

**SUBSTANTIVE EQUALITY AND SEXUAL ORIENTATION:  
LESSONS FROM TWENTY YEARS OF GAY AND LESBIAN RIGHTS  
UNDER THE SOUTH AFRICAN CONSTITUTION**

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**I. INTRODUCTION**

On the day Nelson Mandela was elected as President of the newly-democratic Republic of South Africa, the new constitution ended the most egregious system of legal discrimination in the world. This year, 2014, marks the twentieth anniversary of President Mandela's election and the Constitution that ended South African apartheid. There is abundant exposure to South African constitutional law because of admiration for its Bill of Rights, respect for the South African Constitutional Court justices, and the nation's compelling history as a human rights state born out of apartheid. One of the outstanding elements of the South African Equality Clause is its novel and progressive inclusion of anti-discrimination protections for gays and lesbians.

The prohibition of discrimination based on sexual orientation was particularly important because it occurred—for the first time in any national constitution—in the closely-watched drafting of South Africa's historic "human rights" constitution<sup>1</sup> The South African Constitution advanced the expectations of international gay rights advocates and set a benchmark for future constitutional drafters. The document authors' generous interpretation of existing human rights trends and optimistic view of international law precedents resulted in trail-blazing protections supported by the moral authority of the South African victory over apartheid and the progressive credentials of the activists and human rights advocates who participated in or praised the constitutional result.

Following certification, the promise of the Constitution was realized in a sequence of highly-visible legal victories for gays and lesbians. The Constitutional Court of South Africa decriminalized same-sex sexual activity, required equal treatment of same-sex life partners in areas of immigration and government benefits, and affirmed the fundamental validity of same-sex relationships, eventually requiring full marriage equality. The Court's opinions included express affirmations of the dignity and equality of gays and lesbians in an unbroken series of unanimous, pro-gay decisions that form a substantial core of the overall equality jurisprudence of the Constitutional Court.

Indeed, the South African gay right jurisprudence exceeds the broadest advancements of legal protections anywhere else in the World and contrasts starkly with the appalling road taken by many countries – including nearly every other sub-Saharan African country. Nevertheless, twenty years after the prohibition of sexual orientation discrimination in the Equality Clause of the South African Constitution, its practical effect has been markedly inadequate to achieve the safety and social equality of gays and lesbians in South Africa. In sharp contrast to its expansive textual protections and progressive jurisprudence, the lived reality of South Africans gays and lesbians,<sup>2</sup> particularly in poorer communities, is typified by condemnation, discrimination and homophobic violence. Hence, the Equality Clause protections are a symbol of both the progressive, human rights reach of the post-apartheid Constitution and the gulf between textual promises and reality.

In each of these ways, examination of the history of both the successes and failures of the sexual orientation protections highlights larger lessons from the last twenty years of constitutionalism in

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<sup>1</sup> Mutua, [] at 65 ("the first deliberate and calculated effort in history to craft a human rights state--a polity that is primarily animated by human rights norms.")

South Africa. In this paper, I use the drafting history, Constitutional Court adjudication, and the practical insufficiencies of the Constitution's inclusion of sexual orientation-based protections, to highlight three insights about the last two decades of constitutional rights in South Africa: a hopeful lesson about unpopular, progressive elements in the drafting of modern constitutions; a cautious reminder on the value of purely (or predominantly) judicial/legal victories; and an affirmation of the value of even unrealized constitutional aspirations for comparative constitutional dialogue.

## **II. THE PATH TO CONSTITUTIONAL INCLUSION FOR SOUTH AFRICAN GAYS AND LESBIANS**

### **A. The End of Apartheid and the Rise of Constitutionalism in South Africa**

In the early 1990s South Africa achieved a goal considered impossible throughout long decades on state-sponsored and legally-maintained racism: a relatively nonviolent transition from "racial autocracy to a nonracial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights."<sup>3</sup> As the antitheses of apartheid, equality and human dignity were core values in the democratic transition, prominently placed and affirmed in both of South Africa's transitional constitutions.

#### **1. Drafting a Democratic Constitution for Post-Apartheid South Africa**

The initial, core conflict between the dominant parties at the 1991-92 convention planned to write a constitution that would end apartheid, the Convention for a Democratic South Africa (CODESA), was a disagreement about the process for drafting the constitution.<sup>4</sup> Was the purpose of CODESA merely to create a minimalist constitutional framework to facilitate democratic elections and enable a popularly-elected body to draft the Constitution? Or, were the party-appointed CODESA delegates intended to write the entire constitution? The opposing positions represented the fundamental strategic goals of the African National Congress (ANC), the popular and newly unbanned anti-apartheid party, and the National Party (NP), representing the still-powerful, white-minority apartheid government. The ANC wanted CODESA to have the most constrained possible directive so that the new constitution would be drafted by a newly elected (and sure-to-be ANC-dominated) legislature. The NP, aware of its ever-decreasing power, wanted CODESA to write an entire constitution that would protect the white minority through codification of individual and group rights, protection from prosecution for apartheid-era actions, and clauses preserving the economic status quo.<sup>5</sup> The compromise solution to this problem was a two-stage constitutional drafting process with a newly-formed constitutional court enforcing the parties' negotiated agreement.<sup>6</sup>

The first stage of the process involved drafting a preliminary constitution (the 1993 "Interim Constitution"), holding South Africa's first fully democratic elections, and selecting members of the new Parliament that would choose a new president. The second stage gave the task of crafting the

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<sup>3</sup> Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. Int'l L. & Pol. 695, 695 (1996); African National Congress, *A Brief History of the African National Congress*, <http://www.anc.org.za/show.php?id=206> (last visited April 7, 2013).

<sup>4</sup> The total work of the CODESA (and its follow-up negotiations, the Multi-Party Negotiating Process) was carried out by five Working Groups. The bulk of the Bill of Rights determinations and the procedural details of the constitutional process-and the vast majority of the most divisive issues-came out of Working Group Two. Other Groups addressed different aspects of the transition to democracy. See Lourens du Plessis & Hugh Corder, *Understanding South Africa's Transitional Bill of Rights 4-6* (1994) [hereinafter *Understanding*].

<sup>5</sup> See generally Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Road to Change* (1995); Patti Waldmeir, *Anatomy of a Miracle* (1997) (providing general histories of the political transformation of South Africa at the end of the apartheid era).

<sup>6</sup> The basic structure of this plan was originally proposed by Nelson Mandela one year prior to the start of CODESA, tacitly approved by President de Klerk at CODESA's inaugural session, and formalized over the course of CODESA. Patti Waldmeir, *Anatomy of a Miracle 194-95* (1997).

final constitution (the 1996 Constitution)<sup>7</sup> to the newly elected Parliament and Senate in their additional role as the Constitutional Assembly. Two safeguards linked the two stages of the process: a set of thirty-four inviolable constitutional principles (known as the Thirty-four Principles), which were agreed upon by the initial negotiating parties to constrict the subsequent final constitution,<sup>8</sup> and a constitutional court appointed under the Interim Constitution with the task of certifying that the final Constitution conformed with the negotiated agreement preserved in the Thirty-four Principles.<sup>9</sup>

Altogether, nearly two years passed between the start of formal constitutional negotiations at CODESA and the approval of the Interim Constitution and the thoroughly negotiated Thirty-four Principles.<sup>10</sup> The provisions of the Interim Constitution—with its Bill of Rights inclusive of a sexual orientation protections—came into effect on the first day of South Africa’s first multiracial elections, April 26, 1994.<sup>11</sup> The results of the election—important because of the elected ministers’ role as drafters of the constitution that would replace the Interim Constitution—gave the ANC 62.7 percent of the National Assembly and made Nelson Mandela the President of the Republic of South Africa.<sup>12</sup>

The Constitutional Assembly began working on the text of the final Constitution in May 1994. Under the Interim Constitution, the Assembly was given two years to complete its task.<sup>13</sup> Most of the work was conducted primarily in small “theme committees” rather than in public sessions.<sup>14</sup> The committees held hearings; analyzed submissions from the political parties, private organizations, and citizens; and identified areas of agreement and disagreement. Theme Committee findings were then forwarded to the Constitutional Committee, the authoritative party-based negotiating body of the Constitutional Assembly, where the core of the decision-making process occurred.<sup>15</sup>

Additionally, the Constitutional Assembly inaugurated a widespread public education and popular engagement program. The Public Participation Programme recognized the “fundamental significance of a Constitution in the lives of citizens” and thus sought to place public participation “at the centre of the Constitution-making process.”<sup>16</sup> The Public Participation Programme was meant to instill a feeling of citizen involvement in the constitutional process and to provide legitimacy for its

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<sup>7</sup> It is, of course, a bit of a misnomer to refer to the 1996 Constitution as the final constitution. The “final” Constitution has been amended twelve times since its completion in December 1996, although none are directly relevant to this Article. South African Constitutional Court, <http://www.constitutionalcourt.org.za/site/constitution/english-web/index.html> (last visited Sept. 30, 2012); Constitution of the Republic of South Africa (1996), available at <http://www.info.gov.za/documents/constitution/amendments.htm> (listing and noting amendments).

<sup>8</sup> S. Afr. (Interim) Const., 1993, sched. 4.

<sup>9</sup> S. Afr. (Interim) Const., 1993, sched. 4.; Albie Sachs, *South Africa's Unconstitutional Constitution*, 41 St. Louis U. L.J. 1249, 1255 (1997).

<sup>10</sup> Work was completed by the party delegates late in the evening on November 17, 1993. Understanding, *supra* note 17, at 2-17.

<sup>11</sup> Election '94 South Africa: The Campaign, Results and Future Prospects 187 (Andrew Reynolds ed., 1994).

<sup>12</sup> South Africa's democratic elections were held over several days beginning on April 26, 1994. Despite serious allegations of fraud and ballot tampering, the results (outside KwaZulu-Natal) conformed with expectations to a significant degree: the ANC received a strong but not overly dominant 62.7 percent, the NP received a disappointing 20.4 percent, the Zulu-nationalist Inkatha Freedom Party won the KwaZulu-Natal Province, and the extremist parties on both the left and right received only marginal percentages. *Id.* at 183.

<sup>13</sup> S. Afr. (Interim) Const. 1993, ch. 5, § 73.

<sup>14</sup> Theme committees were identified by number and had the following foci:

(1) character of state, (2) structure of state, (3) relations between levels of government, (4) fundamental rights, (5) judiciary and legal systems, and (6) specialized structures. See Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 Am J. Comp. L. 67, 70 n.23 (1999).

<sup>15</sup> The Constitutional Committee was comprised of members of the seven political parties represented in Parliament in proportion to the number of seats they held in the National Assembly: the ANC (252 seats in parliament), the NP (82), the IFP (43), the Democratic Party (7), the Freedom Front (9), the Pan African Congress (5), and the African Christian Democratic Party (2). See Election '94, *supra* note 24, at 183.

<sup>16</sup> Const. Assembl., Rep. of S. Afr., *The Public Participation Programme*, <http://www.constitution.org.za/const22115.html#PART> (last visited Jan. 13, 2007) (cited in Eric C. Christiansen, *Ending the Apartheid of the Closet*, 32 N.Y.U.J. Int'l L. & Pol. 997 (2000); see also Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa* 239-50 (1999) (detailing the successes of the Public Participation Programme in engaging the public).

outcome.<sup>17</sup> More than two million submissions were received from citizens and domestic groups.<sup>18</sup>

The text of the final Constitution was adopted by an overwhelming majority in both houses of Parliament--80 of 90 Senators and 321 of 400 National Assembly members--significantly above the required two-thirds majority of the entire Constitutional Assembly.<sup>19</sup> However, the proposed final Constitution could not be signed by the President or come into force unless and until the Constitutional Court certified it.<sup>20</sup> The Constitutional Court, established under the Interim Constitution, was required to declare whether the proposed text complied with each of the Principles annexed to the 1993 Constitution.<sup>21</sup>

The Interim Constitution's Thirty-four Principles established "the fundamental guidelines, the prescribed boundaries, according to which and within which the [[Constitutional Assembly] was obliged to perform its drafting function."<sup>22</sup> The expansive Equality Clause was one set of provisions—among many—challenged as impermissibly included in the Constitution when the Certification case came before the Constitutional Court.<sup>23</sup> The challenge was rejected by the Court and the Equality Clause with sexual orientation protections remained in the final constitution.

## 2. Sexual Orientation and the Post-Apartheid Constitutions

The African National Congress (ANC) first affirmed the need for a Bill of Rights in a post-apartheid constitution in 1986.<sup>24</sup> Despite some concerns,<sup>25</sup> enforceable equality and other rights were

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<sup>17</sup> As the media releases from the Constitutional Assembly described it: "The final submission was hand-delivered to the Constitutional Assembly at 11:30pm and at midnight the fax lines were still humming as the country's greatest ever public participation campaign came to a close [on February 20, 1996]." Constitutional Assembly, *Constitutional Talk: The Official Newsletter of the Constitutional Assembly*, vol. 2, (Mar. 8, 1996). Participation in all aspects of the program exceeded expectations. See *id.* vol. 9, (June 30, 1995).

