society's acceptance. There is no evidence in the corpus of even the slightest probing. They had the choice of speaking out, either on or off the

bench, against the gender and sexual minority discrimination that was taking place. In judicial submissions to the TRC, certain judges admitted that they should have been more outspoken. These judges were restricted in what they could write, but they were not in a strait-jacket.

Part of the reason why judges could write in this way is because, in my view, they existed within an interpretive community that condoned it, perhaps even encouraged it. All the judges in the corpus were of similar backgrounds. They were a small elite, mostly white, male, Protestant, privileged and political.[955] And so, (very) generally, were the readers. This group of closely affiliated writers and readers shared assumptions which identified them as a group that could claim interpretive authority yet at the same time certain voices were entirely excluded from the community. I find Stanley Fish's view pertinent. He holds that the source of interpretive authority derives from the writer: the shared interpretive strategies are for *writing* texts. This determines the shape of what is *read*. This suggests that judges write their judgments with a specific kind of reader in mind who would agree with what has been written.

Not every reader of a judgment will agree with the judge's findings, however, and, as this number grows, change must inevitably occur within such communities. An interpretive community is created through language; it is no more than a way of organizing experience. As such, it is permeable and cannot protect its *status quo*

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[955] Swart, M., *The Carfinian curse*, p. 540.

indefinitely. In terms of Foucault's views on power, it does not follow that subjects who are authorized to introduce objects of knowledge into discourse – judges – also have the power to maintain the *status quo*. Presently-held beliefs can be redrawn from the inside when challenged by a source external to it.

A significant change to the interpretive community occurred when South Africa began to take human rights seriously in the 1990s. At that time sexual orientation was placed on the agenda by some influential, vocal outsiders. I see the softening in attitudes towards sexual minorities as being inevitable in the long run, but hastened by a convergence of personalities. Interpretive communities are indeed permeable. Judges already with the ability to introduce statements which could find their way into the prevailing discourse – authorized judges occupying the subject position of judge, such as Ackermann and Sachs JJ – were prepared to incorporate the views of outsiders with whom they had sympathy; particularly Edwin Cameron. One way they did this was to quote extensively in their judgments from Cameron's journal articles. This is an example of how intertextuality assisted in changing the nature of an interpretive community.

This concludes my commentary on judges as rhetoricians. I now provide a commentary on the judgment as a rhetorical device. Judgments are definitely rhetorical constructions and in this next section I review some of the specific techniques I found in the corpus to support this claim.

Words, especially adjectives, carry the subjective feelings of the speaker. From 1926 through to 1990, judges used a number of pejorative words to refer to homosexuality:

abhorrent, depraved, disapproval, disgust(ing), filthy, horrible, odious, perversity, profoundly repulsive, reprehensible, repugnant to nature, revulsion, sexually perverted, shame, and unacceptable.

The use of metaphors in non-fiction texts such as judgments show that metaphors are not limited to fiction. Certain metaphors in the corpus reveal the distaste some judges had for homosexuality. It was seen as an uncontrollable appetite. The phrase 'gratify sexual lust' and associated adjectives ('perverted', 'depraved' and 'unnatural'), together with the word 'carnal', form a metaphor that homosexual sex is a purely physical, strong, uncontrollable sexual appetite. The appetite is in need of constant gratification.[956] Homosexuality is likened to a disease in need of curing, sometimes biological sometimes mental. Another metaphor likens homosexuality to something contagious. It is also 'the canker that afflicted the Biblical Sodom', and something with which one is branded, like Hester's scarlet letter.

In two cases deixis is used to associate homosexuals with paedophilia and bestiality.[957] In terms of discourse deixis, 'this' is used as a demonstrative pronoun to refer back to a person or idea expressed or implied in a previous part of the text. Taking only the paedophilia case as an illustration here, Ramsbottom J opens with the word 'This': 'This is a very difficult type of case'.[958] Since this case concerned sex

[956] A full discussion and references start on p. 132.
[957] *S v P* 1980 (3) SA 782 (NC) – discussed fully on p. 255.
[958] *R v C* 1955 (2) SA 51 (T), 52.

with boys and a man, the reader is unsure whether 'this' refers to paedophilia or homosexuality. My analysis of this case proves that this was definitely a case about paedophilia but this was never made explicit.

The ubiquitous association between paedophilia and homosexuality led me on a lengthy detour.[959] I analysed every case (26 of them) concerning sex with an underage child – male or female and whether in terms of the *Sexual Offences Act* or common law. Statistically, the cases heard in terms of Act show that sixty-five percent of cases were not about men sexually abusing boys. Despite this, the section was amended to raise the age limit of boys to 19 in order to widen the net. In spite of that amendment, no case arose which involved a male within the 16 to 19 year range. A detailed look at all the cases involving younger males shows great latitude in the use of terms such as 'boy' and 'youth' – males referred to as 'school boys' were often deemed by judges to be old enough to be classed as accomplices, 19-year-old males are called 'boys', and a 21-year-old is called a 'youth'. Despite this empirical evidence, the homosexual and paedophile are conflated through a (deliberate?) misuse of language.

