2000

Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process

Eric C. Christiansen
Golden Gate University School of Law, echristiansen@ggu.edu

Recommended Citation
32 N.Y.U. J. of Int'l Law & Politics 997 (2000)

ENDING THE APARTHEID OF THE CLOSET: SEXUAL ORIENTATION IN THE SOUTH AFRICAN CONSTITUTIONAL PROCESS

ERIC C. CHRISTIANSEN*

I. INTRODUCTION

> In the past we South Africans signalled to each other through our differences—the distinctions of race, sex, colour, creed and religion that separated us. The debate about non-discrimination on the basis of sexual orientation offers an invitation to us to deal not in this coinage but in something different . . . . We have quarreled with each other enough in this country . . . . Let us quarrel now rather each with ourself in examining our own deepest prejudices.[1]

In 1994, the Republic of South Africa became the first country in the world to grant explicit constitutional-level protections to gays and lesbians.[2] Those interim constitutional

* J.D. expected May 2001, New York University School of Law; M.A., 1994, University of Chicago. The author wishes to thank Lenore Anderson, Nellie Haddad, Maria Gillen, Howard Venable, and the entire New York University *Journal of International Law and Politics* staff for their support and assistance.

1. Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 472 (1993) [hereinafter *Test Case*].

2. *See* Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians, in* THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 249, 325-26 (Aart Hendricks et al. eds., 1993) (summarizing legal status of gays and lesbians around the world). In the two years since adoption of the 1996 South Africa Constitution, two other countries have adopted constitutional-level protections for their gay and lesbian citizens. In 1998, the Republic of Fiji included sexual orientation in its new constitution's anti-discrimination clause. *See* FIJI CONST. (1998) ch. 4, § 38 (2) ([Equality] "A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her: (a) actual or supposed personal characteristic or circumstances, including . . . sexual orientation . . . ."). The durability and practical effect of the Fijian protections are uncertain; throughout 1999, pressure was exerted by conservative religious groups to amend the Bill of Rights to ensure that discrimination in marriage law and criminalization of same-sex sexual activity remain enforceable under the new equality provisions. *See* "Fiji Islands,"

protections were enhanced and included in the subsequent "final" Constitution, ratified by the democratically elected Constitutional Assembly two years later. Section Nine of the Bill of Rights of the 1996 South African Constitution[3] prohibits public and private discrimination based on sexual orientation.[4] Textually, these protections are located amid a collection of enumerated rights and basic constitutional values, the core of what was meant to be a 'rainbow nation of God' built on "democratic values, social justice, and fundamental human rights."[5] Socially, although they are at conflict with strong public opinion, these protections are a dramatic expression of the new democracy's commitment to expansive human rights protections.

The process of adopting a new constitution for South Africa was a complex, intentionally reflective process set against the dramatic historical backdrop of the end of apartheid and the fundamental reformulation of the political and societal structure of the entire nation. The constitutional process claimed to exemplify the values of inclusion, openness, and democracy which were polar opposites of the values of the South African political generation immediately preceding the

---

World Legal Survey, International Lesbian and Gay Association, *at* http://www.ilga.org/C_INFORMATION.htm (last visited Sept. 30, 2000) [hereinafter *World Legal Survey*]. Also in 1998, the Republic of Ecuador adopted a new constitution that prohibited discrimination based on sexual orientation. ECUADOR CONST. (1998) art. 23, § 3 ("All individuals shall be considered equal and shall enjoy the same rights, freedoms, and opportunities, without discrimination due to . . . sexual orientation . . . .").

3. S. AFR. CONST. (1996) ch. 2, §§ 9(3), 9(4); similar protections were included in the Interim Constitution, S. AFR. INTERIM CONST. (Act 200 of 1993) ch. 3, § 8(2). *See infra* Part II.D. for a comparison of the textual language.

4. "[S]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex." Cameron, *supra* note 1, at 452. This definition was specifically adopted by the South African Constitutional Court in *NCGLE v. Minister of Justice*, 1998 (12) BCLR 1517 (CC), 1998 SACLR LEXIS 36, 52-53 (declaring unconstitutional statutory provisions criminalizing sex between men). The Court, in fact, expanded the legally applicable definition of homosexual sexual orientation to include "people who are bi-sexual, or transsexual and . . . persons who might on a single occasion only be erotically attracted to a member of their own sex." *Id.* at 53.

5. S. AFR. CONST. (1996) preamble.

present one. In light of this avowal of a participatory process, the inclusion of sexual orientation protections in the constitution of a conservative, intensely religious, southern African nation is astounding.

The current South African posture towards its gay and lesbian citizens contrasts starkly with the legal status of gays and same-sex sexual activity in other countries. From a global perspective, torture, incarceration, forcible "medical treatment," and the death penalty are more common legal responses to homosexuality than rights protections.[6] This disparity is starkly evident when the South Africa position is compared with the policies of its neighbor Zimbabwe. While the South African Constitutional Assembly was weighing inclusion of full constitutional protections for gays and lesbians, Zimbabwe President Robert Mugabe was leading a campaign of hatred and violence against that country's fledgling gay rights group, stating

> I find it extremely outrageous and repugnant to my human conscience that such repulsive organisations, like those of homosexuals who offend both against the laws of nature and the morals and religious beliefs espoused by our society, should have any advocate in our midst or even elsewhere in the world . . . . If we accept homosexuality as a right, as is being argued by the association of sodomites and sexual perverts, what moral fibre shall our society ever have . . . .[7]

While such attitudes were not absent from South African society at the end of the apartheid era, they utterly failed to dominate the constitutional discourse about homosexuality. This paper seeks to discover and explain why South Africa rejected violent oppression of gays and lesbians and chose instead to provide legal protection in its first democratic Constitution.

In the early 1990s, South Africa was a country in which gays and lesbians had little genuine political power. They were poorly organized, racially divided, and mostly without sympa-

---

6. *See* AMNESTY INTERNATIONAL UNITED KINGDOM, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 21-27, 29, 32-41, 48-49 (1997).

7. *Id.* at 39.

thy 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—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. Indeed, a 1987 survey of Cape Town residents revealed that 71% believed homosexuality to be morally wrong.[8]

Attempts by the gay and lesbian community to organize were further challenged by the strength of conservative churches in South Africa, the often virulent anti-gay sentiments among both Africans and Afrikaners, and the countless restrictive laws upon movement and meeting for black South Africans. Moreover, as the constitutional drafting process began there was almost no favorable foreign or international legal precedent.[9] And yet, South Africa developed sexual orientation protections surpassing those of any other nation—despite lacking the visibility, history of organizing, and domestic networks of well-funded rights organizations that exist in numerous countries which have succeeded in instituting only limited protections based on sexual orientation. How?

A host of primary documents and disparate historical accounts provide evidence of multiple factors—singly insufficient, but altogether transformative—which are identified in this paper as the means through which South Africa became the first country in the world to offer constitutional-level protections to its gay and lesbian citizens. This article asserts a tripartite explanation: (1) The uniquely synchronous historical development of the anti-apartheid liberation movements and the South African gay and lesbian community set the stage; (2) the radical anti-discrimination ideology of the Afri-

---

8. GORDON ISAACS & BRIAN MCKENDRICK, MALE HOMOSEXUALITY IN SOUTH AFRICA: IDENTITY FORMATION, CULTURE, AND CRISIS 141 (1992).

9. When the first constitutional negotiations began in 1991, there were only two international legal decisions ruling that any international human rights instrument could be interpreted as providing a basis through which to challenge discriminatory laws. Both were European Court of Human Rights decisions that overturned national laws criminalizing same-sex sexual activity. The cases, *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981), and *Norris v. Ireland*, 13 Eur H.R. Rep. 186 (1991), are reviewed briefly *infra* Part III.B.

can National Congress (ANC) provided the philosophical justification; and (3) the autocratic constitutional drafting process secured the explicit, favorable content. Each aspect—the historical, the ideological, and the procedural—was a critical component of this exceptional human rights event. In essence, "sexual orientation" was placed in the South African Constitution through a serendipitous intersection of uniquely South African circumstances and extremely fortuitous timing.

Part Two of this paper will briefly examine the process of creating a new South African Constitution in the 1990s. Nearly a decade of talks preceded the adoption of South Africa's first multi-racial democratic constitution in 1994. These talks and the subsequent drafting conventions created an astonishing document, stunning in its novelty in South African history, in its expressed values, and in its fundamental compromises.

Part Three draws on a wide variety of primary documents from disparate sources to offer an original historical reconstruction of the inclusion of sexual orientation protections in the policy documents, Bill of Rights drafts, and constitutional proposals of the various South African political parties, as well as in the early drafts of the constitutional text. In addition to reviewing the rights protections in legal documents preceding the 1996 Constitution and public opinion expressed in the Constitutional Assembly's Public Participation Programme, this section examines the increasingly visible, newly political, and haltingly multi-racial group of activists attempting to redefine gay rights in the context of liberation. This historical account examines these developments over three time periods: the era of constitutional theorizing preceding the lifting of the ban on the ANC and other liberation movements in 1990, the drafting period for the 1993 Interim Constitution, and the time period for review and final negotiations regarding the 1996 Constitution.

Part Four uses this freshly reconstructed history and the earlier procedural overview to argue that the unique characteristics of the political and social history of South Africa set the stage for novel protections, that treatment of sexual orientation-based equality as an unexamined corollary to the dominant ANC ideology of non-racialism provided the justification, and that an autocratic constitutional drafting process secured the final pro-gay content of the discrimination protections.

II. A COMPROMISE CONSTITUTION FOR A NEW SOUTH AFRICA

Description of South Africa's transition from apartheid authoritarianism to constitutional democracy lends itself easily to hyperbole. The years between 1985 and 1997 have been described as, among other things, a "strange and wonderful tale of collective liberation."[10] The scope of the transition has been identified as "the most historic event in the human rights movement since its emergence,"[11] transforming South Africa "from a country where law was used to express untrammeled power to one where all power was subjected to law."[12] Undoubtedly, it is a transition without precedent in history.

Despite lofty and undeniably admirable goals, the constitution that marked the end of apartheid as a forty-seven year political policy in South Africa was undeniably a work of significant compromise on a whole range of important issues.[13] From the "talks about talks about talks" in 1989 to the effective date of the current constitution on February 4, 1997, the process of bringing constitutional democracy to South Africa was determined by exertions of political power around a bargaining table dominated by the ruling National Party (NP) and the ANC. But despite the flaws in the procedure and imperfections in the resulting document, the negotiations achieved a goal considered impossible for decades: transition from "racial autocracy to a non-racial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights."[14] Examining how controversial sexual orientation protections were adopted and survived amid the political maneuvering and social pressures of transitional South Africa requires an overview of the drafting process.