<sup>18</sup> Submissions in phase one totaled 1.8 million and submissions for phase two totaled 250,000. *Id.* vol. 8, (June 8, 1995). Additionally, over 80,000 people attended public meetings and constitutional education workshops sponsored by the Assembly throughout the country. *Id.* vol. 2, (Mar. 8, 1996). While there were complaints that the program was not fully effective at reaching rural communities, informal settlements, women, and elderly citizens, a 1996 independent survey found that the media campaign had reached 18.5 million people, seventy-three percent of adult South Africans. The survey was conducted by the Community Agency for Social Equality. *Id.* vol. 3, (Apr. 22, 1996). Over four million copies of a special thirty-two page Constitutional Talk edition were produced in all eleven official languages. The publication contained the complete text of the draft Constitution, explanatory articles outlining the issues, and a series of graphics aimed at making the often complex constitutional issues accessible to ordinary South Africans. *Id.* vol. 1, (Feb. 9, 1996).

<sup>19</sup> The Constitutional Assembly consisted of the 400 newly elected members of the National Assembly and the ninety members of the Senate. 3 Debates of the Constitutional Assembly, Rep. of S. Afr. 447-52, 524-25 (1996). Only one party, the African Christian Democratic Party, voted against the text (with two votes). The Freedom Front, a white right-wing party, abstained from the vote with 13 votes. *Id.*

<sup>20</sup> See S. Afr. (Interim) Const., 1993, ch. 5, § 71(2) ("The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a)."). "It is necessary to underscore again that the basic certification exercise involves measuring the [final constitutional text] against the [Thirty-four Principles]. The latter contain the fundamental guidelines, the prescribed boundaries, according to which and within which the [Constitutional Assembly] was obliged to perform its drafting function." Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) para. 32 (S. Afr.) [hereinafter *Certification I*]. "Suffice it at this stage to make two points. First, that this Court's duty--and hence its power--is confined to such certification. Second, certification means a good deal more than merely checking off each individual provision of the [final text] against the several [Principles]." *Id.* at ch.1, § B, para. 17

<sup>21</sup> *Certification I*, supra note 34, paras. 1-19, 26-31.

<sup>22</sup> *Id.* para. 32.

<sup>23</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, para. 32, 1996 (4) SALR 744 (CC), (Case CCT 23/96) (Sept. 6, 1996) [hereinafter *Certification I*].

<sup>24</sup> See Robin Fields, Note, *In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States*, 16 B.C. THIRD WORLD L.J. 65, 92 (1996).

<sup>25</sup> It is unclear what a Bill of Rights meant to the majority black population which had lived under apartheid so long. There was almost no experience of human rights protections for most South Africans during the years of apartheid, or even before that. Indeed many of the associations that South Africans and even members of liberation movements had with a Bill of Rights were negative. For many, a Bill of Rights offered no real protections, or offered protections only to the privileged (a "Bill of Whites" as some have termed it; see Mutua, supra note [ ], at 68-69) or was merely beyond the scope of immediate concern in the midst of

a legal refutation of everything apartheid stood for and a substantiation of ANC claims that a future South Africa would be based on non-racialism. This statement was followed in 1989 by a formal ANC publication, *Constitutional Guidelines for a New South Africa*, which affirmed the need for a justiciable Bill of Rights: “The Constitution shall include a Bill of Rights based on the Freedom Charter.<sup>26</sup> Such a Bill of Rights shall guarantee the fundamental human rights of all citizens . . . and shall provide appropriate mechanisms for their enforcement.”<sup>27</sup> Further Bill of Rights drafts were produced by the ANC in 1990<sup>28</sup> and again in 1992.<sup>29</sup> To a significant degree, the civil and political rights outlined in those two documents form the ideological core of the Interim Constitution’s Bill of Rights. Equality was a central element of all four documents.

Oddly enough, the ruling, white-minority NP was exploring options for a Bill of Rights at the same time.<sup>30</sup> Not only were both of the main parties to the initial constitutional negotiations on similar timelines, but there were certain congruencies to their fundamental findings: a focus on individual rights, a necessary limitation on government power, the need for judicial oversight, and a enforced equality protections.<sup>31</sup> Indeed, by the time the process of negotiating the Interim Constitution began, every major political party agreed that the final document would include a Bill of Rights with a substantial Equality Clause.<sup>32</sup>

#### ***a. Interim Constitution Drafting Period: Behind Closed Doors***

The speculative drafting work related to Bills of Rights during the late 1980s became much more important with the unbanning of the liberation movements and the beginning of negotiations for multi-racial democracy. Gay and lesbian activist groups continued education and lobbying campaigns in the Interim Constitution drafting period. The success of the work of ANC and gay community activists was evident at the ANC National Conference held in May 1992. Sexual orientation was mentioned twice in the party’s formal policy guidelines. In the party’s formal policy regarding a future constitution, the ANC stated that “the right not to be discriminated against or subjected to harassment because of sexual orientation” would be included in a Bill of Rights<sup>33</sup> and,

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the struggle to end apartheid. Additional distrust of a Bill of Rights came from the actual experience of South Africans in the “ethnic homelands.” Many of the Bantustan constitutions included Bills of Rights that were consistently ignored by homeland leadership; they acted as mere facades for authoritarian regimes with atrocious human rights records. See Sachs, *supra* note 58, at 15-16.

<sup>26</sup> Adopted by the 3,000-delegate Congress of the People on June 26, 1955, the ANC-authored Freedom Charter was the political manifesto of the anti-apartheid movement. In addition to the core tenet of multi-racialism, the document also emphasized redistribution of wealth, land ownership by those who work it, equal protection of the law, and other social and economic rights. It was the primary ANC statement of values throughout most of the organization’s history and has been retroactively labeled a proto-Bill of Rights. For full text of the Charter, see Congress of the People, *The Freedom Charter, 1955*, reprinted in 21 COLUM. HUM. RTS. L. REV. 249 app. C, at 249-51 (1989).

<sup>27</sup> African national Congress, *Constitutional Guidelines for a New South Africa*, 21 COLUM. HUM. RTS. L. REV. 235 app. A, at 237 [hereinafter *Constitutional Guidelines*]. The guidelines were the subject of extensive review and critique in South Africa. “Indeed, so many bodies have taken up, analysed, and criticized the Guidelines that they have ceased to be simply an ANC document; instead they have become a working text for the entire anti-apartheid movement.” Sachs, *supra* note 58, at 17.

<sup>28</sup> See Constitutional Committee, African National Congress, *Democratic South Africa--Working Draft for Consultation (1990)*, reprinted in 18 SOC. JUST. 49 (1991) [hereinafter *1990 Draft ANC Bill of Rights*].

<sup>29</sup> See constitutional committee, African National Congress, *Draft Bill of Rights: A Preliminary Revised Text (1992)* reprinted in ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA*, app. 1, 215 (1992) [hereinafter *1992 Draft ANC Bill of Rights*].

<sup>30</sup> Lynn Berat, *A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary*, 13 LOY. L.A. INT’L & COMP. L.J. 47, 475 (1991) quoting South African Law Commission Act 19 of 1973. See SOUTH AFRICAN LAW COMMISSION, *WORKING PAPER NO. 25, PROJECT 58: GROUP AND HUMAN RIGHTS (1989)*, reprinted in *South African Law Commission Bill of Rights*, 21 COLM. HUM. RTS. L. REV. 241, app B (1989).

<sup>31</sup> These shared characteristics were noted in Cameron, *supra* note [ ], at 450-451.

<sup>32</sup> See generally DU PLESSIS & CORDER, *supra* note [ ],. This book’s authors were the primary drafters of the interim Bill of Rights. See also Letter from Albie Sachs, Justice, Constitutional Court of South Africa, to author (Jan. 7, 2000) [hereinafter Letter from Albie Sachs] (on file with author).

<sup>33</sup> African National Congress, *Ready to Govern, ANC Policy Guidelines for a Democratic South Africa* (adopted at the

under “basic principles” related to human resources development, the document stated a goal of “full employment with a rising standard of living and quality of social and working life for all South Africans, regardless of race, sex, class, religion, creed, sexual orientation and physical or mental disability.”<sup>34</sup> Notably, this list is very similar to the text of the Interim Constitution’s Equality Clause—further revealing the importance of early lobbying efforts.<sup>35</sup>

As the CODESA project was resurrected at the Multi-Party Negotiating Process, various parties’ policies became more explicit. The NP’s Charter of Fundamental Rights, adopted as official government policy in 1992 and representing the NP’s Bill of Rights proposal for the Interim Constitution, protected gay rights using “other natural characteristics” language.<sup>36</sup> The ANC submitted the 1992 draft Bill of Rights, an amended version of the 1990 draft, which included “sexual orientation” explicitly.<sup>37</sup> The Democratic Party submission, following the policy it had previously reported, explicitly outlawed direct and indirect discrimination based on sexual orientation.<sup>38</sup> The Inkatha Freedom Party proposals were equally explicit: “All citizens . . . have equal social dignity, shall be equal before the law and shall share an equal right of access to political, social, and economic opportunities irrespective of . . . sexual orientation . . . .”<sup>39</sup> Although the other parties chose not to include sexual orientation protections in their Bill of Rights drafts, either explicit or implicit protections were favored by parties that would go on to win 95.2% of the popular vote in the 1994 elections set up by the Interim Constitution.<sup>40</sup>

The expectation that most parties would include either explicit or implicit discrimination

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National Conference, May 28-31, 1992), § B.5, available at <http://www.anc.org.za/ancdocs/history/readyto.html> (last visited June 28, 2000).

34. *Id.* § L.1.

35. Age, language, and culture are added in the Interim Constitution. See S. Afr. Interim Const. (Act 200 of 1993), ch. 3, § 8(2). As their work with the ANC began to yield results, gay and lesbian activists began lobbying other parties as well. In June 1991, OLGA contacted ten political parties and questioned them about their policy regarding general Bill of Rights protections of individual rights and the specific inclusion of sexual orientation as a protected category. Only the Democratic Party responded affirmatively to the question of explicit protections for gays and lesbians: “The Bill of Rights will guarantee all persons irrespective of . . . sexual preference . . . the following fundamental rights . . . [including] equal protection of the law . . . .” See *id.* at 277, n.20. The National Party (NP) and Labour Party committed only to general protections of individual rights, the Conservative Party stated a Bill of Rights was unnecessary because “the Ten Commandments serve as the best Bill of Rights and all rights are sufficiently enshrined therein,” and six other parties neglected to respond. *Id.*

36. This language was proposed by the National Party on Feb. 3, 1993. See Botha & Cameron, *supra* note **Error! Bookmark not defined.**, at 94-95.

37. “It shall be unlawful to discriminate on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation.” Constitutional Committee, African National Congress, *A Bill of Rights for a New South Africa, Working Document*, art. 7(2) (1992). See also African National Congress, *Ready to Govern*, *supra* note 33, part J § 1 (listing among protected rights in the introduction to the Bill of Rights, “the right not to be discriminated against or subjected to harassment because of sexual orientation,” and, in the education, training and scientific developments section, affirming “all individuals should have access to lifelong education and training, irrespective of . . . sexual orientation”).

38. The Democratic Party proposal stated

[art.] 2.1 Every person shall have the right to equal treatment, and there shall consequently be no discrimination, whether direct or indirect.

[art.] 2.2 Discrimination means unjustified differentiation. Differentiation on the grounds of race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience shall be presumed unjustified unless it is part of a rational programme intended to remedy substantial inequality.

Democratic Party, Draft Bill of Rights, May 1993, *quoted in* Botha & Cameron, *supra* note **Error! Bookmark not defined.**, at 96.

39. Other protected classifications included sex, race, colour, language, traditions, creed, religion, political affiliation and belief, and social and personal status. See KwaZulu Legislative Assembly, *Resolution: Constitution of the State of KwaZulu/Natal* (1 December 1992) § 10(a) Equality, *quoted in* *Unapprehended Felons*, *supra* note **Error! Bookmark not defined.**, at 96.