This concludes my main commentary on the actual techniques used in the text of the judgment. Scattered throughout the study are other instances of particular techniques, such as speech acts and the use of private verbs and public verbs,[960] and transitivity of

[959] Starting on p. 235.
[960] p. 161 *ff*.

verbs,[961] which I mention here only for the sake of completeness. I turn now to a consideration of the judge as a narrator.

Apart from being a rhetorician, a judge is also a narrator and this role enables him to shape a judgment just how he wants. He is the narrator of an ostensibly factual sequence of events but he can fashion these story elements in ways similar to a writer of fiction. The views of Hayden White on historiography are used to support this assertion.

To speak of a court judgment as a narrative is nearly a contradiction in terms. That it is not perceived as fiction reflects the extent to which the idea of 'Natural Law' presupposes a reified, extra-narrative concept of law. This is demonstrated in the sodomy cases. To the extent that the vague, unarticulated law pertaining to sodomy was regarded as natural law, then in that natural law many judges' dilemmas were appeased. They could just as well suppose that it contained the elements of the crime of sodomy upon which they could base their ruling. According to natural law, the moral standards that govern human behavior are objectively derived from the nature of human beings. The authority of legal standards derives from considerations having to do with the moral merit of those standards. Natural law is believed to exist independently of positive law or society. Some things are as they are, because that is how they are. Natural law is particularly influential in the law relating to sodomy

[961] p. 81.

because of the moral connotations.

If, as some judges believe, the law is a reified object located extra-textually, then their judgments, as factual narratives containing this unchanging law, should aggregate. Insofar as judgments are supposed to make objective truth-claims about a selected segment of the law, they must surely be compatible with similar judgments which preceded them. Yet while court cases ought to aggregate into a more comprehensive narrative, in fact they do not. Judgments should combine into a comprehensive whole to the extent that they are completely objective about the law. However, judges as rhetoricians write their cases in distinctly different ways. It is because of the differences in these subjective elements that one judge's judgment does not fit with another's.

Objective truth-claims should, then, result in a seamless *stare decisis*. However, a judgment has a unity of its own – a beginning, middle, and an end. And the reason why two judgments cannot be additively combined – as one can do with a chronicle – is that in the earlier judgment of such an aggregate the end would no longer be an end, and therefore the beginning of the next judgment would no longer be a beginning. The reality is that each judgment has its own unity which does not lend itself to aggregation. Sophocles' trilogy is not itself a play, Mink explains by way of analogy.[962] If it were, its constituents would be not plays but acts.

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[962] Mink, L. O., *Narrative form as a cognitive instrument*, p. 213.

Judges would object to their work being called fiction because their writing is supposed to correspond point by point to some extra-textual domain of occurrence or happening, to confirmable existential statements. The question whether there can be a reality outside of text is highly contestable. Non-fiction writers believe that they are doing something fundamentally different from the novelist, by virtue of their dealing with 'real' events, while the novelist deals with 'imagined' events. But neither the form nor the explanatory power of narrative derives from the different *contents* it is presumed to be able to accommodate. Both fiction and non-fiction writers use narrative to make experience comprehensible.

The referential level of non-fiction narrative – the incorporation of pre-existing material – is always contestable as writers endow it with meaning expedient to their ideology. Writers of non-fiction can select what to include and exclude, and where to begin and end. We see this happening when judges decided which Dutch jurists they should rely on, and over what period, in order to support the criminalisation of homosexuality. A verifiable document, then, does not make the event it speaks of any more objective. In fact, the introduction of such texts can make the issue less clear. Again, the Dutch jurists illustrate this point. Their views on sodomy vary to such an extent that there is no certainty as what gender sodomy relates to, or even whether the act needs to be between humans. My detailed analysis of the sodomy cases illustrates in detail how it is impossible to regard the cases as anything but fiction, and how reliance upon the Dutch jurists to justify factuality is not possible.

Both fiction and factual narrative, such as judgments, are forms of narrative because

they both tell of events. Judgments purport to represent actual events, specific time-space events – X and Y performed a sexual act at this time in this place. Unlike a novelist using his imagination, a judge claims to give a true representation of the facts as presented. However, a closer look at the sodomy cases show a great deal of imagination at play, for example with the male-female sodomy cases where acknowledged rapes and sex with underage girls are redescribed as consensual. It is itself a fiction that these judges could believe they were ruling on actual or real events pertaining to sodomy alone.