---

10. PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF A NEW SOUTH AFRICA xiii-xiv (1997).

11. Makau wa Matua, *Hope and Despair for a New South Africa: The Limits of Right Discourse*, 10 HARV. HUM. RTS. J. 63, 63 (1997).

12. Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249 (1997).

13. Fortunately it is not the task of this paper to evaluate the wisdom of those compromises. *See generally* ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE (1995); Matua, *supra* note 11, at 66, 69-70.

14. Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL. 695, 695 (1996).

A. *The 1993 Interim Constitution*

It is difficult to identify a clear beginning or end to the political and social transformations of South Africa. Secret talks between unofficial representatives of the South African government and the banned ANC began in November 1985[15] with official talks between the NP and ANC beginning in February 1990 when the liberation movements—the ANC, the Pan African Congress, the South African Communist Party, and the Congress of South African Trades Unions—were unbanned.[16] In December 1991 delegates of the various political parties gathered at Johannesburg's World Trade Centre for the constitutional negotiations at a forum called the Convention for a Democratic South Africa (CODESA). Conflicts, deadlock, and violence typified CODESA, which ended without agreement in May 1992.[17] A year later the parties resumed negotiations at the Multi-Party Negotiating Process (MPNP), which finalized an agreement in November 1993.

The goal of negotiating a transition to multi-racial democracy was threatened by an initial issue that divided the principle actors at an elementary level. This fundamental conflict of the parties—preceding any conversations of particular constitutional provisions—was determination of the constitution writing process itself. Were the party-appointed CODESA delegates empowered to write the Constitution, or was the purpose of CODESA merely to create a workable transition structure to facilitate democratic elections so that a popularly elected body could draft the Constitution? These opposing positions represented the fundamental concerns of the two dominant parties: the NP wanted CODESA to write an entire constitution that would protect the white minority through

---

15. *See* SPARKS, *supra* note 13, at 21-36.

16. *See* African National Congress, *A Chronological History of the ANC, at* http://www.ufh.ac.za/collections/Library/ANC_Materials/ANC-history.htm (last visited June 28, 2000).

17. In the months after the collapse of CODESA's second session, the ANC launched a campaign of mass action that was met with violent government opposition. But throughout the months after formal negotiations ended, the lead negotiators for the ANC and the NP continued to meet. One year after CODESA's second session deadlock, the parties returned to the table. The ensuing Multi-Party Negotiating Process resulted in a successful conclusion to the original CODESA tasks. *See* SPARKS, *supra* note 13, at 137-152, 179-196.

codification of "group rights," and the ANC wanted the smallest possible mandate for CODESA so that the constitution would be drafted by a new, sure-to-be ANC-dominated legislature.

The negotiated solution to this fundamental conflict was a two-stage constitutional drafting process.[18] The first stage involved drafting a preliminary constitution, planning elections, and setting up a new Parliament that would elect a new president. The second stage gave the task of crafting a "final constitution"[19] to the newly elected Parliament in its role as the Constitutional Assembly. Two safeguards linked the two stages of the process: enumerated, inviolable constitutional principles established by the parties at the MPNP to constrict the subsequent, final constitution[20] and a Constitutional Court appointed under the Interim Constitution with the task of certifying that the final Constitution violated none of the MPNP party principles.[21] In the end, the parties agreed to thirty-four limitations upon the later substantive decisions of the Constitutional Assembly.[22] The "Thirty-four Principles" guided—or haunted, depending on one's perspective—the entire constitutional drafting process and the resultant current form of government in South Africa.

Following this procedural compromise, MPNP delegates proceeded to draft the Interim Constitution and settle a host

---

18. The basic structure of this plan was originally proposed by 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. *See* SPARKS, *supra* note 13, at 129. *See also* WALDMEIR, *supra* note 10, at 194-95.

19. It is, of course, a bit of a misnomer to refer to the 1996 Constitution as the final constitution. The designation "final" refers not to its projected permanence but to its place at the end and capstone of the transition from apartheid to multi-racial democracy. It is the fourth South African Constitution in the nation's history (others enacted in 1910, 1961, 1983, and 1994). *See* Jeremy Sarkin, *Innovations in the Interim and 1996 South African Constitutions, in* THE REV. 57 (June 1998).

20. *See* S. AFR. INTERIM CONST. (Act 200 of 1993), sched. 4.

21. *See* Sachs, *supra* note 12, at 1255.

22. Of the Thirty-four Principles, now Constitutional Court Justice Albie Sachs, who participated in the CODESA negotiations, has said: "You will find no clear logic to the whole set of principles, except the logic of being as inclusive as possible to make everyone feel protected in the process." *Id.*

of other transition issues.[23] Altogether, nearly two years passed between the start of formal constitutional negotiations at CODESA and the approval of the Interim Constitution and the Thirty-four Principles by the party delegates late in the evening on November 17, 1993.[24] Its provisions—including the world's first protections for gays and lesbians—would go into effect on the first day of South Africa's first multi-racial elections.[25] Newly elected President Nelson Mandela and the first multi-racial Parliament, with its companion role as drafting body of the final constitution, took office in May 1994.

B. *Writing the 1996 Final Constitution*

The Constitutional Assembly, comprised of the 400 newly-elected members of the National Assembly and the 90 members of the Senate, began its work on the text of the final Constitution in May 1994. There was little genuine possibility for the Constitutional Assembly to write a new constitution that differed dramatically from the Interim Constitution; the Thirty-four Principles circumscribed the field of allowable in-

---

23. The total work of the CODESA 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 5-6 (1994).

24. *See generally id.* at 2-17.

25. South Africa's democratic elections were held over several days beginning on April 26, 1994. While voter turn-out rates varied by province, the national average was 86%. *See* ELECTION '94 SOUTH AFRICA: THE CAMPAIGN, RESULTS AND FUTURE PROSPECTS 187 (Andrew Reynolds et al. eds., 1994) [hereinafter ELECTION '94]. Despite extensive security measures and the presence of 70,000 election monitors throughout the country, the elections were a logistical mess. A process that was meant to be one day of voting with results announced twenty-four hours later deteriorated into three days of voting (four in the renamed KwaZulu-Natal province), and nearly a week passed before the results were made public. *See* WALDMEIR, *supra* note 10, at 259-60. 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%, the NP received a disappointing 20.4%, the Zulu-nationalist Inkatha Freedom Party (IFP) won KwaZulu-Natal Province, and the extremist parties on both the left and right received only marginal percentages. *See id.* at 261-62. *See generally* ELECTION '94, *supra*.

novation. Nevertheless, there was a lot of work to be done in a short amount of time. Under the Interim Constitution, the legislative body was given two years from its first post-election meeting to complete their task. Failure to complete the draft would have required President Mandela to dissolve Parliament and call a new general election[26]—an occurrence everyone sought to avoid.

The work of the Assembly was carried out in six theme committees.[27] These 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.[28]

On May 8, 1996, one day short of their two year deadline, the Constitutional Assembly voted on the new constitutional text, the sixth official draft since the Interim Constitution. The final text 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 490-member body.[29] The text was then sent to the Constitutional Court for certification.

---

26. *See* S. AFR. INTERIM CONST. (Act 200 of 1993) ch. 5, § 73.

27. 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).

28. 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 25, at 183.

29. *See* REPUBLIC OF SOUTH AFRICA, DEBATES OF THE CONSTITUTIONAL ASSEMBLY, 29 MARCH TO 11 OCTOBER 1996, vol. 3 (1996), at 447-50 [hereinafter CA DEBATES]. 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 thirteen votes. *Id.*

1. *Public Participation Programme*

As a part of the drafting process, the Constitutional Assembly inaugurated a public education and popular participation program that is unequaled in the development of modern government. 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."[30] The Public Participation Programme was meant to instill a feeling of citizen involvement in the Constitutional process and to provide legitimacy for its outcome.[31]

Participation in all aspects of the program exceeded expectations.[32] In the end, more than two million submissions were received from citizens and domestic groups.[33] The Programme also sought to educate South Africans about their constitution and its process. The government publication *Constitutional Talk*, published throughout the final drafting period, went to great efforts to demonstrate the importance of the public comments to the writing of the final Constitution.[34]

---

30. Constitutional Assembly, *The Public Participation Programme, available at* http://www.constitution.org.za/fct22115.html (last visited Nov. 14, 1999).

31. 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, 1996 (Mar. 8) *at* http://www.constitution.org.za/selection.html (last visited Jan. 4, 2000) [hereinafter *Constitutional Talk*].

32. *See id.* vol. 9, 1995 (June 30).

33. Each submission was given a unique identifier. Submissions in phase one totaled 1.8 million and submissions for phase two totaled 250,000. *Id.*, vol. 8, 1995 (June 8). Additionally, over 80,000 people attended public meetings and constitutional education workshops sponsored by the Assembly throughout the country. Greater than 10,000 calls were recorded on the Constitutional Talk-line, a five-language information source. Thousands more tuned in to weekly television and radio broadcasts. The Internet Project placed a host of available documents on-line: Assembly minutes, working drafts of the Constitution, submissions as they were received, Assembly press releases, and articles from the official newsletter *Constitutional Talk*. *Id.*, vol. 2, 1996 (Mar. 8).

34. *Id.*, vol. 9, 1995 (June 30);

> Every morning, Box 15, Cape Town, 8000, is emptied and all the letters are opened and date-stamped. Then they are taken to the

While there were complaints that the program was less effective reaching rural communities, informal settlements, women, and elderly citizens, an independent survey (conducted by the Community Agency for Social Equality) in 1996 found that the media campaign had reached 18.5 million people, 73% of adult South Africans.[35]

2. *Constitutional Court Review*

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."[36] The Constitutional Court, established under the Interim Constitution,[37] was required to provide "certification": to declare

---

submissions department where they are sorted into subject matter and placed in boxes. Those that are in languages other than English are sent for translation and all handwritten submissions are retyped. Despite public scepticism, the fact is that every contribution—no matter what language or style it is written in or the meagre scrap of paper it is on—is considered significant and finds its way to the theme committees responsible for the relevant section of the constitution.

35. *Id.*, vol. 3, 1996 (Apr. 22). This number, up from 65% as reported in *Constitutional Talk*, vol. 5, 1995 (Mar. 17) was significantly improved by the publication of the working draft of the Constitution in November 1995. *Id.*, vol. 2, 1996 (Mar. 8). 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, 1996 (Feb. 9).

36. Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, ch. 2, para. 32, 1996 (4) SALR 744 (CC), (Case CCT 23/96) (Sept. 6, 1996) [hereinafter Certification].