40. In the 1994 elections, the ANC received 62.6% of the popular vote, the NP received 20.4%, the IFP received 10.5%, and the DP received 1.7%. Combined, they contributed 95.9% of the members of the Constitutional Assembly (384 of 400 members). See ELECTION ‘94, *supra* note **Error! Bookmark not defined.**, at 183.

protections for gays and lesbians marked a tremendous accomplishment,<sup>41</sup> but it did not ensure the inclusion of reference to sexual orientation in the Interim Constitution. By the time of the Multi-Party Negotiation Process, it remained unclear within the Technical Committee for Fundamental Rights whether the form of the equality clause would be a provision prohibiting discrimination against specific, enumerated classes or a generic non-discrimination provision.<sup>42</sup> In the end, party negotiators chose to accept the full enumeration of prohibited bases of discrimination as submitted by the Committee. This was motivated, at least in part, by the particular vulnerability of some groups, including gays and lesbians, under the discretionary judicial interpretive process that would have been necessitated by use of a generic prohibition.<sup>43</sup> This decision, combined with the fact that the Technical Committee far over-stepped its assigned task, gave unexpected importance to the Bill of Rights provisions of the various parties. The result was expansive rights protections under the Interim Constitution.

A historic, albeit potentially temporary victory had been secured, but threats to the new-found protections awaited in the more public, more democratic final Constitution drafting process.

**b. Final Constitution Drafting Period: Internal Allies Trump Public Opposition**

The path from inclusion in the Interim Constitution to the final Constitution was fairly straightforward for most categories of precluded discrimination.<sup>44</sup> While it is not entirely clear from available sources how controversial sexual orientation protections were—only a single party openly opposed inclusion—there is clear evidence that removal of explicit reference to sexual orientation was discussed.<sup>45</sup> As late as October 1995, inclusion of sexual orientation as a protected class was still identified as a “contentious and outstanding issue” in the working draft of the final Constitution.<sup>46</sup> And, publication of the November 22, 1995 working draft was accompanied by editorial commentary that seemed to identify sexual orientation protections as the sole controversial and undecided aspect of the Equality Clause.<sup>47</sup>

**i. Technical Committee Support**

Interim Constitution Principle II stated that

[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia

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41. In an appeal to a 1993 sodomy conviction *S v. H*, then judge (now Constitution Court Justice) Ackerman, while upholding a conviction for private, consensual sex between men, lessened the imposed sentence. Citing the various drafts of the then-pending Interim Constitution, the judge identified a “broad consensus on eliminating discrimination against homosexuality and the likelihood that this will be entrenched in a new constitutional dispensation.” *S v. H*, 1993(2) SACR 545(C), 1995(1) SA 120 (CPD), at 124, cited in Johnson, *supra* note **Error! Bookmark not defined.**, at 620.

42. See Letter from Albie Sachs, *supra* note **Error! Bookmark not defined.**

43. See *id.* The Committee was also influenced by a written submission from the Equality Foundation, a pro-gay lobbying group. See DU PLESSIS & CORDER, *supra* note **Error! Bookmark not defined.**, at 142.

44. No categories were dropped between the Interim Constitution and the final Constitution; pregnancy, marital status, and birth were added. See S. AFR. INTERIM CONST. (Act 200 of 1993) ch. 3, § 8(2); compare S. AFR. CONST. ch. 2, § 9(3).

45. The most likely option would have been usage of language similar to the South African Law Commission phrase “natural characteristics” or the International Convention on Civil and Political Rights “or other status” language. South African Law Commission, *supra* note 62, art. 2; International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966), art. 26 [Equality] [hereinafter ICCPR].

46. See S. LIEBENBERG, ET AL, TECHNICAL COMMITTEE OF THEME COMMITTEE FOUR, CONSTITUTIONAL ASSEMBLY, EXPLANATORY MEMORANDA ON THE DRAFT BILL OF RIGHTS OF 9 OCTOBER 1995: OVERVIEW OF METHOD OF WORK, ch. 6 [hereinafter EXPLANATORY MEMORANDA].

47. “However, some people say that it is wrong to include sexual orientation as one of the grounds for unfair discrimination. They argue that homosexuals should not be given this kind of protection in the new Constitution.” Constitutional Assembly, *Equality and Discrimination, Editorial Accompanying the Working Draft of the New Constitution*, 22 November 1995, available at <http://www.constitution.org.za/edit/equal.html> (last visited Nov. 12, 1999).

the fundamental rights contained in Chapter 3 of this [Interim] Constitution.<sup>48</sup>

Hence, the case for inclusion of sexual orientation protection was more viable if it were a South African codification of international human rights law rather than a South African innovation. The Technical Committee of Theme Committee Four (of the Constitutional Assembly) clearly supported inclusion, and thus it discussed sexual orientation protections as a “universally accepted fundamental right” in its Explanatory Memoranda prepared for the Constitutional Committee.<sup>49</sup> The Committee demonstrated the similarity between sexual orientation discrimination and other forms of proscribed discrimination in human rights documents: “The enumerated grounds of discrimination in international law relate to characteristics and choices which are an integral part of human personality and identity. They also include attributes of groups which are particularly vulnerable to discrimination, exclusion and subordination.”<sup>50</sup>

In addition to qualification under this general principle, the Technical Committee also very favorably interpreted the four cases (by 1995) in which international human rights bodies had identified “sexual orientation” as a category for protection.<sup>51</sup> According to the Technical Committee: The UN Human Rights Committee has interpreted sex as a prohibited ground of discrimination in articles 2(1) and article 26 of the Covenant<sup>[52]</sup> to include sexual orientation. Thus the Committee has ruled that legislation criminalising all forms of sexual contact between consenting homosexual men to be in violation of the rights to privacy protected in article 17 of the Covenant read with the right to non-discrimination in the enjoyment of the rights protected in the Covenant.<sup>[53]</sup> This is consistent with the case law of the European Court of Human Rights.<sup>54</sup>

It is less than fully honest to read international legal precedent as encompassing a blanket affirmation of gay and lesbian equal rights. No formal international human rights documents explicitly include protections of gays and lesbians or prohibit discrimination based on sexual orientation.<sup>55</sup> In 1995, only four cases had established favorable legal precedent related to the rights of gays and lesbians under international law. In *Dudgeon v. United Kingdom*, *Norris v. Ireland* and *Modinos v. Cyprus*,<sup>56</sup> the European Court of Human Rights (ECHR) found national sodomy laws to be inconsistent with member states’ obligations under Article Eight of the European Convention for Human Rights and Fundamental Freedoms. In *Toonen*, the United Nations Human Rights Commission (UNHRC) provided a similar ruling based on its classification of sexual orientation discrimination as a subset of sex discrimination.<sup>57</sup> But at the time the South African Constitution

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48. S. AFR. INTERIM CONST. (Act 200 of 1993) sched. 4, II.

49. See EXPLANATORY MEMORANDA, *supra* note 46, § 4.2.3.

50. *Id.* § 4.2.2.

51. At the start of the constitutional drafting process, there had been only two such cases. See AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note **Error! Bookmark not defined.**

52. ICCPR, *supra* note 151.

53. Nicholas Toonen v. Australia, U.N. Human Rts. Comm., No. 488, U.N. GAOR, 49th Sess., Supp. No. 40, at 226, 235, U.N. Doc. A/49/40 (1994). *Toonen* asserted that the protection from discrimination based on “sex” in ICCPR, art. 26 was to be interpreted as including sexual orientation. Advocates for gay rights had also argued that sexual orientation was covered under “other status” in art. 26, and under the privacy provisions in art. 17 (1). See ICCPR, *supra* note 45.

54. EXPLANATORY MEMORANDA, *supra* note 46, § 4.2.3. The referenced European Court of Human Rights (ECHR) cases are *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 160, 170 (1981) (Court report) (ruling that the Northern Ireland law criminalizing homosexual acts violated Article 8 of the European Convention for Human Rights and Fundamental Freedoms which guarantees “everyone the right to respect for private and family life, his home and his correspondence”), *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, 201 (1991) (Court report) (ruling that Ireland’s sodomy law violated Article 8 of the European Convention), and *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485, 495 (1993) (Court report) (applying *Dudgeon* and *Norris* holdings to Republic of Cyprus). See generally AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note **Error! Bookmark not defined.**

55. See AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note **Error! Bookmark not defined.**, at 7-8.

56. See *supra* note 54.

57. See *Toonen*, U.N. Human Rts. Comm., No. 488, U.N. GAOR, 49th Sess., Supp. No. 40, at 226, 235, U.N. Doc. A/49/40

was being drafted, those cases were recent and limited precedents.<sup>58</sup> Furthermore, with a single exception, national courts have resisted interpreting their established constitutional anti-discrimination provisions to include gays and lesbians as a protected category.<sup>59</sup>

As further support for inclusion of sexual orientation, the Technical Committee asserted: [M]any countries and states have adopted anti-discrimination legislation which either expressly, or through interpretation, have included sexual orientation. Thus, for example, in the Canadian case of *Haig v Canada*,<sup>[60]</sup> it was held that sexual orientation should be treated as an analogous ground of discrimination and thus included within the scope of [sec.] 3 of the Canadian Human Rights Act.<sup>61</sup>

The use of the phrase “for example” is a bit disingenuous here. While it is true that anti-discrimination legislation that includes sexual orientation is reasonably common in developed countries, no country other than Canada has found that homosexuals are an implicit constitutionally-protected category under its national constitution.

Despite the debate that was occurring elsewhere in the Constitutional Assembly, the Technical Committee was unambiguous in its final endorsement: “[I]t is our strong recommendation that sexual orientation be included as a prohibited ground of discrimination in the equality clause.”<sup>62</sup>

## ii. *Gay and Lesbian Organizing During the Final Drafting Period*

The gay and lesbian community’s efforts to influence the final Constitution were sponsored by a coalition of activists and organization under the name National Coalition for Gay and Lesbian Equality (NCGLE). The Coalition’s focus was primarily on high-level lobbying and secondarily on participation in the Public Participation Programme to ensure that explicit sexual orientation protections remained in the final Constitution.<sup>63</sup> NCGLE’s activities were meant to supplement the continued activities of the other South African gay and lesbian groups. During the drafting period, the Coalition’s work included coordinating coalition member actions, organizing lobbying efforts

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(1994).

58. Additionally, enforcement has been problematic: after *Modinos*, 16 Eur. H.R. Rep. 485, Cyprus refused to change its discriminatory laws for several years. And, the ECHR cases are applicable only to the 41 Council of Europe member states. *Toonen*, U.N. Human Rts. Comm., No. 488, U.N. GAOR, 49th Sess., Supp. No. 40, at 226, 235, U.N. Doc. A/49/40 (1994), was a very limited holding that is open to a variety of interpretations. Its reliance upon continued judicial assignment of sexual orientation rights to clauses prohibiting discrimination based on “sex” has been questioned. Additionally, enforcement of the Commission ruling was very challenging, requiring Australia to invoke its “foreign relations power” and sue the province of Tasmania before the provincial legislature changed their law. See Douglas Sanders et al., *Finding a Place in International Law*, The International Gay and Lesbian Association, available at [http://www.ilga.org/Information/finding\\_a\\_place\\_in\\_international.htm](http://www.ilga.org/Information/finding_a_place_in_international.htm) (last visited Sept. 17, 2000).

Very few international human rights bodies have evidenced the kind of unequivocal prohibition of discrimination on the basis of sexual orientation as the Technical Committee reads into recent precedent. International law, at its best, has been inconsistently hostile. For example, homosexual acts are still criminalized in Romania despite the fact that its Council of Europe membership hinged on bringing its laws into compliance with the European Convention. See AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note **Error! Bookmark not defined.**, at 38-39.

59. The single exception is Canada. See *Haig v. Canada*, [1992] 10 C.R.R. (2d) 287; see also *Egan v. Canada*, [1995] 2 S.C.R. 513. Two laws address federal human rights protections in Canada: the Charter of Rights and Freedoms is aimed at state action and the Human Rights Act applies to private individuals. In *Haig*, the Supreme Court of Canada unanimously held that discrimination based on sexual orientation was analogous to the discrimination prohibited in the Equality Clause of the Charter of Rights and Freedoms (added to the Canadian Constitution in 1982):

Every individual is equal before the law and under the law and has the right to equal protection of the law and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms).

60. *Haig v. Canada* [1992] 10 C.R.R. (2d) 287.