When a judge treats a rape case, for example, as a sodomy case there has to be an acknowledgement that the 'same' event can be told differently. Events, then, are not the raw material out of which judgments are constructed; rather they are a function of particular narrative structure. The cases concerning underage girls, for example, should have been brought under section 14 of the *Sexual Offences Act*. Instead, they were narrated as justifications for legalizing male-female sodomy. These particular sexual acts, then, were not part of an untold story yet to be told. They were facts not yet described in the context of a certain narrative.

Fourteen cases construct the history of sodomy between 1926 and 1999.[963] If merely

[963] *R v Gough & Narroway* 1926 CPD 159; *Cunningham v Cunningham* 1952 (1) SA 167 (C); *R v V* 1953 (3) SA 314 (A); *R v N* 1961 (3) SA 147 (T); *R v H* 1962 (1) SA 278 (SR); *R v M* 1969 (1) SA 328 (R); *S v K* 1973 (1) SA 87 (RA); *S v M* 1977 (2) SA 357 (TkS); *S v M* 1979 (2) SA 406 (RA); *S v M* 1984 (4) SA 111 (T); *S v H* 1995 (1) SA 120 (C); *S v Kampher* 1997 (4) SA 460 (C); *High Court National Coalition*; *Constitutional Court National Coalition.*

listed in date order, we are referring to a chronicle of events – this case was heard in this year, that case was heard the year after *etc*. Any continuity is based purely on the order of the dates. Within each of those judgments, however, judges have to make sense of the particular facts of each case. They do this by using the narrative form.

The form of a story is 'this happened, *then* that' whereby events, situations, or actions are presented as succeeding each other in such a manner as to appear to follow on. Whereas a chronicle is structured in terms of 'this (then) that', the judgment is structured in terms of 'this *then* that'. In the narrative form, 'then' is significant because it transforms a succession of events into a meaningful sequence. It is as if putting events into a story can of itself construct meaning. When two males perform the same sexual act as a male and female, different meanings are constructed; illegal for the former, legal for the latter.

The facts presented to the judge by counsels do not in themselves constitute the story. They cannot, because each party will present the same facts in ways more favourable to their own argument. The most that counsels might offer to the judge are story elements which he then makes into a story by the suppression or subordination of certain facts and the highlighting of others; techniques no different to the novelist. The definition of narrative lend itself nicely to the cycle of a court case. When a case comes before a court the *status quo* has been disturbed by humans. In the sodomy cases in particular, a non-permissible sexual act has taken place between two people. After hearing the case a judge (sometimes more) rules in an effort to redress the situation. In criminal cases the redress is punishment. Court cases are, in effect, two narratives in one – a telling of the facts of the case and then the judge's opinion.

No sexual act is intrinsically criminal; it can only be conceived as such from a particular point of view. The sodomy cases show that it was never certain what act actually counted as a crime. Judicial evidence in itself is value-neutral but whether the evidence is placed in a narrative that make the acts legal or illegal depends on how the judge as narrator will narrate them. This suggests that a judge brings to his deliberations an idea of the types of configurations of events that can be recognized as within a permissible range acceptable to the audience for which he is writing. As history has shown, it was permissible for judges to take cases which lent themselves far more to being governed by the law pertaining to rape and sex with underage girls and use them to justify legalizing male-female sodomy cases.

Judges wanted to tell the story that male sodomy was unacceptable to society and should remain a crime. Just as *S v Kampher* (sodomy between prison inmates) was not an ideal case to use to decriminalize male sodomy in 1997, in the 1960s and 1970s the cases used to decriminalize male-female sodomy were not ideal. It seems that the court wanted to settle the matter once and for all and so they used cases which arose at the time to drive home their preference. This emphasizes how judges use circumstances as they find them and fashion their opinions from them. Judges work with what they have at hand. Several rhetorical devices are used to differentiate the male-female sodomy cases, such as using different legal principles compared to male sodomy, posing questions which, when answered in a certain way, do not require the

judge to go further (such as determining whether *mens rea* was present),[964] deliberately distancing themselves by not using the term sodomy, using archaic nomenclature, and all but ignoring the real issues of the cases such as non-consensual sex in the form of rape and sex with underage girls. Judges wanted male-female sodomy decriminalized and they wanted that to become 'settled law'. The 'rightness' of these decisions are derived from an imaginative and intuitive process within the judge's thought process. The way in which the judge employs rhetoric determines the decision.