37. *See* S. AFR. INTERIM CONST. (Act 200 of 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, *supra* note 36, ch. 2, para. 32. "Suffice it at this stage to make two points. First, that this Court's duty—and

whether the proposed text complied with each of the Principles annexed to the 1993 Constitution. The Court's certification opinion was announced on September 6, 1996.[38]

In what Justice Albie Sachs later identified as a "unique jurisprudential and political event in the world,"[39] the South African Constitutional Court declared the South African Constitution to be "unconstitutional."[40] While acknowledging that the drafting marked a "monumental achievement" and that "in general and in the majority of its provisions" the Assembly had succeeded, the Court stated "we ultimately come to the conclusion that the [proposed Constitution] cannot be certified because there are several respects in which there has been noncompliance" with the Thirty-four Principles.[41] Two issues of non-compliance relate directly to the on-going viability of sexual orientation protections: the constitutional amendment process and the entrenchment of the Bill of Rights.

The draft constitution allowed for amendment if a two-thirds majority of the National Assembly voted for it. The Court, undoubtedly aware that nearly 63% of the current Assembly belonged to a single political party,[42] held that the amendment process required additional safeguards in order to meet the "special procedures involving special majorities"

---

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.

38. Five major political parties submitted written documentation as did eighty-four other organizations and individuals. From these written objections—2,500 pages in total—individual speakers and organizational representatives addressed the Court at the oral arguments held July 1-11, 1996. Representatives of the Constitutional Assembly had the opportunity to respond to each objection. *See* Certification, *supra* note 36, at ch. 1, § D.

39. Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 669 (1996).

40. *Id.*

41. Certification, *supra* note 36, ch. 1, § F. In a lengthy opinion, the Constitutional Court identified nine components of the May 1996 draft of the Constitution that failed to comply adequately with the Thirty-four Principles—including problems with labor rights, the independence and impartiality of government oversight mechanisms, and fiscal and structural inadequacies regarding local government. *See* Certification, *supra* note 36, at chs. 6, 8.

42. The ANC received 62.7% of the seats in the National Assembly in the 1994 elections. *See* ELECTION '94, *supra* note 25, at 183.

requirement of Principle XV.[43] Principle II required the final constitution to include a set of human rights protections, constitutionally safeguarded and enforceable by the courts.[44] The Court determined that the normal amendment procedures were inadequate to create "entrenched" rights. Consistent with its ruling, the Court returned the text to the Constitutional Assembly for revision. The amended text was completed on October 11, 1996[45] and approved by the Constitutional Court on December 4, 1996.[46] On December 10, 1996, Human Rights Day, the new Constitution was signed by President Mandela. It formally took effect on February 4, 1997.[47]

C. *The South African Bill of Rights*

In order to understand the South African Bill of Rights and the particular sexual orientation-based equality provisions that are the focus of this paper, context is vitally important. This reflects several realities of apartheid South Africa: the utter lack of fundamental human rights protections, distrust of judicial will or court capacity to protect rights, and the inexperience of most South Africans with a culture of rights.[48] And

---

43. "Amendments to the Constitution shall require special procedures involving special majorities." S. AFR. INTERIM CONST. (Act 200 of 1993) sched. 4, Principle XV. *See* Certification, *supra* note 36, paras. 152-56.

44. "Everyone 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* the fundamental rights contained in Chapter 3 of this Constitution." S. AFR. INTERIM CONST. (Act 200 of 1993) sched. 4, Principle II.

45. *See Constitutional Talk*, *supra* note 31, vol. 5, 1996 (Oct. 17). In a replay of the earlier vote the ANC, NP, DP, and PAC supported the amended final Constitution, the Freedom Front abstained, citing fears for single-medium education, and the ACDP voted against the Constitution which they said should be subordinate to biblical law. *Id.*

46. *See Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997(2) SALR 97, para. 205 ("We certify that all provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa, 1993.").

47. *See* Lionel Williams, *South Africa's New Constitution Takes Effect Today*, AFR. NEWS SERVICE, Feb. 3, 1997, *available in* 1997 WL 8819069.

48. As ANC Constitutional Committee member (now Constitutional Court Justice) Albie Sachs stated in 1989, "The battle for human rights in

yet the final Constitution was permeated by the language of fundamental rights and has been described as "the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms."[49]

At the most pragmatic level, a Bill of Rights was included in the South African Constitution because it benefited both the ruling government and the liberation movements in the political re-creation of South Africa. The minority white population benefited because it offered legal protection to individuals once the majority ruled.[50] A strong Bill of Rights ensured against the possibility of retributive laws, lessened the likelihood of unrestrained African claims on property seized by whites during the apartheid years, permitted maintenance of Afrikaner cultural traditions, and allowed for limited group rights of association.

For the ANC, enumerated fundamental rights were both a core value of the liberation movements and a tool for advancing majority rule.[51] Despite some concerns,[52] a guarantee of

---

our country has essentially been a struggle for the vote not for a Bill of Rights." Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COL. HUM. RTS. L. REV. 13, 13 (1989).

49. *See* Mutua, *supra* note 11, at 65. Mutua also identifies the strong influence of human rights norms on the constitution of Namibia after its independence from South Africa. *Id.* at 65 n.6.

50. Notably, the Interim Constitution included property rights protections—one of the biggest concerns of the white minority because of the tremendous amount of property claimed by whites under authority of apartheid era laws restricting residence and property ownership by blacks in most parts of South Africa.

51. *See* Justice Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451, 452 (1997):

> A Bill of Rights was one of the essential tools without which the relatively peaceful transition from this history of racial oppression and apartheid to a nonracial democracy would not have been possible. Without some guarantee of protection for the rights of minorities, the previous ruling white minority government would not have relinquished power to the inevitably black-controlled majority government.

Id.

52. 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

fundamental rights was the legal refutation of everything apartheid stood for and a substantiation of ANC claims that a future South Africa would be based on their policy of non-racialism. A Bill of Rights allowed the ANC to allay significant fears of the white minority generally and the ruling NP specifically.[53] Moreover, rights discourse and the ANC had become increasingly intimate as the anti-apartheid campaign grew in power during the exile of the liberation movements.[54]

In 1986, the ANC first affirmed the need for a Bill of Rights in a post-apartheid constitution.[55] This statement was followed in 1989 by *Constitutional Guidelines for a New South Africa,* a formal ANC publication affirming the need for a justiciable Bill of Rights: "The Constitution shall include a Bill of Rights based on the Freedom Charter.[56] Such a Bill of

---

Rights were negative. For many, a Bill of Rights offered no real protections, offered protections only to the privileged (a "Bill of Whites" as some have termed it; *see* Mutua, *supra* note 11, at 68-69) or was merely beyond the scope of immediate concern in the midst of 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 48, at 15-16.

53. There are varying accounts of the importance of a Bill of Rights for the exiled ANC. A Bill of Rights, after all, would place limits on state power—and in a post-apartheid state, that would mean limits on ANC power. Some have claimed that an ANC call for enumerated rights is evidenced throughout the organization's history while others have suggested that only the imminent possibility of majority rule raised the issue for the ANC leadership. *See* African National Congress, *The ANC and the Bill of Rights 1923 to 1993: A Seventy-Year Survey, at* http://www.anc.org.za/ancdocs/history/billorts.html (last visited Sept. 7, 2000) (tracing the history from the 1923 African Bill of Rights through the 1943 African Claims and the 1955 Freedom Charter to the ANC Bills of Rights in the eighties and the Interim Constitution); *compare* Sachs, *supra* note 12, at 1249 (recounting ANC Constitutional Committee discussion of including a Bill of Rights in a future democratic constitution).

54. Rights-based arguments formed the crux of international legal arguments facilitating the renunciation of the apartheid government by international bodies and foreign governments. *See* Mutua, *supra* note 11, at 63-64.

55. *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).

56. 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,

Rights shall guarantee the fundamental human rights of all citizens . . . and shall provide appropriate mechanisms for their enforcement."[57] Bill of Rights drafts were produced by the ANC in 1990[58] and again in 1992.[59] 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.

In the late 1980s, the ruling National Party began its own investigation into the viability of a Bill of Rights—but with a much different purpose in mind. The government mandated that the South African Law Commission[60] "investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights as well as the role the courts play or should play."[61] The resulting report, Working Paper No. 25, Project

---

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, 1995*, *reprinted in* 21 COLUM. HUM. RTS. L. REV. 249 app. C, at 249-51 (1989).

57. 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 criticised 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 48, at 17.

58. *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*].

59. *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, at 215 (1992) [hereinafter *1992 Draft ANC Bill of Rights*].

60. The Commission, established in 1973 by an Act of Parliament, consisted of members of the judiciary, the legal profession (including academic lawyers), the magistrates' bench, and officials of the Department of Justice. *See* South African Law Commission website, *at* http://www.lawcomm.co.za (last visited Sept. 20, 2000).

61. 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. 467, 475 (1991) *quoting* South African Law Commission Act 19 of 1973.

58: Group and Human Rights,[62] was published in March 1989 with an Interim Report published in 1991.[63] The report supported a Bill of Rights with enumerated fundamental rights applied equally under law—a notion untenable under any form of apartheid.[64]

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 recognized role for affirmative action programs.[65] 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.[66]

At the Multi-Party Negotiating Process in 1993, the initial drafting of the interim Bill of Rights was assigned to the Technical Committee on Fundamental Rights During the Transition, one of the seven technical committees that inherited the unfinished work of the CODESA working groups.[67] The Technical Committee consisted of lawyers, civil rights workers, and former activists with legal backgrounds. Hence, much of the drafting of the contents of the Bill of Rights was the work of rights "experts" rather than party negotiators.[68] The authors' task was carefully circumscribed: they were to draft a proposed list of minimal rights necessary for the envisioned two-

62. *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 COLUM. HUM. RTS. L. REV. 241, app. B (1989).

63. *See* SOUTH AFRICAN LAW COMMISSION, INTERIM REPORT, PROJECT 58: GROUP AND HUMAN RIGHTS (1991), *cited in* Edwin Cameron, *Unapprehended Felons: Gays and Lesbians and the Law in South Africa*, *in* DEFIANT DESIRE 89, 95 (Mark Gevisser & Edwin Cameron, eds., 1995) [hereinafter *Unapprehended Felons*].

64. *See* SOUTH AFRICAN LAW COMMISSION (1989), *supra* note 62.

65. These shared characteristics were noted in Cameron, *supra* note 1, at 450-51.

66. *See generally* DU PLESSIS & CORDER, *supra* note 23. 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).

67. *See* DU PLESSIS & CORDER, *supra* note 23, at 39.