61. EXPLANATORY MEMORANDA, *supra* note 46, § 4.2.3.

62. EXPLANATORY MEMORANDA, *supra* note 46, § 6.1.

63. See STYCHIN, *supra* note **Error! Bookmark not defined.**, at 74-75. Based in Johannesburg, NCGLE was formed in December 1994 in anticipation of the struggle to keep sexual orientation in the final Constitution’s non-discrimination clause. It coordinated national efforts on behalf of a loose association of seventy-three member organizations

that reflected the racial and linguistic diversity of gay and lesbian South Africans, preparing submissions to the Constitutional Assembly, and orchestrating the noteworthy letter-writing, petition, and postcard campaigns.<sup>64</sup>

### iii. *Organized Opposition to Inclusion of Sexual Orientation Protections*

Despite internal debates within the parties, only one political party—the African Christian Democratic Party (ACDP)<sup>65</sup>—actively fought inclusion of sexual orientation in the final Constitution.<sup>66</sup> Their justification for this opposition was based on their call for all political decisions to reflect so-called “biblical values.” According to the ACDP, inclusion of anti-discrimination protection for gays and lesbians “goes against the will of God and African culture.”<sup>67</sup> In their attempts to persuade the Constitutional Assembly to remove sexual orientation protections, the party focused on the contentious issue of same-sex marriage<sup>68</sup> and the assertion that the inclusion of sexual orientation in the Equality Clause amounted to special protection.<sup>69</sup> Although the ACDP won only two seats in the National Assembly in the 1994 elections,<sup>70</sup> political support for the party is considerably less than support for its conservative positions.<sup>71</sup> Indeed, significant numbers of non-ACDP-affiliated religious conservatives opposed the inclusion of sexual orientation protections.<sup>72</sup>

Other than the ACDP and some conservative religious groups, there was very limited formal institutional opposition to the inclusion of sexual orientation during the drafting of the final Constitution. Nevertheless there was significant evidence of disapproving public sentiment in the petitions received through the Constitutional Assembly’s Public Participation Programme.

### iv. *Sexual Orientation in the Public Participation Programme*

The debate over inclusion of sexual orientation protections in the final Constitution figured

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64. International Gay and Lesbian Human Rights Commission, *Historic South African Bill of Rights Includes Sexual Orientation*, Press Release, May 1996 available at [http://www.iglhrc.org/news.press/pr\\_960501.html](http://www.iglhrc.org/news.press/pr_960501.html) (last visited June 28, 2000).

65. The ACDP, the smallest party in the Constitutional Assembly, was founded in 1994 by Kenneth Meshoe, a Christ for All Nations evangelist minister claiming an instruction from God to found a political party based on “biblical values.” African Christian Democratic Party, *Reverend Kenneth Meshoe’s Testimony*, available at [http://www.acdp.org.za/faq\\_testimony.asp](http://www.acdp.org.za/faq_testimony.asp) (last visited June 28, 2000).

175. One of the twelve reasons the ACDP opposed the final Constitutions states:

The ACDP rejects the horizontal application of the equality clause in Chapter 2 of the Bill of rights. We do not want Gays and Lesbians who are protected by the “sexual orientation” clause in subsection 9(3) to be imposed on us. We want the right not to employ them, if we so wish, and not to have them teach our children their immoral, unnatural and sinful lifestyles.

*Twelve Reasons Why the ACDP Voted Against the Adoption of the South African Constitution* at [http://www.acdp.org.za/doc\\_twelve\\_reasons.asp](http://www.acdp.org.za/doc_twelve_reasons.asp) (last visited June 28, 2000).

67. *Constitutional Talk*, *supra* note 31, vol. 1, 1996 (Feb. 9, 1996).

68. For example:

What people do not realise is that this clause puts us priests in a lot of trouble . . . . What it means is that if two people of the same sex come to my church and ask me to marry them, if I refuse on grounds that they are of the same sex, they have recourse to the law . . . . We have to test the will of the people on this issue . . . . And I am sure the majority of our people would not allow such marriages to be legalised. This is against the will of God and African culture. It is just the truth . . . .

*Id.*

69. According to the ACDP, inclusion of sexual orientation as a protected category yields “preferential protection” that is open to all sorts of abuses including “the right to homosexuality, bestiality, paedophilia and other ‘perverse sexual activity.’” *Id.* at vol. 8, 1995 (June 8, 1995).

70. See ELECTION ‘94, *supra* note **Error! Bookmark not defined.**, at 183.

71. See STYCHIN, *supra* note **Error! Bookmark not defined.**, at 80.

72. At the May 1995 National Sector Public Hearing for Religious Groups, several religious leaders declared that the sexual orientation clause was not necessary as there was sufficient protection in other rights. Mr. Mokabane of Concerned Evangelicals and Rev. Steele, of the International Fellowship of Christian Churches, spoke against inclusion of protections for homosexuals, reciting arguments similar to the ACDP party position. The general focus of the meeting was on church-state issues and rights of free exercise. See *Constitutional Assembly National Sector Public Hearing/Religious Groups*, World Trade Center, May 26, 1995, at <http://www.constitution.org.za> (last visited Nov. 14, 1999).

prominently in the Public Participation Programme—as did many aspects of the Bill of Rights.<sup>73</sup> Identified as a “hot topic” early in the process, inclusion of sexual orientation in the Equality Clause was mentioned in over 800 of the individual public comments and in petitions bearing over 24,000 signatures.<sup>74</sup> By a significant majority, the individual submissions supported inclusion<sup>75</sup>—perhaps as a result of the efforts of gay and lesbian activists—but petitioners organized by conservative churches during the first phase of the Programme, urged removal by a more than a two-to-one majority over petitioners for inclusion.

For such a typically impassioned topic, the comments make for decidedly boring reading; many of the submissions are in the form of petitions or sound either scripted or faithful to a proposed model. Submissions in support of inclusion followed certain trends. They phrased the request as a wish to “keep sexual orientation in the Constitution,” expressing approval for maintenance of the new status quo created by the Interim Constitution. To the extent that the writers expressed a reason for inclusion, they most often cited a general non-discrimination, fundamental rights argument:<sup>76</sup> “Discrimination for one means discrimination for all, we cannot have a truly democratic society when any section of the population is discriminated against;”<sup>77</sup> and “I don’t work any different, I don’t sleep any different, I don’t love any different, I don’t want to be treated any different.”<sup>78</sup> Many of the writers identified themselves as lesbians or gay men<sup>79</sup>—although far more contributors explicitly identified themselves as heterosexual.<sup>80</sup> At least a few made reference to the international implications of constitutional protections: “The clause in the interim constitution—including sexual orientation should remain as is; also serving as an example and a forerunner for equality to other countries.”<sup>81</sup>

The public comments that opposed inclusion of sexual orientation in the Constitution were different in form as well as substance. Most were petitions; one typical submission from the pre-working draft stage states:

I hereby strongly object to the legalisation of immoral and unnatural sexual lifestyles under Chapter 3 Paragraph 8.2 of our interim constitution. The phrase ‘SEXUAL ORIENTATION’ must be deleted from our present constitution and must NOT be included in the final constitution that is being drafted. Homosexuality, lesbianism, sodomy and bestiality are unnatural, abnormal and immoral and do not deserve any constitutional protection under clauses like “sexual orientation.”<sup>82</sup>

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73. The Programme can be divided into two separate public comment periods, one from formation of the Constitutional Assembly in May 1994 until mid-1995 and another from publication of the working draft in November 1995 until February 20, 1996. In the period of response to the working draft alone, 56% of the total comments addressed articles of the Bill of Rights. *See Constitutional Talk*, *supra* note 31, vol. 2, 1996 (Mar. 8, 1996).

74. This total is based on figures reported by the Constitutional Assembly: petitioners opposed during first phase, 16,663; petitioners supporting inclusion in first phase, none reported; petitioners opposed during second phase, 546; and petitioners supporting inclusion during second phase, 7,032. *See Constitutional Assembly, Annual Report, 1995-1996*, at <http://www.constitution.org.za> (last visited Jan. 4, 2000).

75. All submissions are identified by their unique identifier number assigned by the Public Participation Programme staff at the time the submission was received. All of the submissions are available on a searchable database at <http://www.constitution.org.za/form.html>. The nature of the database and the fact that many of the submissions address multiple issues make it impossible to offer exact numbers, but an examination within those constraints reveals that there are three or four supportive submissions (from individuals) for every letter of opposition.

76. *See, e.g.*, Submission #8319 (N. Webster); Submission #6152 (K. McConnell), *see supra* note 75.

77. Submission #7289 (V. Smith), *see supra* note 75.

78. Submission #7149 (C. Minnar) (capitalization altered), *see supra* note 75.

79. *See, e.g.*, Submission #6036 (D. Renge); Submission #7289 (V. Smith), *see supra* note 75.

80. *See, e.g.*, Submission #6008 (J. Narendse); Submission #6120 (R. Hitzeroth), *see supra* note 75.

81. Submission #6024 (R. Buitendag), *see supra* note 75.

82. Submission #5061 (“Petition”), *see supra* note 75. (The commentary preceding this submission states: “The constitutional assembly has received 16,363 copies of the following and similar petitions concerning the sexual orientation clause in the interim

The overwhelming majority of opposition submissions based their argument on “biblical values” and fundamentalist Christian notions of morality.<sup>83</sup> Many of the petitions express opposition to other liberal aspects of the Constitution, most typically the legality of abortion and the abolition of the death penalty,<sup>84</sup> and occasionally the absence of explicit reference to God as well.<sup>85</sup> The other common feature of these submissions is the vehemence of their feelings: “How can any disgusting, deviant sexual behaviour have the phrase ‘fundamental rights’ protecting it?”<sup>86</sup> For those who may have hoped that the inclusion of sexual orientation protection in the Interim Constitution two years earlier would initiate a new period of tolerance and understanding, the vituperative submissions of some opponents must have been a startling realization.

**v. *The Debate Ends; Sexual Orientation Is Included***

The Public Participation Programme culminated a few months prior to the completion of the Constitutional Assembly’s drafting responsibilities. As the two-year timeline for completion of the final Constitution moved into its last six months, many final decisions were made outside of public or media scrutiny. Several factors contributed to this. The Technical Committees had finished much of their work, the working draft was published and was being distributed, and a significant number of political compromises needed to be made prior to consideration by the whole Constitutional Assembly. The debates of the smaller, party-based Constitutional Committee—and other “informal” negotiations—were neither recorded nor reported. It is difficult to know anything significant about their discussions—other than the results of the process.

On October 10, 1995, the Constitutional Committee agreed to follow the Technical Committee recommendations on a host of matters—including retention of the Interim Constitution’s explicit reference to sexual orientation as a category protected from discrimination in the final Constitution.<sup>87</sup> Despite public opposition, limited legal precedent, fragmentary organizations, and conservative cultural elements, gays and lesbians held on to their ground-breaking protection in the final South African Constitution.

The centrality of equality in the constitutional values of both the interim and final constitutions is unchallenged: the right of equality before the law enjoys prominence as the first enumerated right in both constitutions. As the Bill of Rights is “the cornerstone of democracy in South Africa,”<sup>88</sup> the equality provisions are the cornerstone of the Bill of Rights itself.

Section Nine “Equality,”:

- 9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.*

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constitution.”).

83. See, e.g., Submission #5577 (Browne); Submission #6591 (Abraham), *see supra* note 75.

84. See, e.g., Submission #3820 (Scheider); Submission #3824 (J.E. Binion), *see supra* note 75.

85. See, e.g., Submission #3372 (Macgregor, et al); Submission #5062 (“Petition”), *see supra* note 75.

86. Submission #6794 (N. Taylor), *see supra* note 75.

87. See STYCHIN, *supra* note **Error! Bookmark not defined.**, at 74.

<sup>88</sup> S. AFR. CONST. chap 2, § 7.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.<sup>89</sup>

## B. Explaining Gay Equality in the Constitutional Drafting Process

At the end of the apartheid era in the late 1980s, South Africa was a country in which gays and lesbians were poorly organized politically, racially divided, and mostly without sympathy from the general population. Before ratification of the post-apartheid Constitution, there was no domestic legal precedent for treating gays and lesbians in any manner other than as criminals. Anti-gay sentiment was high.<sup>90</sup> And yet within a few years, gay South Africans benefited from a level of constitutional protection greater than that of any other nation—level of legal protection that remains pre-eminent twenty years later.

Why did South Africa—a deeply religious, conservative, southern African nation—become the first country to include constitutional-level protections for gays and lesbians? The answer involves a unique culmination of factors occurring at the time apartheid was ending in South Africa.<sup>91</sup> These factors include historical, ideological, and procedural elements unique to South Africa in the 1990s.<sup>92</sup>

### 1. History and Timing

The consequence of three historically congruent factors—simultaneous maturation of the ANC and the burgeoning South African gay community, newly-formed linkages between the two distinct liberation movements, and changing international legal precedent related to sexual orientation—set the stage for the legal transformation of the status of gays and lesbians in the context of a new, multi-racial South Africa. Gay and lesbian organizing was achieving its own kind of legitimacy in the late 1980s and early 1990s. After years of limited, starkly apolitical organizing, a few new groups of politically active gays and lesbians were established. Explicit identification with the liberation movements and recognition of the importance of multi-racial organizing marked a dramatic change from the recent past. Furthermore, both negative and positive reasons brought activists and the ANC into contact in the final years of apartheid. For example, a conflict over anti-gay remarks by a public ANC figure and the ensuing response from anti-apartheid groups abroad highlighted the involvement of gay equality supporters in the broader anti-apartheid movement, reinforced the idea that anti-gay discrimination is directly analogous to racial discrimination, and required the ANC to make its initial affirming statements regarding the issue of sexual orientation and rights.