Proponents of historical narrative consider how something might be perceived to change over time or how it might be something completely different. To illustrate, I use two cases from the corpus. A man performed anal intercourse with another man.[965] He was sentenced to fifteen months' imprisonment with hard labour, partially suspended provided that he undergo psychiatric treatment and not commit a similar offence. In another case a man had anal intercourse with a young girl.[966] Both cases were brought under a charge of sodomy. The first case remained a sodomy charge but in the second case the sodomy charge was changed to indecent assault because the court held that sodomy only applied to male-male anal intercourse. The wording in the second case makes it clear that it is not sodomy – 'Male having intercourse *per*

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[964] *R v H* 1962 (1) SA 278 (SR), 280 ('If a man has no intention of having intercourse *per anum*, I do not think he can be convicted of sodomy if while attempting to rape a woman he by mischance penetrates her anus'.)
[965] *S v K* 1973 (1) SA 87 (RA).
[966] *S v M* 1979 (2) SA 406 (RA) – 'in addition to raping the complainant, a young African girl, the appellant had also forcibly effected penetration of the complainant *per anum*'.

anum with a female - Such not sodomy ... - Conviction of indecent assault substituted'.[967] In this example, is the first incident of anal penetration the same as the second case or has it changed? In the absence of any further information we should conclude it is the same. The question, then, is: is male-male anal penetration the same as male-female, or is it a changed act? This is important to consider because if it is a changed act then there is justification for using a different legal basis. It should be the same act because the Dutch jurists who judges relied on so heavily to criminalize male-male sodomy viewed male-female anal penetration in the *same* way.[968]

A thing changes when it now differs from what it was. The definition of sodomy – 'that particular kind of unnatural offence where there is penetration *per anum*'[969] – should apply to both cases because the definition is silent regarding gender. In some respects it is different because there are different genders, but according to the legal definition which the judges should have applied, it is not different because both involved the same *act*. If anything, the cases should have been differentiated on the basis of consent. The male-male case involves consenting adults whereas the male-female case involves rape and with a girl who could never be deemed to give consent. These cases have clearly been treated as different but not because of this blatant suppression of non-consent. The reason for the difference is gender alone. The act has

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[967] *S v M* 1979 (2) SA 406 (RA), 406.
[968] According to Hunt *et al*, 'some jurists regarded ordinary sexual relations between Jews and Christians as "sodomie"' – Hunt, P. & Milton, J. (2nd ed.), *South African Criminal Law and Procedure Vol. II*, p. 268, and sodomy could even be committed with pictures and statues according to Von Quistorp.
[969] *R v Gough & Narroway* 1926 CPD 159, 163.

changed so much that it has become a different act in the mind of the judge because gender is viewed as so dominant or essential that the same act is rendered different rather than changed.

The sodomy cases start in the 1920s with male-male cases which are always tried as sodomy throughout the period. In the 1960s three male-female cases are brought to court as sodomy cases but ruled to be indecent assault. The fourth and final male-female case in 1979 confirms this. This means that the male-female cases were different. The judges are careful not to use the word sodomy and they do not refer to previous male-male cases. Instead, they rely on previous cases of male-female sexual acts which do not involve anal penetration to rule that what they are dealing with is not sodomy. Sodomy could not change itself nor make itself different from how it was. As a (merely) physical act it could not effect nor do anything. It could only suffer being acted upon. What the factual narrative of sodomy required, then, was a human agent – a judge – who effected the change.

Pierre de Vos holds the view that the language in a legal text does not have a single 'objective' meaning and cannot always produce one absolute or fixed meaning. The South African Constitution, for example, does not have a single 'objective' meaning and cannot always produce one absolute or fixed meaning.[970] Judges are uncomfortable with the idea that they are not merely discovering a 'true', 'objective'

[970] de Vos, P., *A bridge too far?*, pp. 2 & 3.

or ‘original’ meaning of the text. If texts as varied as the Dutch jurists’ treatises and the Constitution do not have one objectively determinable meaning, the risk is that the judicial process will be open to criticism of arbitrariness and bias. In order to try and curtail the effect of the indeterminacy of a text de Vos suggests that judges rule in terms of a grand narrative. The grand narrative of sodomy seems to be that male sodomy has been a sin and a crime for millennia whereas male-female sodomy came to be accommodated as a modern sexual variation.

These grand narratives, however, rely on a rather naïve and outdated view of history. Those presently in power get to write their version of history. However, power is always contestable and there is no guarantee that those who adopt a particular metaphor will always be in power. The story of sodomy is messy, disjointed, contrived and forced. It provides a good illustration that grand narratives and teleology do exist in the lived world.

Conclusion

I have presented a small slice of rhetoric at work over a period of time and about a specific subject. A definitive conclusion is impossible and presumptuous. My hope is that the theorists that I have relied on and the exercise of analyzing legal texts that I have undertaken can convince us that legal texts are simply a subset of texts generally.

Judges would probably not have wanted to rule on homosexuality if they had had the choice. It was an offensive area of law. Cases of this kind are about a minority and, statistically, they form a small part of reported cases. Why then the effort?

‘Our law has never treated lesbians and gays kindly,’ says Edwin Cameron.[971] The extent to which the law is kind to minorities is an indication of the overall legal health of a society. And lesbians and gays are not the only minority.

[971] Cameron, E., *Sexual orientation and the constitution*, p. 453.

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