68. *See id.* at 39-40.

year interim period prior to adoption of a constitution crafted by an elected Constitutional Assembly.[69]

The Technical Committee far exceeded their modest mandate, producing a full and detailed Bill of Rights based on a variety of foreign and international precedents.[70] Throughout, the Committee remained essentially closed to outside scrutiny, but as the process advanced, the main parties weighed in on the issue of the content of the enumerated rights.[71] The resulting final Bill of Rights identified an extensive list of individual and group rights, made them justiciable against the state and private actors, and explicitly identified a very narrow set of circumstances in which the rights could be overcome by state priorities.[72]

D. *The South African Equality Clause*

For obvious reasons, equality was always identified as a central component of any Bill of Rights for South Africa. Even early in the Interim Constitution drafting process, it was identified by the Committee on Fundamental Rights as one of the "minimal or essential rights that had to be accommodated" in even a merely transitional Bill of Rights.[73] 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

---

69. *See id.* at 40-42.

70. The sources for the Bill of Rights were both international rights documents and foreign constitutions, with particular preference for more recent national documents, "reflecting accumulated wisdom in international as well as domestic human rights jurisprudence." *Id.* at 47. Commonly cited sources were the 1949 German Constitution, the Canadian Charter of Rights and Freedoms (1982), and the Chapter on Human Rights and Freedoms in the Constitution of the Republic of Namibia (1990). *See id.*

71. *See id.* at 49-51.

72. *See* 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.

73. *See* DU PLESSIS & CORDER, *supra* note 23, at 42-43.

right in both constitutions. As the Bill of Rights is "the cornerstone of democracy in South Africa,"[74] the equality provisions are the cornerstone of the Bill of Rights itself. Section Nine, "Equality," also encompasses the most visible and most justiciable of the final Constitution's textual references to gay and lesbian rights:

> 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.
>
> (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.[75]

The inclusion of sexual orientation among the list of illegitimate forms of discrimination incorporates by implication a host of rights commonly sought by gays and lesbians in other countries and allows judicial enforcement of all rights outlined in the Bill of Rights.

---

74. S. AFR. CONST. ch. 2, § 7.

75. 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).

Although there were some significant changes in the Bill of Rights between the Interim Constitution and the final Constitution,[76] there were only a few changes in the Equality Clause between 1993 and 1996.[77] Changes included the addition of protection from discrimination based on pregnancy, marital status, and birth. Additionally, reference to affirmative measures to protect or advance historically disadvantaged persons was stated more unequivocally, and reference to land restitution was removed to another section of the Bill of Rights.[78]

Only two of the changes directly relate to the protection of discrimination based on sexual orientation. First, and vitally, "horizontal rights" were added. Not only is state discrimination prohibited by the Constitution, but discrimination by

---

76. Changes included addition of some second generation rights: Housing, § 26; Health Care, Food, Water, and Social Security, §27; [additional specificity in the areas of] Property, § 25; Culture, Religious, and Linguistic Communities, § 31; Enforcement, §38; among other cosmetic and clarification changes. *Id.* at ch. 2, § 8; *cf.* S. AFR. INTERIM CONST. (Act 200 of 1993), ch. 2, § 9 (right to life).

77. Ch. 3, § 8 [Equality] of the 1993 Interim Constitution reads:

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
>
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
>
> (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
>
> (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

78. Ch. 3, § 8(3)(b) was expanded and altered in ch. 2, § 25 of the final Constitution.

private actors is prohibited as well.[79] Second, the inclusion of the "right to equal benefit of the law" in addition to "equal protection" offers a promise of substantive equality rather than mere facial equality.[80] Such changes reflect a dramatic textual affirmation of substantive equality protections.

III. RECONSTRUCTING A HISTORY OF SEXUAL ORIENTATION PROTECTIONS IN SOUTH AFRICA

The final approved text of the South African Constitution included an impressive array of rights with broad applicability assured through an expansive Equality Clause. Through its constitutional process, South Africa had reinvented itself as a human rights state and defined "human rights" in a dramatically progressive and expansive manner. Protection from public and private discrimination based on sexual orientation was one of the most revisionist—and controversial[81]—aspects of the Bill of Rights guarantees of equality, and yet its history has not previously been explored in a comprehensive manner. This section attempts to recreate the historical events which precipitated this human rights milestone through examination of primary documents, extant histories of discrete aspects of South African gay and lesbian history, and the original constitutional drafting materials.

In order to address the question of how sexual orientation protection made it into the Equality Clause of the final Constitution, this Note examines three important periods: 1986-1992, during which sexual orientation protections were evaluated by the ANC and the South African Law Commission; 1992-93, the Interim Constitution drafting period; and the 1994-96 period, in which the Interim Constitution and working drafts of the final Constitution were critiqued by the Constitutional Assembly and the public. After a brief overview of the legal status of gays and lesbians prior to the constitutional period, this section examines each of the three periods in turn.

---

79. S. AFR. CONST. ch. 2, § 9(3),(4).

80. *Id.* § 9(1)

81. Exclusion of the death penalty (ch. 12, § 11), allowance of abortion (ch. 2, § 12(2)), and the complicated agreements regarding land restitution (ch. 2, § 25) are other highly controversial aspects of the final Constitution. *See* S. AFR. CONST.

A. *The Background of Anti-Gay Domestic Law*

Neither the pre-democracy legal status of South African homosexuals nor their legal status in neighboring nations accounts for the constitutional protections granted by the ANC and the constitutional authors in the early 1990s. Indeed, the eventual inclusion of gay and lesbian protections in the South African constitution must be understood as a radical departure from the legal practice in other nations, and even from pre-liberation South Africa's legal traditions.

Apartheid South Africa exhibited a well-developed tradition of legally-sanctioned discrimination against gays and lesbians. South Africa had gathered anti-homosexuality laws from each of its several legal traditions[82]—all of which condemned homosexuality. The legal situation in pre-liberation South Africa was more harsh (*de jure* at least) than many of its neighbors. Whereas many sub-Saharan nations have no explicit provisions related to homosexuality,[83] South Africa has had condemnatory laws since colonization.[84]

The general common law prohibitions on same-sex sexual activity were codified by legislation early in the apartheid era. The Immorality Act of 1957 codified Afrikaner ethics related to "unlawful carnal intercourse and other acts in relation

---

82. South Africa's modern legal traditions are a composite of Dutch-Roman law, British common law, and the heavily Christian-influenced apartheid policies of the National Party. *See Unapprehended Felons*, *supra* note 63, at 91, 92-94.

83. *See* TIELMAN & HAMMELBURG, *supra* note 2. This is not meant to imply worse *de facto* treatment for gays and lesbians in South Africa. Many nations rejected their colonial common law systems and did not explicitly integrate sodomy or other common law homosexual offences into their national law after independence, but nevertheless have histories replete with anti-gay persecution.

84. Specific restrictions on same-sex sexual activity became law in South Africa through its Roman–Dutch law tradition, imported from pre-Napoleonic Holland during colonization in the 1600s. At the time of its imposition, Roman-Dutch law punished all non-procreative sexual activity but by the beginning of the twentieth century, the common law was enforced against gay men exclusively. In the twentieth century, the common law punished sodomy, frottage, mutual masturbation, and "other unnatural sexual offences" between men. *See* Pierre de Vos, *On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution*, 12 S. AFR. J. HUM. RTS. 265, 274-75 (1996).

thereto."[85] As with the apartheid laws, the motivation for the Immorality Act was maintenance of the "purity" of Afrikaners and biblical mandate.[86] The Immorality Act did not specifically address same-sex offences at the time it was enacted, but as gays and lesbians began to become more visible, general sexual offense laws were applied with greater frequency and explicit laws began to appear.[87]

While the common law applied to all "unnatural offenses," the statutory offenses affected only public conduct by males until 1967.[88] In response to a much-publicized raid on a large gay party in a private home in a wealthy Johannesburg suburb in 1966,[89] the legislature sought to tighten laws on homosexual activity and to make prosecution easier.[90] White, urban gays and lesbians responded to the legislation with opposition organizing and succeeded in getting the Parliamentary Select Committee[91] to drop the legislation. Nevertheless, amendments to the Immorality Act were passed in March 1969 that raised the age of consent for male homosexual activity to

85. Sexual Offenses Act 23 of 1957, 1 JSRSA 2-195 (1995), referred to as the Immorality Act until the Immorality Amendment Act 2 of 1988 changed the official name to the Sexual Offenses Act.

86. Voris Johnson, *Making Words on a Page Become Everyday Life: A Strategy to Help Gay Men and Lesbians Achieve Full Equality Under South Africa's Constitution*, 11 EMORY INT'L L. REV. 583, 592-93 (1997).

87. Glen Retief, *Keeping Sodom Out of the Laager: State Repression of Homosexuality in Apartheid South Africa*, *in* DEFIANT DESIRE, *supra* note 63, at 99, 101-03.

88. Mark Gevisser, *A Different Fight for Freedom: A History of South African Gay and Lesbian Organization from the 1950s to 1990s*, *in* DEFIANT DESIRE, *supra* note 63, at 14, 31. Only public solicitation of gay sex and cross-dressing could be statutorily enforced; private gay parties offered no opportunity for legal prosecution.

89. This raid plays a significant symbolic and practical role in the history of gay organizing in South Africa. *See id.* at 30-37; *see also* Retief, *supra* note 87, at 101-03. Opposition to the anti-gay laws proposed after the raid resulted in the first serious gay political organization in South African history, the Homosexual Law Reform Fund. *See* Gevisser, *supra* note 88, at 32-37.

90. *See id.* Among other provisions, the proposed law would have created offenses committed by lesbians and initiated a compulsory prison term of three years for a single offense by men or women.

91. The Parliamentary Select Committee was reviewing the legislation on behalf of Parliament. *See id.* at 32-34.

nineteen years[92] and made it illegal for a male to commit with another male "any act which is calculated to stimulate sexual passion or to give sexual gratification" at a party (defined as "any occasion at which two or more people are present").[93]

By the second half of the twentieth century, most of the laws punishing non-procreative sexual activity were not enforced—with the exception of provisions against homosexuality.[94] And yet, the enforcement of "unnatural offenses" laws was arbitrary at best, giving gays the status of "unapprehended felons" in South African society.[95] As late as 1989, new recommendations were being made to increase the criminal penalties for homosexual conduct.[96] Unpredictable enforcement patterns and judgments (often accompanied by statements of moral revulsion by judges) were not the only detrimental effect of sodomy and "unnatural offenses" laws. As late as 1990, courts were recognizing a version of the "homosexual panic defense"[97] in murder trials despite clear recognition of the

---

92. The inflated age of consent was extended to women in 1988. *See* CARL F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS ch. 5 n.3 (1988).