And, outside of South Africa, changes in the legal status of gays and lesbians were being recognized by international human rights bodies for the first time in history. The previously singular and surprising pro-gay international legal precedent relating to sexual orientation announced by the European Court of Human Rights in its *Dudgeon* decision in 1981,<sup>93</sup> was affirmed in *Norris* in

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<sup>89</sup> S. AFR. CONST. ch. 2, § 9 (emphasis added). The only other explicit reference is Section 35 of the Bill of Rights which secures the right of a “spouse or partner” to visit a detained or imprisoned person. *Id.* ch 2, § 35(2)(i).

<sup>90</sup> Even as the apartheid government was lifting criminal sanctions against inter-racial sexual activity in 1988, the Parliament was considering an expansion of laws against same-sex sexual activity, [cite] Indeed, a 1987 survey of Cape Town residents revealed that 71% believed homosexuality to be morally wrong. GORDON ISAACS & BRIAN MCKENDRICK, MALE HOMOSEXUALITY IN SOUTH AFRICA: IDENTIFY FORMATION, CULTURE, AND CRISIS 141 (1992).

<sup>91</sup> I have struggled to bring historical analysis to the novel and somewhat surprising results of the constitutional process for gays and lesbians in South Africa in another publication, *Ending the Apartheid of the Closet*, so the description below is merely a summary of my proposed explanation. Eric C. Christiansen, *Ending the Apartheid of the Closet*, 32 N.Y.U J. Int’l L. & Pol. 997 (2000).

<sup>92</sup> Sexual Orientation in the Constitutional Drafting Process, *supra* note [9], at 1042-56.

<sup>93</sup>.*See supra* note 54.

1991<sup>94</sup> and in *Modinos* in 1994.<sup>95</sup> One year later, the United Nations Human Rights Commission relied on the International Covenant on Civil and Political Rights in order to strike down the criminalization of sex between men in the province of Tasmania in Australia.<sup>96</sup> These last two pro-gay decisions were announced during the constitutional drafting period.

## 2. Ideology and Non-Racialism

The liberation movements, especially through their most visible public face, the ANC, first stated the goal of a non-discriminatory South Africa in the 1955 Freedom Charter. This focus on a state founded on principles opposite to apartheid—equality, multi-racial democracy, opportunity—continued throughout the years of exile. The philosophical underpinnings of the Constitution, in form and spirit, were meant to destroy and repudiate apartheid legal norms.

“Non-racialism,” expressed negatively as non-discrimination and positively as fundamental human equality, animated ANC discourse throughout its history. The ANC ideology of non-racialism was both a philosophy and a tool. As a philosophy, it espoused an end to all forms of discrimination and the inviolability of human rights by the state. It also acted as a tool for ending apartheid, creating democratic government, and healing the nation. The presumptive inclusion of gays and lesbians as a class of citizens to benefit from the end to an era of discrimination combined with the centrality of non-racialism in ANC discourse about a post-apartheid nation, strongly supported the development of anti-discrimination policies that could include protections for gays and lesbians.

## 3. Constrained Drafting Process

The third factor contributing to the inclusion of protections for gays and lesbians was the particular method of drafting the Constitution. The final draft of the Constitution was the result of a sequential process that moved from draft to draft under tight time constraints and strong political pressures on most aspects. The earliest decisions—indeed the entire Interim Constitution—and most of the weightiest decisions throughout the process were made by party-based negotiating committees behind closed doors. Additionally, small groups directed most of the textual decisions—theme committees of experts for the interim text and technical committees in the final drafting process. And the party-based Constitutional Committee approved most final decisions before the last draft was put to a vote—a vote uniformly decided along party lines. The consequence of this controlled, sequential process and the limited number of only indirectly-accountable drafters was a rather autocratic result. Gay and lesbian advocates were beneficiaries of this process because of the specific historical moment of its occurrence, the congruence of their concerns to the dominant ideology of the process, and the pro-gay attitudes of several important constitutional actors.

Hence, the stage for this unprecedented protection was set by the unique history of South Africa and its gay and lesbian citizens: the rise of gay and lesbian visibility contemporaneous with the fundamental constitutional re-creation of a state that had existed for forty-seven years with discrimination as its primary political and social reality. The justification for such an innovative legal protection was provided by the dominant ideology of liberation movement elites, allowing sexual orientation protections to be included as a presumptive corollary of the ANC policy of non-racialism. And, a highly-structured and political party-controlled constitutional drafting process codified progressive human rights standards and including explicit protections for gays and lesbians—despite uncertain claims of public support and international law precedent.

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94. *See id.*

95. *See id.*

96. *See* Toonen, U.N. Human Rts. Comm., No. 488, U.N. GAOR, 49th Sess., Supp. No. 40, at 226, 235, U.N. Doc. A/49/40 (1994).

### III. GAY AND LESBIAN RIGHTS AT THE SOUTH AFRICAN CONSTITUTIONAL COURT

Having secured ratification of the first constitution to include express protections based on sexual orientation, hopes were high for many South African gay and lesbian activists. In the years that followed, the Constitutional Court repeatedly rose to the challenge presented by unprecedented legal protections for an unpopular segment of South African society.<sup>97</sup> In its first two decades, the Court has decided six cases related to the sexual orientation provision of the Equality Clause. In each judgment—evaluating criminalization of same-sex sexual activity, the application of laws related to family formation, and the recognition of same-sex relationships—the Court unanimously affirmed the full legal equality of the gay and lesbian parties before it.

For purposes of the discussion I will focus on the dramatic cases that start and conclude the two decade arc of gay rights victories in the last two decades: the decriminalization of sodomy and in 1998 and the requirement of full marriage equality in 2005.

#### A. Decriminalization in the *NCGLE Sodomy Case*.

In the 1998 decision of *NCGLE v. Minister of Justice (NCGLE Sodomy case)*, the South African Constitutional Court decriminalized consensual same-sex sexual activity between adult men.<sup>98</sup> The unanimous decision confirmed a lower court ruling,<sup>99</sup> that declared unconstitutional the common law offense of sodomy and struck down provisions of the Sexual Offences Act that criminalized certain vaguely-defined acts between men.<sup>100</sup> Writing for the Court with no dissenting opinions, Justice Ackermann held that the common law and statutory offences of sodomy violate the equality, dignity, and privacy rights of the South African Constitution.

On the central issue of equality, Ackermann applied what is now the standard analysis for discrimination questions. Indeed, the *NCGLE Sodomy* case marked the first application of the Equality Clause from the 1996 Constitution and it continues to be cited as one of the seminal description of how the South African courts should evaluate discrimination claims. The Court follows a multi-stage inquiry. The core questions are (1) Does the act discriminate? (2) Is the discrimination unfair? and (3) Can the unfair discrimination be justified?<sup>101</sup>

The first inquiry merely asks the parties to identify the challenged differential treatment under law; are similarly situated persons or classes of people treated differently? This neutral type of discrimination is common in laws of all kinds and thus the focus for the South African courts is on whether there is “unfair discrimination.” Discrimination is presumed to be unfair if it is based on a classification enumerated in the Equality Clause: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture,

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<sup>98</sup> National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others, 1999 (1) SALR 6 (CC) (1998) [hereinafter *NCGLE Sodomy Case*].

<sup>99</sup> National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others, 1998 (6) BCLR 726 (W). The Witwatersrand High Court also struck down the common law offenses of sodomy and commission of an unnatural sexual act (to the extent it criminalized acts “committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute an offence”). These rulings were not referred to the Constitutional Court because a High Court (a South African trial court) is not required to refer declarations of constitutional invalidity of common law offences to the Court. *NCGLE Sodomy case*, para. 2 (following § 172(2)(a) requirement that declaration of constitutional invalidity of “an Act of parliament, a provincial Act, or any conduct of the President” must be confirmed by the Constitutional Court to have force, but having no such requirement for common law rules).

<sup>100</sup> Sexual Offences Act, 1957, § 20A: “A male person who commits with another male at a party [“any occasion where more than two persons are present”] any act calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.” Other statutory provisions detailing various state employment repercussions were also struck down. *NCGLE Sodomy*, para. 106, orders 3.1 et seq.

<sup>101</sup> This is laid out by the constitutional Court in *NCGLE Sodomy*, para. 16 (citing *Harksen v. Lane NO and Others*, 1997 (11) BCLR 1489 (CC), para. 53). While *Harksen* was decided under the Interim Constitution, the use by the Court in *NCGLE Sodomy* adopted the earlier framework for analysis into the equality jurisprudence under the 1996 Constitution.

language, and birth.<sup>102</sup> Sodomy laws, which effectively target only same-sex sexual activity, are presumptively unfair discrimination based on sexual orientation.

In the final stage of the inquiry, justification exists where the differentiation, although unfair, satisfies the requirements of the Constitution's Limitations Clause.<sup>103</sup> The South African Limitations Clause, like those in the German and Canadian constitutions after which it was modeled, identifies a narrow set of justifications for an otherwise unconstitutional restriction on a person's rights. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."<sup>104</sup>

Ultimate determination of unfairness is based on "the position of the complainants in society" particularly "whether they have suffered in the past from patterns of disadvantage," the character and purpose of the provision and the impact on the "rights and interests of the complainants."<sup>105</sup> In the *NCGLE Sodomy* case, the Court concluded:

(a) Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. ...

(b) [The sodomy prohibition] has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

(c) The discrimination ... gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

Unfair discrimination that fails to be justified under the Limitations Clause is a violation of the Constitution and must be declared unconstitutional and remedied. "When deciding a constitutional matter within its power, a court ... (a) must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable..."<sup>106</sup> Hence, the Court has no flexibility with the declaration of invalidity but has significant discretion in relation to the remedy it grants to plaintiffs.

In *NCGLE Sodomy*, the Court held that the laws were not saved by Limitations Clause analysis: "[t]here is nothing which can be placed in the other balance of the scale. The inevitable conclusion is that the discrimination in question is unfair and therefore in breach of [the Equality Clause]."<sup>107</sup> Moreover, the Court conducted a significant survey of sodomy laws in Western countries to demonstrate their growing disfavor.<sup>108</sup>

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<sup>103</sup> S. AFR. CONST. ch.2, § 36(1):

The rights of the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including--(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

<sup>104</sup> S. AFR. CONST. ch.2, § 36 (1):

<sup>105</sup> *NCGLE Sodomy*, para. 19 (citing *Harksen v. Lane NO and Others*, 1997 (11) BCLR 1489 (CC), paras. 50-51).

<sup>106</sup> Sec 172

<sup>107</sup> *NCGLE Sodomy*, para. 27.

<sup>108</sup> 478 US 186 (1986). It is both true and slightly disingenuous to identify *Bowers* as a rare exception among liberal Western democracies. Much of the credit for the "trend" goes to the European Court of Human Rights, the human rights adjudicatory body that ruled, in *Dudgeon v. Northern Ireland*, 4 EHRR 149 (affirmed in the 1991 case *Norris v. Ireland*, 13 EHRR 186, and subsequently reaffirmed in the 1993 case, *Modinos v. Cyprus*, 16 EHRR 485) that sodomy laws were a violation of the European Convention for the protection of Human Rights and Fundamental Freedoms, [cite], a document to which all member states of the Council of Europe must subscribe. Rulings of the ECHR identify requirements placed upon member states--in 1998 there were 39 members of the Council of Europe-- and currently 47 states are members. See [http://www.coe.int/T/E/com/about\\_coe/member\\_states/default.asp](http://www.coe.int/T/E/com/about_coe/member_states/default.asp) (last visited April 6, 2008).

Notably, Justice Ackermann referenced *Bowers v. Hardwick*, the most notable "exception to the trend" of striking down sodomy laws in liberal democracies. The Court's opinion stressed the 5-to-4 nature of *Bowers* and the "sustained criticism" of its

In Ackerman’s rather technical opinion, sexual orientation discrimination is just another kind of discrimination rejected in the Constitution. The process of analysis for such discrimination is notable for its commonality with any other type of prohibited discrimination. For loftier rights language, a reader need only review the concurring opinion of Justice Sachs. With his long-term concern for the equality of LGBT persons, Sachs affirms the larger importance of striking down sodomy laws—and its symbolic significance for a new constitutional democracy:

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.<sup>109</sup>

Sachs clearly identified the limited but vital capacity of the Constitutional Court when evaluating gay rights issues and the remainder of his concurrence focuses on “complementary observations of the broader matters” and is essentially taken by him as an opportunity to present some considered thoughts on the constitutional issues of privacy, dignity and equality as highlighted by the present case.<sup>110</sup> This is not an uncommon practice in early Constitutional Court opinions, especially among Justices, like Sachs, who are deeply invested in an expansive and progressive understanding of the constitutional project.