93. Gevisser, *supra* note 88, at 35.

94. *See Unapprehended Felons*, *supra* note 63, at 91, *citing* R. v. Gough and Narroway, 1926 CPD 159 (holding that sex between men, "an abhorrent practice," survived as a crime in modern South African law); *see* R. v. Curtis, 1926 CPD 385 (1926), S. v. V., 1967 2 SA 17 (E) (holding masturbation between men was still a crime; 1967), and R. v. Baxter, 1928 AD 430 (condemning male sex acts "so disgusting in nature" that the Chief Justice had to "refrain from repeating them"). Sodomy prosecutions and convictions occurred at a rate of hundreds each year (e.g., in 1992: 428 prosecutions and 283 convictions) and "unnatural sexual offences" at a rate of dozens each year (e.g., in 1992: 26 prosecutions and 24 convictions). *See* Kevan Botha & Edwin Cameron, *Sexual Privacy and the Law*, *in* S. AFR. HUM. RTS. Y.B. 1993 219, 224 (Neil B. Boister ed., 1994) (includes statistics from 1978 to 1992).

95. *Id.* at 219 (borrowing term from RICHARD D. MOHR, GAYS/JUSTICE—A STUDY OF ETHICS, SOCIETY, AND LAW 53 (1988)).

96. Even after passage of the Immorality Amendment Act of 1988, officially decriminalizing interracial sex, a committee reviewing sexual morality laws suggested criminalizing sex between women and establishing "rehabilitation programs" for gays and lesbians prosecuted under the Act. The committee also suggested strong language expressing abhorrence of homosexuality. *See* Gevisser, *supra* note 88, at 60.

97. A "homosexual panic defense" is a provocation defense by which (typically) a heterosexual-identified man justifies homicide of an apparently gay victim by asserting that his violent act was an understandable response to an unwelcome sexual advance.

frightening precedent established by repeated acquittal.[98] These anti-gay laws and biased treatment by the South African justice system were components of the contemporary legal system at the time the new Constitution was being drafted.[99]

The social status of gays and lesbians was, not surprisingly, linked to their legal status. Legal threats during the 1980s provoked some political organizing. The inevitable result of such organizing was a gradual increase in the visibility of gays and lesbians. However, gay political organizing, other than in the form of discrete campaigns against specific threats, was in a primitive stage of development. Gay groups that existed at the time tended to be exclusively white, predominantly male, and self-consciously "apolitical." But times were changing in South Africa, and the transformative era would also include gay and lesbian organizing.

B. *Pre-Liberation Era: Two Movements Come into Their Own*

During the first of the three historical periods to be examined, beginning in the mid-1980s and extending through the lifting of the ban on the liberation movements in 1990, drafting a South African Bill of Rights was becoming a less speculative, more potentially viable project as the possibility of democracy in South Africa became imaginable. Drafts were being developed by political parties and other groups.[100] In what was initially an unrelated development, a transformation was occurring in South Africa's gay and lesbian communities as well. The appearance of a more organized and visible gay and lesbian presence and the growth of the first viable multiracial and liberation-oriented (i.e. aligned with the anti-

---

98. "One cannot but express one's concern that these men do not know the risk they take." State v. Langenhoven et al, Cape Town SS 163/91 (Tebbutt, J.), *quoted in* Retief, *supra* note 87, at 108-09. *See also* State v. Guss Davey, Cape Town SS 285/91 (acquittal based on gay panic) *referenced in id.*

99. Anti-gay laws and anti-gay application of existing laws continued until overturned by the Constitutional Court in 1996. *See* NCGLE v. Minister of Justice, 1998 (12) BCLR 1517 (CC), 1998 SACLR LEXIS 36, at 39-40 ("Before the new Constitutional order came into operation in our country, the common-law offence of sodomy differentiated between gays and heterosexuals and between gays and lesbians.").

100. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 180-81 (1998).

apartheid movement) gay and lesbian groups coincided with the self-conscious development of ANC governing documents.

1. *The New Gay and Lesbian Politics*

A moment of empowerment and possibility was being experienced by gay and lesbian groups in the late 1980s. The gay and lesbian organizations of the preceding decade—nearly all-white, mostly male, apolitical organizations[101]—were fading from predominance and being replaced by a smattering of organizations with a more liberation-oriented approach.[102] Lesbians and Gays Against Oppression (LAGO), formed in Cape Town in 1986, was the first organization of the new gay and lesbian politics. Formed with explicit links to Western Cape anti-apartheid groups, LAGO denounced the apolitical postures of earlier groups and linked the struggle for gay rights with the struggle for racial equality.[103]

In addition to its other organizing activities, LAGO provided support for two important liberation activists whose confrontations with the apartheid government were complicated by their homosexuality and whose anti-apartheid activities helped legitimize the gay rights movement. Simon Nkoli, a black anti-apartheid and gay activist arrested for township activism in 1984 and charged as part of the 1986 Delmas Treason Trial,[104] has been described as "perhaps South Africa's most well-known gay activist" for his very visible involvement with the ANC and gay and lesbian groups.[105] His unique position

---

101. The largest of these, and the only national organization, was Gay Association of South Africa (GASA). *See generally* Gevisser, *supra* note 88, at 48-62 (describing GASA's formation and activities).

102. *See id.* at 74-78.

103. A stated goal of LAGO was to "situate the lesbian and gay struggle within the context of the total liberation struggle." *Id.* at 58.

104. In the 1986 Delmas Treason Trial, part of President P.K. Botha's State of Emergency repression, Nkoli was charged with treason along with several prominent members of the United Democratic Front. He was later acquitted. The trial attracted enormous attention and has been described as "one of the most significant political mobilising points for the mass democratic movement in the 1980s." Simon Nkoli, *Wardrobes: Coming Out as a Black Gay Activist in South Africa*, *in* DEFIANT DESIRE, *supra* note 63, at 257 n.1.

105. *Id.* at 249. References to the importance of Nkoli, in the development of gay activism and legitimacy within the liberation movement and in individuals' personal life experiences, are found throughout the writings of gay and lesbian South Africans.

as an activist is also evidenced in the support he received from foreign anti-apartheid and gay rights organizations during his incarceration.[106] After his acquittal in 1988, he formed the notable township group Gay and Lesbian Organization of Witswatersrand (GLOW) and remained visible in the anti-apartheid movement and the ANC. Ivan Toms, a founding member of LAGO, was also a visible member of the anti-apartheid struggle. Toms and his End Conscription Campaign, which grew out of his own refusal to re-enter the South African Defense Force and support its repressive activity, were repeatedly maligned because of his homosexuality.[107] Both activists tell of dual discrimination: externally from the apartheid government specifically and society generally and internally from co-revolutionists fearful of the impact a visible homosexual could have on the movement.[108]

While LAGO and its successor in the Western Cape, the Organization of Lesbian and Gay Activists (OLGA), were primarily white organizations, their clear association with the anti-apartheid struggle as a member of the United Democratic Front[109] was a significant development for gay and lesbian organizing in South Africa.[110] Nevertheless, racial division re-

106. *See* Gevisser, *supra* note 88, at 56 ("[I]n Nkoli, gay anti-apartheid activists had found a ready-made hero.").

107. *See* Ivan Toms, *Ivan Toms Is a Fairy: The South African Defence Force, the End Conscription Campaign, and Me, in* DEFIANT DESIRE, *supra* note 63, at 258-63. Toms's sexuality was introduced at his trial because he and other members of the Organization of Lesbian and Gay Activists (OLGA) had discussed a meeting with ANC activists (to discuss the ANC position on gay and lesbian rights) in Harare. His counsel at trial was gay activist and acting Constitutional Court Justice Edwin Cameron. *Id.*

108. *See id.* at 259-61; Nkoli, *supra* note 104, at 254-56.

109. The United Democratic Front (UDF) was an ANC-aligned, anti-apartheid umbrella organization within South Africa.

110. "OLGA was working towards a non-racial, non-sexist, democratic, non-heterosexist democratic South Africa and . . . its mission was to support lesbian and gay activists who were working in the struggle for South Africa and to raise the issue of lesbian and gay rights within the broader democratic movement." Toms, *supra* note 107, at 261 (internal quotations marks removed). OLGA applied for UDF membership in 1989: "[T]here was a range of responses, from giggles to disbelief . . . . OLGA's application was accepted, for moral and strategic reasons: moral, because OLGA motivated the worthiness of its cause, and strategic, because the whole point of the UDF was to make its constituency as broad as possible." A Western Cape UDF Regional Executive, *quoted in* Gevisser, *supra* note 88, at 75.

mained a reality for South African gay organizations. Similarly, the acceptance of recognized figures like Nkoli was not indicative of a broader trend in the often homophobic treatment of many in liberation groups.[111] Organizations like GLOW and the Association of Bisexuals, Gays and Lesbians (ABIGALE)—formed in Johannesburg in 1988 and in the Western Cape in 1992, respectively—were organized to address the specific needs of black gays and lesbians.

2. *ANC Organizing and the "Gay Issue"*

In 1986, the ANC had not yet formulated any official policy related to gay and lesbian rights.[112] But events in the following year raised the stakes for all parties. In September 1987, Ruth Mompati, an ANC National Executive Committee member, precipitated a minor crisis with inflammatory remarks first reported in London's *Capital Gay* newspaper under the title "ANC dashes hopes for gay rights in SA."[113] Ms. Mompati was quoted as saying, "I cannot even begin to understand why people want lesbian and gay rights," and that homosexuals are "not normal." She demeaned as insignificant the gay rights movement by justifying the lack of an ANC policy with, "We don't have a policy on flower sellers either."[114]

Several English, Dutch, and Scandinavian anti-apartheid groups protested—a few organizations even threatened to withdraw support if the ANC did not retract the statements. Within two months the ANC responded. Then ANC Minister of Information Thabo Mbeki[115] summarized the ANC policy: "The ANC is indeed firmly committed to removing all forms of discrimination and oppression in a liberated South Africa . . . .

---

111. *See, e.g.*, Hein Kleinbooi, *Identity Crossfire: On Being a Black Student Activist*, *in* DEFIANT DESIRE, *supra* note 63, at 264-68.

112. *See* Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement*, *in* DEFIANT DESIRE, *supra* note 63, at 270.

113. *Id.*

114. *Id. See also* Gevisser, *supra* note 88, at 70 (reporting additional comments: "The gays have no problems . . . . I don't see them suffering. No one is persecuting them.").