## **B. Getting to the Altar: Family and Relationship Recognition**

The *NCGLE Sodomy* case began a trend. Over the next five years, the Court handed down five additional rulings related to the rights of lesbians and gay men.<sup>87</sup> Each was a unanimous decision by the Court; each was a victory for the gay plaintiffs; and each reaffirmed the Court’s fundamental commitment to a generous interpretation of the Equality Clause as it applied to sexual minorities.

In the 1999 *NCGLE Immigration* case, the Court ruled that the equality protections required that a “partner, in a permanent same-sex life partnership” be entitled to treatment equal to that of a married heterosexual spouse for the purposes of immigration law.<sup>88</sup> To reach this conclusion the Court had to discuss the nature of same-sex relationships, whether they resemble heterosexual relationships in quality and kind. The Court states several conclusions about the nature of same-sex relationships: “Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms [and] are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships.”<sup>111</sup> And, most importantly for this case, “they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.”<sup>112</sup> Ultimately, after review of comparative remedies law and affirmation of Parliament’s capacity to refine the court’s [action], the Court “cured” the challenged law by “reading in, after the word ‘spouse’, the following words: ‘or partner, in a permanent same-sex life partnership.’”<sup>113</sup>

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holding. *NCGLE Sodomy*, paras. 53-54. In disregarding the American ruling, the Court highlighted the express nature of the sexual orientation protections and the fundamentally more protective nature of the South African Constitution.

<sup>109</sup> *NCGLE Sodomy*, para 107.

<sup>110</sup> *NCGLE Sodomy*, paras. 107-138 (Sachs concurring).

<sup>111</sup>

<sup>112</sup> *NCGLE Immigration*, para. 56.

<sup>113</sup> The Court concluded it had two options for remedies: strike down the provision allowing spouses to immigrate or to “read in” comparable benefits for same-sex life partners. The former option had the significant failing of being “equality with a vengeance,” it created legal equality by stripping rights away from those legitimately benefiting from an otherwise constitutional provision with strong popular and legislative support. The latter option had the difficulty of being a novel verdict not previously applied by the Court. *NCGLE Immigration*, para. 86. The order, unlike the order in *NCGLE Sodomy*, had no retrospective effect.

In the 2002 *Satchwell* case, the Court held that the government must afford to same-sex partners of South African judges the same employment benefits provided to opposite-sex spouses.<sup>89</sup> In a short, but (again) unanimous opinion, the Court ruled that

Inasmuch as the [Act's provisions] afford benefits to spouses but not to same-sex partners who have established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions constitute unfair discrimination.<sup>114</sup>

In just over a dozen substantive paragraphs that rely heavily on the discussion of family and respect for alternative forms of familial relationship in *NCGLE Immigration*, the Court affirms the underlying lesbian relationship and decries the discrimination in the Remuneration Act.<sup>115</sup> The Court had no difficulty saying that the petitioners live “in every respect as a married couple and are acknowledged as such by their respective families and friends” and that their relationship is “intimate, committed, exclusive and permanent.”<sup>116</sup> Notably, in this case counsel for the Minister of Justice and Constitutional Development, representing the views of the government,

conceded without qualification, correctly in [the Court's] view, that permanent same-sex life partners are entitled to found their relationships in a manner which accords with their sexual orientation and ... that such relationships ought not to be the subject of unfair discrimination.”<sup>117</sup>

In the *DuToit* case in 2003, the Court ruled that denial of second-parent adoption rights to gay couples was a violation of their constitutional rights to equality and dignity in addition to being a violation of the “best interests of the child” standard required by the child welfare protections of the Constitution.<sup>90</sup> The Act's limitation “perpetuates the fiction or myth of family homogeneity based on the one mother/one father model. It ignores developments that have taken place in the country, including the adoption of the Constitution.”<sup>118</sup> The Court concluded that the categorical exclusion of permanent same-sex couples from the possibility of joint adoption “surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development...”<sup>119</sup> The Act's prohibitions “deprive children of the possibility of a loving and stable family life”<sup>120</sup>

And later in 2003 in *J and B*, the Court applied the same reasoning to a case regarding adoption following artificial insemination.<sup>91</sup> In a very brief judgment, another unanimous Court ruled on behalf of the lesbian appellants. Consistent with the previous cases, the Court held that Section 5 of the Status Act unfairly distinguishes married persons and permanent same-sex life partners. Section 5 discriminates by denying to same-sex partners a right granted to heterosexual married couples: for both partners to become the legal parents of children born from artificial insemination. The Court remedied the unconstitutional fault in the law by reading in language for “permanent same-sex life partner” whenever wife or husband is mentioned.

These judgments also evidence the Court's increasing frustration with parliamentary inaction.<sup>92</sup> At least since the ruling in *NCLGE Immigration*--if not as far back as the ratification of the Constitution with its inclusive Equality Clause--strong evidence existed that the Court would rule against sexual orientation-based discrimination in family law generally and civil marriage laws specifically. Nevertheless, Parliament had neglected to take definitive action on the issue of marriage equality--and required additional (and unequivocal) coercion by the Court before it would act.

In *J and B*, the Court expressly stated its frustration with Parliament for its failure to pass legislation that would bring South African family law into compliance with the equality mandate of

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<sup>114</sup> Satchwell, para. 23.

<sup>115</sup> Satchwell, paras. 12-13.

<sup>116</sup> Satchwell, para. 22.

<sup>117</sup> Satchwell, para. 15 (writing for the Court, Justice Madala described this concession as “correct[] in my view”)

<sup>118</sup> Du Toit, para 28.

<sup>119</sup> Du Toit, para. 21.

<sup>120</sup> Du Toit, para. 22.

the Constitution:

Comprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation . . . .<sup>93</sup>

The Court chided Parliament for its inaction, reminding the members of Parliament that they are formally bound by the Constitution<sup>94</sup> and that they have a constitutional duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>95</sup> The executive and legislature were therefore “obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians.”<sup>96</sup>

### C. Marriage Equality at the Constitutional Court

Marie Adriaana Fourie and her girlfriend Cecelia Bonthuys had been together nearly ten years when they brought suit for legal recognition of their relationship in the Pretoria High Court in 2002.<sup>97</sup> The legal conclusion that the rights and privileges of marriage may not be denied on the basis of sexual orientation was mostly unsurprising. Nearly every element of the *Fourie* decision had been previously decided. The Court’s unanimous substantive ruling was a relatively modest extension of existing precedent related to gay and lesbian equality in the realms of family formation and relationship recognition.

“...taking account of the decisions of this court, bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are and in no small degree.”<sup>121</sup>

The prohibition of same-sex marriage was unfair discrimination because it was differential legal treatment on the basis of sexual orientation.<sup>98</sup> The Court asserted that the gay and lesbian parties to the cases sought:

the right to be acknowledged as equal and to be embraced with dignity by the law... [that] accept[s] the reality of their presence, and the integrity in its own terms, of their intimate life . . . . [T]he law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples.<sup>99</sup>

Although the substantive holding was not significantly in doubt, what was surprising was the court-ordered delay in enforcing the order of invalidity. The Court could have directly and immediately fixed the problem it had repeatedly signaled for Parliament to address in previous cases: the absence of a comprehensive legal scheme addressing same-sex family relationships. In prior cases, the Court had used its expansive remedial powers to invalidate discriminatory laws or to “read in” necessary language to cure a constitutional defect.<sup>100</sup> The Court took neither option in *Fourie*. Rather, it declared the constitutional infirmity of existing law but held that the ruling of invalidity was suspended for one year.<sup>101</sup> It sent the deficient law back to Parliament and gave it twelve months to “cure the defect” in the Marriage Act.<sup>102</sup>

Parliament was ordered to remedy the discrimination in South African family law because the “present exclusion of same-sex couples from enjoying the status and entitlements” of marriage is “unsustainable.”<sup>103</sup> Same-sex couples may not be “subjected to marginalization or exclusion by law either directly or indirectly.”<sup>104</sup> Parliament must finally perform the task the Court had reminded them was theirs; as Justice Sachs said in relation to the *Fourie* remedy: “It’s not only the court’s duty to protect constitutional rights. In fact, it’s mainly legislative.”<sup>105</sup> As Parliament considered its

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options, its task was carefully circumscribed by both the general ruling in *Fourie* and the judgment's declaration of two mandatory "guiding principles" relevant to Parliament's assigned task.<sup>106</sup>

The first principle was that Parliament could not achieve equality by no longer recognizing any marriages between opposite-sex or same-sex couples. "Levelling [sic] down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality . . . ."<sup>107</sup> The second principle addressed a concern that the parliamentary response would in fact produce "new forms of marginalization [sic]."<sup>108</sup> The Court expressly rejected the apartheid-era legal claim that separate but equal is sufficient. "Ignoring the context, once convenient, is no longer permissible . . . ."<sup>109</sup> The Court will not be blind to the context in which that happens; equality and dignity require a concern for "the intangibles as well as the tangibles involved."<sup>110</sup>

## IV. A SOUTH AFRICAN GAY RIGHTS JURISPRUDENCE

### A. Summarizing Twenty Years of Constitutional Protections

The South African Constitutional Court's extant gay rights jurisprudence is arguably the most affirmative gay rights jurisprudence of any national court. In the twenty years since the Constitution came into force, the Court has repeatedly and forcefully held that the transformative constitutional values of equality and dignity forbid the state from denigrating or excluding gays and lesbians from full and equal citizenship based merely on their position as a traditionally disfavored minority.<sup>122</sup> The Court's jurisprudence has been typified by three traits: robust engagement and meaningful application of the prohibition of discrimination; realistic assessment of the historical and social context of anti-gay discrimination; and genuine commitment to advancing the transformative values of equality and dignity in the Constitution.

#### 1. Engaged

The first characteristic that typifies the Constitutional Court in the area of gay and lesbian equality is robust judicial engagement. The Court reached substantive holdings on a surprising number of high-profile gay rights case in its first twenty years. The Justices have not been seen to shy away from the controversy associated with their socially unpopular views of gay and lesbian equality. Nor have they been shy to strike down government policies or laws that discriminate: "Although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of the public institutions which are based on and perpetuate such prejudice."<sup>123</sup>

Moreover, the Court's judgments have been uniformly unanimous in result and have demonstrated little prevarication in their description of gay and lesbian individuals' rights or the value of same-sex relationships. And, support for gay and lesbian equality under the Constitution has not been a vanity project of a few justices: a variety of justices have authored the lead opinions with significant, meaningful concurrences reinforcing the core holdings. The Justices have seemingly embraced their responsibility to advance equality and prohibit "marginalization or exclusion by law either directly or indirectly."<sup>124</sup>

#### 2. Contextual

The Constitutional Court's commitment to understanding discrimination and protecting rights requires the Court to consider the context of the existing discrimination as well as the context of the rights granted by the Constitution. Context is vital for the Court in its assessment of the impact of sodomy laws (even when unenforced) on gay men. The Court identifies the deeper dimensions of the law: "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a

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<sup>122</sup> 48-58

<sup>123</sup> NCGLE Sodomy, para. 129.

<sup>124</sup> 147

significant section of the community.”<sup>125</sup> Context shows that sodomy laws have been used as a tool of oppressions and an expression of social disapproval – unacceptable under the new Constitution. “Ignoring the context, once convenient, is no longer permissible....”<sup>126</sup> The Court declares it will not be blind to the context in which that happens; equality and dignity require a concern for the “intangible as well as the tangibles involved.”<sup>127</sup>

The Court has discussed existing animus toward gays and lesbians as a contextual reality to be reflected in its decisions, rather than as an unfortunate fact to be ignored. The Court acknowledges the hurt of discrimination, as when it acknowledges that exclusion of gays and lesbians from recognition of their relationships “has been wounding and the scars are evident in our society to this day.”<sup>128</sup> Indeed, the Court does acknowledge the negativity with which gays and lesbians are commonly viewed in South Africa, but strongly affirms that “the ubiquity of a prejudice cannot support its legitimacy.”<sup>129</sup>

This was particularly evident in the discussion of religious arguments against marriage equality. For example, Justice Sachs acknowledges the role of procreation in religious understandings of marriage but denies its importance to a legal understanding of the institution.<sup>130</sup> For the Court, the constitutional duty is both to take seriously the religious views of the majority of South Africans as well as to protect the rights of non-believers and minority faiths. “Certainly the Court cannot assess the correctness of particular biblical interpretations of sources of law but it can assess that marriage equality has no direct impact on marriages of traditional believers.”<sup>131</sup> As a consequence, the judgment states unequivocally, “It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.”<sup>132</sup>

Additionally, the Court’s decision to assign the task of realizing full marriage equality to the Parliament while at the same time narrowly circumscribing the result--and even providing a deadline for the changes<sup>113</sup>—demonstrates an expansive and creative use of the Court’s remedial authority to serve transformative constitutional values. The expected (and actual) result was that the ANC—the political standard-bearers of the most notable liberation movement of the last century and the overwhelmingly dominant political party in South Africa—passed marriage equality into law in South Africa.<sup>114</sup> The “democratic legitimacy” of a legislative resolution,<sup>115</sup> the requirement of at least legislative support for gay and lesbian South Africans from the ANC, and the inevitable discussion of the meaning of gay rights in the context of South Africa’s constitutional values dramatically supported the realization of substantive equality both domestically and internationally.