115. Mr. Mbeki became Deputy President after the 1994 elections and National President in 1999.

That commitment must surely extend to the protection of gay rights."[116] At the same time, an ANC spokesperson stated

> ANC policy towards gays and lesbians and towards other groups in South Africa which are discriminated against has to be the same, because it is an issue of principle enshrined in our Freedom Charter. The raison d'etre of the ANC's existence is to fight discrimination and deprivation of gays and lesbians cannot be excluded from that process.[117]

Nevertheless, although the ANC Director of Publicity stated in 1989 that sexual behavior between consenting adults should be regarded as "a private matter and not be subject to penalization,"[118] an article published that same year identified gay rights as an area of disagreement within the ANC, stating, "the whole question touches on a variety of cultural sensibilities, and clearly needs to be handled with dignity and sensitivity, without pandering to backwardness and homophobia, and bearing in mind the special contribution which the South African gay community has to make towards finding the right answer."[119]

In response to the inconclusive nature of ANC support, gay and lesbian activists initiated a policy of constructive engagement. Meeting with members of the ANC Constitutional Committee[120] and other ANC representatives, activists formulated a response to the ANC's 1989 *Constitutional Guidelines.*[121] The submission, drafted by OLGA and supported by eleven other South African gay and lesbian groups, identified lesbian and gay rights as fundamental human rights, a public issue requiring a political response "as a part of a whole package of gender issues in the development of social and economic rights for all individuals."[122] One result of these contacts was considerable debate on the issue of homosexuality by the ANC

---

116. Fine & Nicol, *supra* note 112, at 271.

117. *Id.* at 270-71.

118. Sachs, *supra* note 48, at 30.

119. *Id.*

120. Albie Sachs and Kader Asmal. *See* Fine & Nicol, *supra* note 112, at 271.

121. *See Constitutional Guidelines, supra* note 57.

122. Fine & Nicol, *supra* note 112, at 271.

Women's Section at a March 1990 policy meeting.[123] Importantly, this meeting in Lusaka, Zambia was also attended by members of the mostly male ANC National Executive. The gathered representatives adopted a position opposing discrimination based on sexual orientation at that meeting. As a consequence "when the ANC Draft Bill of Rights was prepared, persons like Kader Asmal and [Albie Sachs] who felt strongly on the subject as a matter of human rights principle, could include express references to non-discrimination on the grounds of sexual orientation, knowing that [they] were articulating ANC policy . . . ."[124] A few months later, the 1990 draft Bill of Rights included a prohibition of discrimination based on sexual orientation under Gender Rights: "Discrimination on the grounds of . . . sexual orientation shall be unlawful."[125]

These somewhat dramatic advances in the official stance of the ANC must be balanced against the failure to sway the majority of the ANC to the cause of gay and lesbian rights. Activists and others continued to express concerns about the durability of ANC support. As one observer noted, "[o]fficial ANC support of gay issues has been at worst grudging and at best half-hearted."[126] The 1991 Winnie Mandela trial is often considered an example of the ANC's tepid commitment to gay rights. Outside the courtroom a demonstrator waved a sign stating, "Homosex is not in black culture." Inside the courtroom, Ms. Mandela's attorney attempted to defend her involvement in the kidnapping and assault of four young men by claiming that her actions were necessary to protect young (black) men from (white) homosexuality.[127] Although the trial happened after promulgation of the 1990 draft Bill of Rights, the strategy of demonizing homosexuality to provide justification for brutality by the then-wife of the party's most

123. Other policy issues discussed at the meeting included family rights and abortion. Documentation of the meeting was never published due to the upheaval resulting from the near-contemporaneous unbanning of the ANC. *See* Letter from Albie Sachs, *supra* note 66.

124. *Id.*

125. This occurred in November 1990. *See 1990 Draft ANC Bill of Rights*, *supra* note 58, § 7(2). The draft's introductory note acknowledged OLGA's contribution.

126. Gevisser, *supra* note 88, at 75-76.

127. *See* Rachel Holmes, *"White Rapists Made Coloureds (and Homosexuals)": The Winnie Mandela Trial and the Politics of Race and Sexuality*, *in* DEFIANT DESIRE, *supra* note 63, at 287-88.

visible member passed without official ANC comment.[128] Both GLOW and OLGA protested the lack of ANC response without success.[129] To the extent that the trial was "a test of the ANC's real support for the lesbian and gay rights clauses included in its draft Bill of Rights,"[130] the ANC failed.

3. *The National Party and the South African Law Commission*

The ANC Constitutional Committee was not the only body thinking about the place of gays and lesbians in a future legal order. The South African Law Commission's 1989 report on group rights suggested Bill of Rights language prohibiting discrimination "on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic[s]."[131] Explicit reference to anti-discrimination protections for gays and lesbians was absent from the 1989 and 1991 texts of the Law Commission's suggested Bills of Rights despite the Commission's assertions that such protections were intended. According to the Law Commission, gays and lesbians would be identified by judges as a "natural group" like women, children, or disabled persons because they are "assigned to that status by nature."[132] Hence, homosexuals would fall under "other natural characteristics" protections and governmental discrimination should be prohibited.[133] But as Edwin Cameron pointed out in a 1992 speech, the discretion of judges—a disturbing area of trust at best in light of the judiciary's history on gay and lesbian issues—remained an uncertain and problematic component of the Law Commission's suggestion.[134]

---

128. *See id.* at 290-91.

129. *See id.*

130. Fine & Nicol, *supra* note 112, at 272.

131. SOUTH AFRICAN LAW COMMISSION, *supra* note 62, art. 2, at 241.

132. *Id.* at 241, *discussed in* Cameron, *supra* note 1, at 465-67.

133. Prohibition of private discrimination was to be addressed through civil rights legislation rather than a Bill of Rights. *See* SOUTH AFRICAN LAW COMMISSION, *supra* note 62, at 241.

134. *See* Cameron, *supra* note 1, at 467 (arguing that "the Commission perseveres in its view that homosexuals deserve constitutional protection" but believes the "delicacy of the topic and the controversy that an explicit view might evoke could be a constraint on plainer talk" and raising the question whether later judges would be prepared to be any more explicit).

C. *Interim Constitution Drafting Period: Behind Closed Doors*

The speculative drafting work during the late 1980s became much more important with the unbanning of the liberation movements and the beginning of negotiations for multiracial democracy. Gay and lesbian activist groups continued education and lobbying campaigns in the Interim Constitution drafting period. One of the most notable events—and a dramatic piece of evidence of a fundamental cultural shift that was transforming South Africa at the time—occurred in December 1991 (the same month CODESA began) when members of the gay groups OLGA and GLOW participated in episodes of the wildly-popular South African Broadcasting Company television program *Agenda*, which focused on gay rights in a future South Africa.[135]

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[136] and, 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."[137] Notably, this list is very similar to the text of the Interim Constitution's Equality Clause—further revealing the importance of early lobbying efforts.[138]

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 pro-

---

135. Fine & Nicol, *supra* note 112, at 274; *see also* Letter from Albie Sachs, *supra* note 66.

136. African National Congress, *Ready to Govern, ANC Policy Guidelines for a Democratic South Africa* (adopted at the National Conference, May 28-31, 1992), § B.5, *available at* http://www.anc.org.za/ancdocs/history/readyto.html (last visited June 28, 2000).

137. *Id.* § L.1.

138. Age, language, and culture are added in the Interim Constitution. *See* S. AFR. INTERIM CONST. (Act 200 of 1993), ch. 3, § 8(2).

tections 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 . . . ."[139] 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,"[140] and six other parties neglected to respond.[141]

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 according to the Law Commission scheme, using "other natural characteristics" language.[142] The ANC submitted the 1992 draft Bill of Rights, an amended version of the 1990 draft, which included "sexual orientation" explicitly.[143] The Democratic Party submission, following the policy it had previously reported, explicitly outlawed direct and indirect discrimination based on sexual orientation.[144] The Inkatha Free-

139. Democratic Party, Draft Constitutional Proposals, August 1991, *quoted in* Fine & Nicol, *supra* note 112, at 273.

140. *Id.*

141. The Azanian People's Organization, the Inkatha Freedom Party, the New Unity Movement, the Pan African Congress, the South African Communist Party, and the Workers' Organization for Socialist Action did not respond after much opportunity to do so. *See id.*

142. *See id.* at 277 n.20. This language was proposed by the National Party on Feb. 3, 1993. *See* Botha & Cameron, *supra* note 94, at 94-95.

143. "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 136, § 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 that "all individuals should have access to lifelong education and training, irrespective of . . . sexual orientation").

144. The Democratic Party proposal stated

dom 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 . . . ."[145] 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.[146]

The expectation that most parties would include either explicit or implicit discrimination protections for gays and lesbians marked a tremendous accomplishment,[147] 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-discrimi-

---

> [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 Unapprehended Felons*, *supra* note 63, at 96.

145. 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 63, at 96.

146. 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 25, at 183.

147. 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 86, at 620.

nation provision.[148] 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.[149] 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 temporary victory had been secured, but threats to the new-found protections awaited in the more public, more democratic final Constitution drafting process.

D. *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.[150] 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.[151] As late as October 1995, inclusion of sexual orientation as a protected class was still identified as a "contentious and outstanding issue" in the

148. *See* Letter from Albie Sachs, *supra* note 66.

149. *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 23, at 142.

150. 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).

151. 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].

working draft of the final Constitution.[152] 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.[153]

1. *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 the fundamental rights contained in Chapter 3 of this [Interim] Constitution.[154]

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.[155] 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

---

152. *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].

153. "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).

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

155. *See* EXPLANATORY MEMORANDA, *supra* note 152, § 4.2.3.

groups which are particularly vulnerable to discrimination, exclusion and subordination."[156]

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.[157] 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[[158]] 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.[[159]] This is consistent with the case law of the European Court of Human Rights.[160]

---

156. *Id.* § 4.2.2.

157. At the start of the constitutional drafting process, there had been only two such cases. *See* AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note 6.

158. ICCPR, *supra* note 151.

159. 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 151.

160. EXPLANATORY MEMORANDA, *supra* note 152, § 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 6.

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.[161] 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*,[162] 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.[163] But at the time the South African Constitution was being drafted, those cases were recent and limited precedents.[164] Furthermore, with a single exception, national courts have resisted interpreting their established constitu-

---

161. *See* AMNESTY INTERNATIONAL UNITED KINGDOM, *supra* note 6, at 7-8.

162. *See supra* note 160.

163. *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).

164. 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 (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 6, at 38-39.

tional anti-discrimination provisions to include gays and lesbians as a protected category.[165]

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*,[166] 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.[167]

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.

Not all members of the Constitutional Assembly were convinced by the arguments from international human rights precedent. There are more recent reports of what has been characterized as a "rather faint objection" to inclusion of sexual orientation protections in light of the fact that equal rights for gays and lesbians lacked universal acceptance. Advocates for inclusion "responded that universal acceptance defined the minimum platform that had to be provided. It did not stop

---

165. 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).