### **3. Transformative**

The third abiding characteristic of the Constitutional Court’s gay right jurisprudence has been its commitment to the transformative nature of the post-apartheid constitutions. The Court’s commitment to substantive equality rather than merely formal equality has typified its approach to the cases discussed above. This is reflected in the Court’s expansive understanding of the plaintiff’s claims.

[The gay and lesbian parties seek] “not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law... [T]he law in the past

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<sup>125</sup> NCGLE Sodomy, para 107.

<sup>126</sup> 151

<sup>127</sup> 153

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<sup>129</sup> 113

<sup>130</sup> 85

<sup>131</sup> 92

<sup>132</sup> 92

failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples.”<sup>133</sup>

The Constitution’s commitment to expansive notions of equality is reflected in the Court’s rulings and in its approach. In assessing rights under a transformative constitution, “[t]he crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned.”<sup>112</sup> Moreover, the cases are not just about the plaintiffs and their discrimination; they are about the values of the nation: “At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”<sup>134</sup> It is clear that the Court views its role as supporting the transformation started in the Constitution—and believes some of its gay rights cases have successfully done so: “From today a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, less lonely and more dignified. The law catches up with an evolving social reality.”<sup>135</sup>

Alas, for all that the Court’s jurisprudence reflects commitment to the transformational project of the Constitution, legal decisions are important but limited in their impact. The Court’s successes in prohibiting state-sponsored discrimination and changing the legal rules, primarily impacts laws and government institutions. As we shall see below, impacting on the lived reality of gays and lesbians is much more difficult.

## **B. The Inadequacy of Constitutional Law Protections**

Sadly, the legal protections are only part of the story for many South Africans. Indeed, for many people, they are only a small part of the overall story—and a part that does not include their lived reality. The legal protections must be contrasted with continuing social disapproval of homosexuality, frequent occasions of day-to-day discrimination, and the dramatic prevalence of hate crimes, especially crimes of homophobic violence. Much has been written by scholars and activists that examines these complex issues in greater depth and sophistication than is appropriate for this paper, so the discussion below is meant for instrumentalist purposes primarily.

### **1. Danger and Disfavor**

In a 2008 study of attitudes toward same-sex sexual activity, 83.6% of South Africans said it was always wrong. Indeed only 7.7% of South Africans reported believing that it was not wrong at all.<sup>136</sup> And these are attitudes toward activity unanimously declared constitutional by the Constitutional Court a full decade earlier. Studies routinely show these kinds of disparity between popular attitudes and legal protections in South Africa. And attitudes in South Africa seem to be changing only slowly. A more recent 2013 study found that 61% of South Africans felt that society should not accept homosexuality. And while South Africa had dramatically higher favorable responses (31%) than any other nation in Africa (the next highest was Kenya at 8%), the rate of disfavor was significantly higher than any other nation that has comparable legal protections.<sup>137</sup>

And the disfavor with which LGBT people are viewed results in significant discrimination and physical harm. As Justice Minister Radebe recently said, “Notwithstanding the comprehensive constitutional and legal framework and protection for LGBTI persons, we have sadly witnessed acts of discrimination and violent attacks being perpetrated against LGBTI persons.”<sup>138</sup> The state has

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<sup>133</sup> 78

<sup>134</sup> NCGLE Sodomy, para 107.

<sup>135</sup> NCGLE Sodomy, para. 129.

<sup>136</sup> Tom Smith, “Cross-national Differences in Attitudes towards Homosexuality” (April 2011);

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Smith-CrossNational-NORC-May-2011.pdf>

<sup>137</sup> Pew Research, “The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries” (June 4, 2013); <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality>.

<sup>138</sup> IOL News, Radebe launches LGBTI violence programme, (April 29 2014); [http://www.iol.co.za/news/crime-courts/radebe-launches-lgbti-violence-programme-1.1681563#.VF\\_n6Mn4LC6](http://www.iol.co.za/news/crime-courts/radebe-launches-lgbti-violence-programme-1.1681563#.VF_n6Mn4LC6)

initiated a variety of legislative responses, including specialized legislation to address discrimination, like the Employment Equity Act and the Rental Housing Act, as well as The Promotion of Equality and Prevention of Unfair Discrimination Act, which translates the constitutional discrimination prohibitions into statutory law and establishes special Equality Courts to address discrimination by private parties. But the discrimination and violence continue.

Homophobic violence in South Africa (as elsewhere) can take many forms but it has its most gruesome expression in the epidemic of so-called “corrective rape.” Corrective rape is the practice of sexual assault primarily against lesbians or other gender non-conforming women, for the claimed purpose (or excuse) of “curing” them of their homosexuality. While not limited to black lesbians as victims or townships as the location, the crimes have their most enraging and unmitigated occurrences among townships lesbians. As a recent report baldly asserted, “rape is fast becoming the most widespread hate crime against lesbian women in townships across South Africa.”<sup>139</sup>

While this particular category of hate crime is connected to the greater, appalling prevalence of rape in South Africa, the roots of this specific form of violence lie in sexism and hatred of LGBT persons. Moreover, while the statistics (as with both sexual assault and anti-gay hate crimes generally) are unlikely to reflect the full scope of the problem, there are estimates of up to ten reported corrective rapes a week.<sup>140</sup> There are critical concerns about corrective rape that extend beyond the acts of violence to doubts about the state’s response: Do police sufficiently investigate the crimes? Do state prosecutors diligently pursue the perpetrators? Do local authorities show adequate concern? Does public opinion sufficiently condemn these acts? Fundamentally, are the state and the public complicit in this on-going epidemic of violence? At the intersection of “homophobia, sexism and gender-motivated violence” there will be no easy solutions but the on-going nature of the crisis is grotesquely evident.<sup>141</sup>

The government has acknowledged these many problems with discrimination—in its varied dimensions— but has been unable to solve it.

“In spite of this enabling legal environment, the lived reality for many LGBTI persons is quite a different story. On the most extreme end of a wide spectrum of discriminatory experiences, there are frequent reports of extreme violence inflicted on young, black, lesbian women in the form of so-called “corrective” rape, often ending in murder. Gay men and transgender persons are also often targets of physical violence, and labour discrimination and exposure to derogatory and threatening speech is also common. Finally, deprioritisation, marginalisation, exclusion and targeted victimisation by those public institutions intended to provide services and protection are everyday realities for LGBTI persons in many communities, leading to a lack of resources when crimes are committed and resulting in victims’ fear to even report crimes.”<sup>142</sup>

The consequence is that many gays and lesbians continue to have a particular (and realistic) fear of unfair treatment and even violence regardless of the constitutional and statutory protections.

## **2. Social Change and the Courts**

It is perhaps no great revelation that even the much-praised South African courts have been insufficient for the task of inaugurating a society without discrimination based on sexual orientation. Courts cannot achieve a socially just society on their own. Moreover, the litigation strategy of the last two decades has been, both objectively and relatively, exceedingly successful at securing pro-gay

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<sup>139</sup> Action Aid, “Corrective Rape” <http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/ActionAid-Corrective-Rape.pdf>

<sup>140</sup> Lee Middleton, ‘*Corrective Rape*’: *Fighting a South African Scourge*, TIME (Mar. 8, 2011), <http://content.time.com/time/world/article/0,8599,2057744,00.html> (“South Africa should be a beacon of tolerance. Its constitution was the first in the world to outlaw discrimination based on sexual orientation ... But in the townships on the city’s outskirts, another reality reigns. The rate of violence against women in South Africa is among the highest in the world.”)

<sup>141</sup> [http://rapeoutcry.co.za/home/?page\\_id=177](http://rapeoutcry.co.za/home/?page_id=177)

<sup>142</sup> Department of Justice and Constitutional Development, “National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex Sector”; <http://www.justice.gov.za/vg/lgbti/2014-LGBTI-Strategy.pdf>

rulings and migrating lofty constitutional promises into practical legal rules. Expectations should therefore be modest in scope and appropriately tailored. This is particularly true when the Court's and the Constitution's views are so divergent from popular opinion. It is reasonable to expect only limited contributions from courts, not full-scale change. Substantive change in social attitudes must come from extra-judicial efforts – from civil society and cause-based organizing (with appropriate support from governmental entities). The Court may have been insufficient for the realization of substantive equality for gays and lesbians in South Africa, but its contributions were assuredly necessary.

## V. LESSONS FROM THE SOUTH AFRICAN EXPERIENCE

### A. For Progressive Constitutional Drafting

If end-of-the-century human rights scholars had written a “best practices” manual for constitution drafters, the chapter on “What to Include in Your New Bill of Rights” would look very much like the South Africa Bill of Rights in the 1996 Constitution. Of course, this is no coincidence. The process of drafting the South African Constitution was “a deliberate attempt to have a fundamental instrument of government that embraced basic human rights.”<sup>143</sup> The final text not only included numerous, enforceable rights but one of its primary identified purposes was to “establish a society based on democratic values, social justice and fundamental human rights.”<sup>144</sup>

One of the abiding lessons of the South African experiment in progressive constitutionalism is that constitutional drafting need not fit within established, “proven” patterns. Novelty in constitution-making is not a per se flaw. The South African Constitution included relatively uncommon rights (social welfare rights, environmental rights) with expanded scope (prohibitions on private discrimination, broadened non-discrimination categories like sexual orientation) and permitted substantially expanded enforcement through its expansive standing and remedial provisions.<sup>145</sup> For many commenters, this was “promising too much.” It seemed a recipe for popular disappointment, court delegitimation, or state failure. But twenty years of constitutional adjudication in South Africa challenge that expectation. And even the areas where the state is struggling at the moment, are mostly separate from the work of the Court. In large part the expansive and progressive elements of the Constitution have worked because they shared an affirmative constitutional purpose: transformation.

The first generation of justices to interpret the Constitution, themselves steeped in the international human rights tradition,<sup>146</sup> saw transformative rights adjudication as a core purpose of their institution. As former Chief Justice Chaskalson described it, “[u]nder our Constitution the normative value system and the goal of transformation, are intertwined.”<sup>147</sup> This approach envisions South Africa as a reformed nation—not just a liberal democracy but a “human rights state”—which is in the process of rising to its great potential to transform itself and to be an example to other

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<sup>143</sup> Jonathan Faull, “Praising the South African Constitution,” Africa is a Country [blog], <http://africasacountry.com/2012/02/16/praising-the-south-african-constitution/> (quoting U.S. Supreme Court Justice Ruth Bader Ginsberg).

<sup>144</sup> S. AFR. CONST. 1996, pmb1.

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<sup>146</sup> Many of the justices, especially the ANC members, had joined foreign law faculties, human rights organizations, and NGOs, or had participated in meetings or international conferences related to apartheid and human rights. See website of the Constitutional Court of South Africa, “Judges,” <http://www.constitutionalcourt.org.za> (last visited Jan. 6, 2012) (providing biographies of current and former justices).

<sup>147</sup> Arthur Chaskalson, former Chief Justice of the Const. Ct. of S. Afr., Justice Chaskalson's Farewell Speech (June 2, 2005), <http://www.constitutionalcourt.org.za/site/farewell.htm> (last visited Jan. 3, 2011)

nations.<sup>148</sup> The “Constitution demands [of judges] ... a legal order be established that gives substance to its founding values--democracy, dignity, equality and freedom.”<sup>149</sup>

The Constitutional Court is the “the key institution of [South African] constitutional democracy,” the primary guardian and expositor of the Constitution.<sup>150</sup> From the time it was founded and given the task of certifying the Constitution and guaranteeing inclusion of the previously negotiated characteristics of the final Constitution to its on-going charge to monitor the lower judiciary and the assess the validity of government actions, the Court has been at the center of South Africa’s transition. It is the most visible symbol of the modern constitutional state.

To the extent that the Court’s review of current controversies encourages popular or legislative dialogue about constitutional commitments to progressive goals, it further advances the values of the Constitution. It reminds all South Africans that the Constitution’s historic promises remain relevant to present problems. This strengthens and reinforces the role of the Constitution in contemporary society. Indeed, it is perhaps a particularly vital role of these early generations of the Constitutional Court to reinforce the values of the founding generation through their written judgments.

Moreover, with progressive rights of equality for gays and lesbians, which many people oppose for religious or other grounds, the Court plays a critical role, reminding South Africans of the commitments they made in the Constitution—even if those commitments are challenging or personally disfavored. This is facilitated by the Court’s enviable position of relative respect with in South African government, which allows the Court to assert full equality as a core constitutional value in a manner that re-connects it to non-racialism and the struggle against apartheid.

In some ways, the Constitutional Court’s successes have resulted from its capacity to maintain and reinvigorate South Africa’s “constitutional moment,” the period of expectancy and generosity at the end of apartheid and the start of democratic constitutionalism. The Court’s frequent references to transformation and constitutional values, support its progressive and expansive rulings by reminding South Africans of a more optimistic moment in time when the promises were initially made.

## **B. For Adjudication of Sexual Orientation Protections**

### **1. Guiding State Action**

One central lesson to be drawn from the Court’s actual adjudication of gay and lesbian rights is its intentional and proactive use of its judgments and judicial orders to steer state actors to act consistently with their constitutional obligations. Courts to some extent always use this guidance function; the nature of legal precedent is intended to inform state actors of the import of particular legal results for relatively similar parties in relatively similar situations. But the South African Constitutional Court has gone further.

The Court has encouraged, or occasionally even chided, the political branches into specific action that would advance substantive justice. The most obvious example of this occurred in the cases that preceded the marriage equality decision in *Fourie*. The Court rebuked Parliament for its failure to pass “comprehensive legislation” related to family law and marriage. The consequence was that lesbian and gay South Africans had received only “piecemeal relief” in the absence of the guidance Parliament had a duty to provide.<sup>151</sup> As multiple cases highlighted this deficiency between 1999 and 2003, the Court was no longer content to imply that Parliament should act. In the last gay rights case before *Fourie*, the Court pointedly declared that “[i]t is not appropriate for courts to

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<sup>148</sup> S. Afr. Const. 1996, pmb1.

<sup>149</sup> Arthur Chaskalson, former Chief Justice of the Const. Ct. of S. Afr., Justice Chaskalson’s Farewell Speech (June 2, 2005), [http:// www.constitutionalcourt.org.za/site/farewell.htm](http://www.constitutionalcourt.org.za/site/farewell.htm) (last visited Jan. 3, 2011)

<sup>150</sup> Constitutional Court website; <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>; As the Court’s website states: “[T]he 11 judges stand guard over the Constitution and protect everyone’s human rights.” <http://www.constitutionalcourt.org.za/home>

<sup>151</sup> See, e.g., J and B 2003 (5) SA 621 (CC) at paras. 22-26.

determine [details of laws implementing marriage equality] . . . Those are matters for the legislature . . . ”<sup>152</sup>

## 2. Leveraging Legitimacy

An even more focused version of such direction occurred when the court issued its judgment in *Fourie* and provided “guiding principles” that were to direct the court-mandated legislative resolution of unclear family law standards for gay and lesbian couples.<sup>153</sup> Even the Court’s decision to require a legislative remedy could be understood to show that Parliament will not escape its constitutional responsibilities through judicial resolution. Specifically, the Court’s order to Parliament, which included a one-year deadline and specific requirements for the eventual legislation,<sup>154</sup> leveraged the democratic authority and popularity of Parliament generally, and the ANC specifically, and bolstered the Court’s judgment.<sup>155</sup> The intended result was substantive equality, i.e., more popularly legitimized equality for same-sex couples because it was democratically legislated by the politically and culturally dominant ANC. Both the Court and Parliament seemed aware of this reason for assigning this task to Parliament rather than merely remedying the injustice through judicial fiat.<sup>156</sup>

The marriage equality legislation eventually passed<sup>157</sup> could consequently claim greater political legitimacy, and the process of its passage prompted discussion of gay rights issues popularly. In these ways, the Court was able to reinforce the constitutional value of equality in a more productive and potentially enduring manner than if it had merely issued a ruling itself and “read in” language to alter the existing marriage laws.<sup>158</sup> The Court instead used its exceptional jurisdictional rules and open-ended remedial power to advance substantive equality through a process that bolstered the socio-political elements of equality.

## 3. Inspiring Future Claims

The Court’s announcement of a constitutional requirement for “meaningful engagement”<sup>159</sup> in the (unrelated) housing case *Olivia Road* also has a potential to support substantive equality in a dramatic way. Because the Court requires the state to present evidence of good faith consultation with impacted individuals and concerned civil society organizations, affected communities are significantly empowered to advocate for their own rights. In the context of gay and lesbian rights, this opens an additional avenue for organizing and engagement with the state related to the crisis of corrective rape (or other extant equality issues). If particularly affected communities, in this case, township lesbians and others, are consulted (as the Court has required in social welfare cases like *Olivia Road*), there is a far greater likelihood of improved outcomes, i.e., greater safety and security and more effective prosecutions—and perhaps even educational programs supporting better treatment of gays and lesbians.

Such a result would not only lead to improved outcomes for community stakeholders but also increase LGBT involvement with government—and educate the state bureaucracy about ground-

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<sup>152</sup> Id. at para. 26.

<sup>153</sup> Minister of Home Affairs & Another v Fourie & Another 2005 (1) SA 524 (CC) at paras. 148-50 (S. Afr.).

<sup>154</sup> Id. at para. 158.

<sup>155</sup> Id. at para. 162.

<sup>156</sup> See, e.g., Home Affairs Portfolio Comm., Civil Union Bill, Film & Publications & Immigration Amendment Bills: Briefing (Sept. 13, 2006), available at <http://www.pmg.org.za/minutes/20060912-civil-union-bill-films-publications-immigration-amendment-bills-briefing-department> (discussing “the Fourie judgement [sic] which had placed the Executive, Parliament as well as [the Legal Advisor’s] office under considerable pressure to amend the legislation or to alternatively introduce separate legislation ... they also very carefully studied all other Constitutional Court cases and other relevant jurisprudence on the topic of same sex marriages.”).

<sup>157</sup> Civil Union Act 17 of 2006 (S. Afr.).

<sup>158</sup> This was, unsurprisingly, the Court’s back-up plan. Fourie 2005 (1) SA at para. 162 (“Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words ‘or spouse’ after the words ‘or husband’ as they appear in the marriage formula.”).

<sup>159</sup> *Olivia Road* 2008 (3) SA at para. 9.

level discrimination issues. If such a constitutional requirement spreads from socio-economic rights to other categories of constitutional rights, the occurrence of good faith community consultation in one substantive area will influence popular expectations in other areas.

### C. Benefits for Comparative Constitutionalism and Global LGBT Equality

One result of its constitutional history is a great deal of respect for the South African Constitution, which has been described as one of the “newer, sexier and more powerful operating systems in the constitutional marketplace.”<sup>160</sup> American Supreme Court Justice Ruth Bader Ginsberg agreed, recently encouraging Egypt to look to the model of the South African Bill of Rights as an exemplar for its new constitution.<sup>161</sup> This makes the Constitution even more important in comparative context; it is recommended as an example for burgeoning democracies. Although the lived reality could not possibly match the promise of its founding document, “South Africa's pro-human rights constitution, stable government, democratic institutions, independent judiciary, and strong economy mean it has great potential to become a global human rights leader.”<sup>162</sup>

The content of the constitutional provisions matter as well. It is known and noted by other countries that South Africa chose to include express protections based on sexual orientation in its Constitution. This decision by the drafters has impact far beyond the country's borders. The South African Constitution is a well-respected extant model for other countries and future constitutions. The effective creation of a new, default list of categories for equality clause protection, which includes sexual orientation, does not ensure that future nations will adopt the protections but it fundamentally alters the presumptions as future constitutional equality provisions are drafted. This is particularly the case because the Constitutional Court has applied the provision extensively.

The Constitutional Court's jurisprudence is also a model for other nations. As the first national constitution in the world to do so, South Africa's treatment of the provision—is it a full, substantive right worthy of protection or is it merely window dressing with no legal impact?<sup>163</sup>—was also inevitably important. The international and comparative impacts bolster the significance of the Court's gay rights jurisprudence. The South African Constitutional Court, drawing on a greatly respected Constitution and considering international and comparative law in its decisions, expansively protects the equality of gays and lesbians and affirms their fundamental equality and human dignity.

Because the judgments come from the South African Court, they are more likely to be noticed and they may more easily join the comparative law conversation about human rights adjudication. The expansive caselaw prohibiting discrimination based on sexual orientation is of signal important in comparative context—particularly at this time when a significant number of national courts (and legislatures) are adjudicating and debating this issue. The South African Court has always seen itself as part of a global conversation about constitutional values and constitutionalism; but when the Court speaks about equality and gay right rights in its cases, it is not only speaks to an international audience but it from a unique experience.

## VI. CONCLUSION

It is appropriate and valuable to mark the twentieth anniversary of the Constitution that ended South African apartheid. And among many successes for the Constitution is its novel and

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<sup>160</sup> Adam Liptak, *'We the People' Loses Appeal With People Around the World*, N.Y. TIMES, <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>; <http://africasacountry.com/2012/02/16/praising-the-south-african-constitution/>. Even South Africa agrees: <http://www.info.gov.za/documents/constitution/>

<sup>161</sup> Adam Liptak, *'We the People' Loses Appeal With People Around the World*, N.Y. TIMES, <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>.

<sup>162</sup> Human Rights Watch, *2011: South Africa Annual Country Report*, <http://www.hrw.org/world-report-2011/south-africa>

<sup>163</sup> The interesting but brief lesson in 1990s Fijian constitutionalism is relevant here.

progressive inclusion of anti-discrimination protections for gays and lesbians. The prohibition of discrimination based on sexual orientation was particularly important because it occurred in this historic “human rights constitution.” Moreover, the ensuing gay rights jurisprudence of the South African Constitutional Court exceeds the broadest advancements of legal protections anywhere else in the world. The Constitutional Court’s opinions include express affirmations of the dignity and equality of gays and lesbians in an unbroken series of unanimous, pro-gay decisions that form a substantial core of the overall equality jurisprudence of the Court. Three critical elements conjoined for adjudicatory success related to gay and lesbian rights: a protective constitutional text, a willing and supportive judiciary, and an effective litigation strategy. Indeed, the step-by-step litigation strategy was wildly successful in achieving its legal goals. The challenge gays and lesbians are currently experiencing is leveraging legal victories into social equality.

Nevertheless, twenty years after the prohibition of sexual orientation discrimination in the Equality Clause of the South African Constitution, its practical effect has been markedly inadequate to achieve the safety and social equality of gays and lesbians in South Africa. In sharp contrast to its expansive textual protections and progressive jurisprudence, the lived reality of South Africans gays and lesbians, particularly in poorer communities, is typified by condemnation, discrimination and homophobic violence. Hence, the Equality Clause protections are a symbol of both the progressive, human rights reach of the post-apartheid Constitution and the gulf between textual promises and reality.

In this paper, I have examined the drafting history, Constitutional Court adjudication, and the practical insufficiencies of the Constitution’s inclusion of sexual orientation-based protections, to highlight three insights about the last two decades of constitutional rights in South Africa: a hopeful lesson about unpopular, progressive elements in the drafting of modern constitutions; a cautious reminder on the value of purely (or predominantly) judicial/legal victories; and an affirmation of the value of even unrealized constitutional aspirations for comparative constitutional dialogue.

But there are risks ahead that highlight the need for broader public support. Judicial action is relatively insecure; it is subject to legislative revision, constitutional amendment, and executive inaction. Change through judicial order without popular support may be fleeting, ineffective, or merely symbolic. And, more than at any other point in the last two decades, there is uncertainty about the road ahead for South Africa. To simplify a complex historical process: the sexual orientation protections entered the Constitution through elites in the drafting process and were maintained through party discipline and the focus on other issues more central to the transition of political power. With open questions of party discipline and frequent allegations of abuse of political power, the stakes are much higher for the extra-legal, social equality side of the struggle for gay and lesbian equality in South Africa. Without changes in public opinion, the steady legal gains of the last two decades are threatened by the potential for constitutional amendment (relatively easy in the current climate) or a populist, conservative turn by a weakened party seeking to maintain dominance.

The inclusion of sexual orientation protections in the Constitution that ended apartheid in South Africa stands as a figurative marker at the beginning of the modern, constitutional era for equality for gay, lesbian, and bisexual persons. Its legal significance is singular and substantial. But it can support social equality, not achieve it. And, the legal protections themselves require a powerful Court, a stable political sphere, and strong, popular confidence in South Africa’s transformative constitutional values.