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

167. EXPLANATORY MEMORANDA, *supra* note 152, § 4.2.3.

the constitution-making body from including other kinds of protection, even if not universally accepted."[168] Advocates of inclusion were apparently trying to cover all the bases.

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."[169]

2. *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 under the name National Coalition for Gay and Lesbian Equality (NCGLE). The Coalition's focus was on high-level lobbying and grassroots participation in the Public Participation Programme to ensure that explicit sexual orientation protections remained in the final Constitution.[170] 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.[171] NCGLE's activities were meant to supplement the continued activities of the other South African gay and lesbian groups. It coordinated national efforts on behalf of a loose association of seventy-three member organizations.[172] During the drafting period, the Coalition's work included coordinating coalition member actions, organizing lobbying efforts that reflected the racial and linguisitic diversity of gay and lesbian South Africans, preparing submissions to the Constitutional Assembly, and

---

168. Sachs, *supra* note 14, at 704.

169. EXPLANATORY MEMORANDA, *supra* note 152, § 6.1.

170. *See* STYCHIN, *supra* note 92, at 74-75.

171. *See* Drusilla Menaker, *S. African Gays Struggle to Keep Rights in Constitution: Interim Charter is Only One in World That Protects Them*, S.F. EXAMINER, Mar. 10, 1995, at A3. *See* Bob Drogin, *South Africa Gays Chalk Up New Rights to Nation's Cruel History; During Blacks' Struggle, Homosexual Activists Got Support from Anti-Apartheid Leaders. Constitution Now Protects Them from Bias*, L.A. TIMES, Dec. 13, 1996, at A5.

172. *See* Drogin, *supra* note 171. *See generally* National Coalition for Gay and Lesbian Equality, *Equal Rights Project*, *at* http://steppingout.ru.ac.za/ncgle-info.htm (last visited June 28, 2000).

orchestrating the very successful letter-writing, petition, and postcard campaigns.[173]

3. *Organized Opposition to Inclusion of Sexual Orientation Protections*

Despite internal debates within the parties, only one political party—the African Christian Democratic Party (ACDP)[174]—actively fought inclusion of sexual orientation in the final Constitution.[175] Their justification for this opposition was based on their call for all political decisions to reflect "biblical values." According to the ACDP, anti-discrimination protection for gays and lesbians "goes against the will of God and African culture."[176] In their attempts to persuade the Constitutional Assembly to remove sexual orientation protections, the party focused on the contentious issue of same-sex marriage[177] and the assertion that the inclusion of sexual ori-

---

173. 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 (last visited June 28, 2000).

174. 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 (last visited June 28, 2000).

175. One of the twelve reasons the ACDP opposed the final Constitution 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.

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

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

177. 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

entation in the Equality Clause amounted to special protection.[178] Although the ACDP won only two seats in the National Assembly in the 1994 elections,[179] political support for the party may have been considerably less than support for its conservative positions.[180] Indeed, significant numbers of non-ACDP-affiliated religious conservatives opposed the inclusion of sexual orientation protections.[181]

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.

4. *Sexual Orientation in the Public Participation Programme*

The debate over inclusion of sexual orientation protections in the final Constitution figured prominently in the Public Participation Programme—as did many aspects of the Bill of Rights.[182] 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

---

> to be legalised. This is against the will of God and African culture. It is just the truth . . . .

Id.

178. 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).

179. *See* ELECTION '94, *supra* note 25, at 183.

180. *See* STYCHIN, *supra* note 92, at 80.

181. 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).

182. 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).

publication of the working draft in November 1995 until February 20, 1996. The responses can be roughly divided into two different categories: petitions and individual submissions. 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.[183] By a significant majority, the individual submissions supported inclusion[184]—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 nondiscrimination, fundamental rights argument:[185] "Discrimination for one means discrimination for all, we cannot have a truly democratic society when any section of the population is discriminated against;"[186] and "I don't work any different, I don't sleep any different, I don't love any different, I don't

183. 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).

184. 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.

185. *See, e.g.*, Submission #8319 (N. Webster); Submission #6152 (K. McConnell), *see supra* note 184.

186. Submission #7289 (V. Smith), *see supra* note 184.

want to be treated any different."[187] Many of the writers identified themselves as lesbians or gay men[188]—although far more contributors explicitly identified themselves as heterosexual.[189] 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."[190]

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."[191]

The overwhelming majority of opposition submissions based their argument on "biblical values" and fundamentalist Christian notions of morality.[192] 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,[193] and occasionally the absence of explicit reference

---

187. Submission #7149 (C. Minnar) (capitalization altered), *see supra* note 184.

188. *See, e.g.*, Submission #6036 (D. Renge); Submission #7289 (V. Smith), *see supra* note 184.

189. *See, e.g.*, Submission #6008 (J. Narendse); Submission #6120 (R. Hitzenroth), *see supra* note 184.

190. Submission #6024 (R. Buitendag), *see supra* note 184.

191. Submission #5061 ("Petition"), *see supra* note 184. (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 constitution.").

192. *See, e.g.*, Submission #5577 (Browne); Submission #6591 (Abraham), *see supra* note 184.

193. *See, e.g.*, Submission #3820 (Scheider); Submission #3824 (J.E. Binion), *see supra* note 184.

to God as well.[194] 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?"[195] 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.

5. *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.[196] 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.

IV. WHY SOUTH AFRICA?

Examination of the processes of constitutional drafting in South Africa, of policy development by the dominant political

194. *See, e.g.*, Submission #3372 (Macgregor, et al); Submission #5062 ("Petition"), *see supra* note 184.

195. Submission #6794 (N. Taylor), *see supra* note 184.

196. *See* STYCHIN, *supra* note 92, at 74.

parties, of organizational development by gay institutions, and of the legal history of gay and lesbian South Africans yields a tripartite explanation of how South Africa came to be the first nation to prohibit discrimination against gays and lesbians in its Constitution. First, 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. Second, justification for such an innovative legal protection was provided by the dominant ideology of the liberation movements, yielding the prohibition of discrimination based on sexual orientation as a presumptive corollary of the ANC policy of non-racialism. And third, an autocratic constitutional drafting process codified progressive human rights standards including explicit protections for gays and lesbians supported by uncertain claims of public support and international law precedent.

A. *Unique History of South Africa and its Gay Community*

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.

1. *Two Movements Come of Age*

The culmination of South Africa's grotesque policies of dramatic, legally-enforced racial discrimination under apartheid coincided with the emergence of early multi-racial gay and lesbian organizing; the mid-1980s witnessed the realization of long-dormant possibility for both the ANC and the gay community. The ANC had begun tentative talks with the ruling government in 1986. Meetings that were inconceivable even a few years earlier were taking place and there seemed to be genuine hope that the end of apartheid was near. Even before their ban from participation in South African political activity was lifted, the ANC was preparing to transform itself:

from exiled liberation movement to dominant political power in a newly democratic South Africa.

Gay and lesbian organizing was achieving its own kind of legitimacy. 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. The growth of recognizable gay organizations in townships, groups focused on the distinct needs of black gays and lesbians, further evidenced the trend toward visibility and power.

The consequence of this simultaneous maturation was that the new voices of South African gay activism were asserting equality arguments contemporaneous with, and in the same rights-based language as, discussions regarding the drafting of the Bill of Rights by the ANC and other groups.

2. *Linkages Between the ANC and Gay Rights Activists*

Both negative and positive reasons brought activists and the ANC into contact in the final years of apartheid. The conflict over Ruth Mompati's remarks[197] 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.

These somewhat forced contacts created the opportunity for later, more favorable contacts between members of the liberation-oriented Organisation of Lesbian and Gay Activists and ANC Constitutional Committee members. And, additional—previously invisible—contacts between the ANC and gay rights were appearing through the public acknowledgement of their homosexuality by visible ANC supporters like Simon Nkoli during the Delmas trial, Ivan Toms in the End Conscription Campaign, and other prominent anti-apartheid figures including Edwin Cameron and others. As Nkoli and others began to make explicit the connections between gay rights and the broader struggle of the liberation movements, bonds were

197. *See supra* text accompanying note 114.

formed between the party and the activists. Increasingly, gay activists were visible members of the anti-apartheid movement and members of the ANC.[198]

3. *Newly Sympathetic International Legal Interpretation*

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,[199] was affirmed in *Norris* in 1991[200] and in *Modinos* in 1994.[201] 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.[202] These last two pro-gay decisions were announced during the constitutional drafting period.

While it remains uncertain what lasting effect these international legal decisions will have on gay rights organizing, these legal precedents provided unquestioning support for national gay rights movements. For legal scholars and human rights advocates, recognition of some implicit protections for gays and lesbians under the European Convention on Human Rights and the ICCPR marked a dramatic legitimation within the framework of international human rights. Happening when they did, at the moment that rights discourse was dominating the constitutional discussions in South Africa and a burgeoning gay rights movement was claiming anti-gay discrimination was the apartheid of sexual orientation, these international precedents help set a pro-gay stage for the coming constitutional drama.[203]

---

198. *See* STYCHIN, *supra* note 92, at 82.

199. *See supra* note 160.

200. *See id.*

201. *See id.*

202. *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).

203. As at least one author has noted, "[l]iberal European notions of gender rights and the political legitimacy of gay rights had immense impact on senior ANC lawyers like Albie Sachs and Kader Asmal, who have hence be-

But the importance of history is not limited to fortuitous and coincidental timing. The content of South Africa's history and its tremendously formative influence on ANC ideology are vital, additional factors: history set the stage, but it was the ideology of the liberation movements that provided the philosophical justification and indeed the affirmative argument for inclusion of anti-gay discrimination prohibitions in the Constitution.

B. *Presumptive Corollary of Non-Racialism Ideology*

It is self-evident that ANC ideology and the history of the struggle against apartheid are inseparable. 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.

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 writings of the leaders of the liberation movements are full of paeans to a future human rights state:

> For those of us who have suffered arbitrary detention, torture, and solitary confinement, who have seen our homes crushed by bulldozers, who have

---

come gay issues' strongest lobbyists within the ANC." Gevisser, *supra* note 88, at 75.

> been moved from pillar to post at the whim of officials, who have been victims of assassination attempts and state-condoned thuggery, who have lived for years as rightless people under states of emergency, in prison, in exile, outlaws because we fought for liberty, the theme of human rights is central to our existence.[204]

The resultant, express philosophy was intimately linked to the liberation movements' vision of a future South Africa and specifically tied to the political philosophy of the ANC.

1. *Prohibiting Anti-Gay Discrimination as a Corollary of Non-Racialism*

Non-racialism is a radical view of fundamental human rights and non-discrimination shaped by a history of violence-enforced, state-led discrimination in all areas of fundamental human activity for decades. As defined by the ANC in 1991, a non-racialist state is a

> South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all. It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognizes the worth of each individual.[205]

It was a short but difficult ideological step from radical opposition to all forms of discrimination to claims that anti-gay discrimination had no place in a new South Africa. And, although it was problematic applying an unquestionably moral ideology of non-racialism to the issue of homosexuality—an issue burdened by moral antipathy in the minds of many South Africans—such an analysis shifted the moral heft of the argument. Instead of justifying the inclusion of gays and lesbi-

---

204. Sachs, *supra* note 48, at 19-20.

205. Constitutional Committee, African National Congress, *A Discussion Document on Structures and Principles of a Constitution for a Democratic South Africa*, 13-14 (1991), *quoted in* Peter N. Bouckaert, *The Negotiated Revolution: South Africa's Transition to Multi-Racial Democracy*, 33 STAN. J. INT'L L. 375, 399-400 (1997).

ans in a newly equal society, the burden was placed upon those who argued for exclusion and discrimination. And justifying exclusion or denial of rights is a difficult task in a post-apartheid South Africa; "[S]ympathy shown to the gay cause . . . seems to reflect a post-apartheid backlash against racial prejudice, which had made discrimination of all kinds politically unfashionable."[206]

Some advocates of gay and lesbian rights were not hesitant to make explicit the congruence between anti-gay sentiments and racist attitudes. "What has happened to lesbian and gay people is the essence of apartheid—it tried to tell people who they were, how they should behave, what their rights were. The essence of democracy is that the people should be free to be what they are. We want people to be and to feel free."[207] The same analysis allowed gay and lesbian advocates to assert moral authority when attacked by religious conservatives: "In [calling for removal of 'sexual orientation' from the final Constitution] they echo the discarded ideology of apartheid: that some members of our society should not be protected from discrimination, prejudice and exclusion," asserting that some South Africans are "second class citizens."[208] By identifying their cause as a corollary to the dominant non-discrimination ideology of the ANC, activists secured the presumption of inclusion in the Bill of Rights text at each stage of the constitutional process.

2. *The Ideology of Non-Discrimination as a Political Strategy*

The assertion that a new South Africa would be a "human rights state" characterized by non-discrimination and the absence of racial animosity served a practical purpose as well. The affirmation of radical non-discrimination ideology assured the ruling white minority of individual rights protections in a newly majoritarian state. Hence, the ANC ideology had a

---

206. David Beresford, *ANC Liberal Reform Stuns South Africa*, OBSERVER NEWS PAGE, July 21, 1996, *available at* LEXIS, News Library, Non-US News File. *See* Johnson, *supra* note 86, at 589 (seeing maintenance of gay rights discourse within the context of South Africa post-apartheid, anti-discrimination sentiment as important for future success of gay rights movement).

207. Fine & Nicol, *supra* note 112, at 271 (quoting Albie Sachs at a May 17, 1990 OLGA press conference).

208. Equality Foundation Spokesperson Kevan Botha, *quoted in Constitutional Talk*, *supra* note 31, vol. 4, 1995 (Feb. 24).

special role as a political strategy that required that non-racialism be a "without exceptions" policy. Gays and lesbians benefited from this as well.

The vital political role of the human rights/non-discrimination ideology of the ANC was evident throughout the organization's history. During exile, the opponents of apartheid focused on rights language to assert their own legitimacy and the moral and legal weight of their demands for an end to apartheid.[209] Their argument—"we only want human rights"—had significant practical appeal. Once the ANC ban had been lifted, the same ideology supported the negotiation process; assurances that "we will not take away your human rights" and constitutional compromises proving it—as evidenced by the Thirty-four Principles—allowed the transition to progress despite distrust and violence. Even after the first popular elections, the ideology still had a role. President Mandela's repeated claim that "we are a human rights nation" served the efforts to rise from division to a unified, multi-racial society.

This central use of broad ideological rhetoric throughout the ANC history facilitated arguments that the end of legal discrimination implicated rights protections for gays and lesbians. Only a more compelling ideological justification for exclusion of gays and lesbians could challenge the carefully crafted presumption of full inclusion. No such viable ideology was available during the constitutional drafting period.

3. *Ideological Alternatives in the Constitutional Era*

The end of apartheid saw little competition for dominant ideology. The preeminence of the ANC as the central political actor assured the dominance of its political philosophy. Arguments for exclusion of gay rights from the ANC-dominated constitutional process had to distinguish the sexual orientation area of non-discrimination from the remaining human

---

209. *See, e.g.*, African National Congress, Constitution of the African National Congress (June 1991), Preamble, § B [Aims and Objectives], § C [Character of the ANC], *at* http://www.anc.org.za/ancdocs/history/const/constanc. html (last visited Sept. 21, 2000); *see also* African National Congress, Constitution of the African National Congress (South Africa) (January 1958), § 2 [Aims and Objectives], *at* http://www.anc.org.za/ancdocs/history/const/const58.html (last visited Sept. 21, 2000).

rights protections. The two main arguments against inclusion of a prohibition on anti-gay discrimination were either lacking philosophical cohesion or politically unpalatable amid the general non-discrimination rhetoric.

The argument from religious conservatives, typified by the policies of the ACDP and expressed in tens of thousands of petition signatures, called for exclusion of "sexual orientation" from the equality clause because it was contrary to Christian morality as expressed in the Bible. But such philosophical support for opposition, despite its apparent popular support, was inconsistent with the vision of South Africa as a new diverse nation united in its racial, political, and religious differences. In addition to its limited electoral pull, which ensured it had little power in the Constitutional Assembly, the ACDP would have been a problematic ally in the carefully negotiated drafting process—they challenged fundamental notions of South Africa's self-definition (e.g. secular state) and pronounced combative, divisive rhetoric on multiple occasions.[210]

A second basis for excluding gays and lesbians from discrimination protection was based on the theory that homosexuality is "un-African." Despite the existence of significant evidence indicating the transcultural and pan-historical existence of same-sex sexual activity[211] and specific evidence of such activity among black South Africans,[212] much of the argument against securing rights for gays and lesbians in Africa generally

---

210. *See* ACDP, *Election Manifesto, at* http://www.acdp.org (visited Nov. 12, 1999) ("The ACDP aims to revisit the values upon which our constitution is based especially where they threaten the biblical norms of family rights and values. We believe in the right to religious freedom and as such reject the notion to refer to South Africa as a secular state."). *See, e.g., Constitutional Talk, supra* note 31, vol. 1, 1996 (Feb. 9, 1996) ("Asked whether such a position would not antagonise the human rights movement, ACDP President Meshoe said: 'If human rights groupings want to be against the truth, so be it. And, as an African, I wouldn't like to see European liberals imposing their lifestyles on the African masses.'").

211. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (examining same-sex affectional patterns in nineteenth-century Nigerian Society, pre-Columbian Native-American societies, nineteenth-century Zuni society, ancient Egyptian, Greek, and Roman societies, Mesopotamian society, the Azande, Siwah, el Garah, Basotho, Venda, Meru, Phaloborwa, Nuer, Bantu, and Lovedu societies of Africa, as well as the Paleo-Siberian, Chinese, Vietnamese, Indian, Japanese, Burmese, Korean, and Nepalese societies).

212. *See* ISAACS & MCKENDRICK, *supra* note 8, at 20.

has promoted the idea that homosexuality is an imported European disease.[213] This notion, buoyed by traditional Christianity, has been the basis for unflinching condemnation of homosexuality in some of South Africa's neighboring nations.[214] Despite the popularity and frequency of such claims, some authors suggest that it is condemnation of homosexuality rather than same-sex desire that is the European import. According to such theories, negative Christian attitudes toward sexuality generally and homosexuality specifically have joined with Islamic attitudes to create homophobia in indigenous cultures that did not previously exhibit it.[215]

Regardless of their questionable validity, neither of these philosophical bases for opposition could effectively gather sufficient popular support, amass a significant coalition in the Constitutional Assembly, or animate a competing political strategy with any of the persuasiveness of the dominant ANC ideology. Hence, once prohibition of anti-gay discrimination was successfully constructed as a corollary of non-racialism, a compelling justification for inclusion of sexual orientation had been linked to the dominant ideology animating the constitutional drafting process.

C. *Autocratic Drafting Process*

The third factor contributing to the inclusion of protections for gays and lesbians was the particular method of draft-

---

213. "[H]omosexuality is against our culture as Africans, although we know that there are people introduced to this lifestyle. I'm sure they are an embarrassment to their ancestors. This is a white man's disease that has been introduced into black culture." Kenneth Meshoe, *in* EXIT, vol. 71, 1995, at 3, *quoted in* Kevan Botha & Johan Peters, 1995 S. AFR. HUM. RTS. Y.B. 254, 271.

214. *See generally id.*; CHRIS DUNTON & MAI PALMBERG, HUMAN RIGHTS AND HOMOSEXUALITY IN SOUTHERN AFRICA (1996). For a summary of legal treatment of gays and lesbians in neighboring nations, see Tielman & Hammelburg, *supra* note 2.

215. James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1020 (1997) ("Christian-based homophobia has damaged many cultures in which sexual contacts and relationships between men and women used to be tolerated and even accepted. Recently, Christian Puritanism from the West, mixed with Islamic fundamentalism, has attacked homosexuality, even in countries where same-sex contacts had previously been tolerated.").

ing 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 some 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.

1. *Sequential Drafting Process*

Subsequent constitutional drafts were often determined by earlier documents or prior negotiations. Certain aspects of the final Constitution, such as those affected by the Thirty-four Principles, were not only bound by law but were judicially enforced. Other aspects of the Constitution, such as the highly contentious issues of land restitution and pardon for human rights violations, were subject to such extensive negotiations, often in closed committee meetings, that even revisions supported by a majority of the Assembly would have involved dramatic revision of countless provisions.

The sequential nature of the drafting process (beginning as far back as the early Bills of Rights issued by the ANC and the South African Law Commission) offered significant benefits to the advocates for inclusion of sexual orientation provision. Only in a process where subsequent drafts consisted, exclusive and rather formalistically, of previously approved materials and newly negotiated terms, could a small group of pre-liberation lobbyists critically influence a highly controversial aspect of a constitution drafted nearly a decade later. It resulted in unforeseeable impact from the gay rights lobbying

of the ANC in the mid-to-late 1980s. This early advocacy bore fruit in the 1990 draft Bill of Rights that included sexual orientation as a protected category under the gender clause. The early insertion of non-discrimination statements into ANC party documents precipitated the prominent affirmation of that policy at the 1992 national conference. Vitally, these earliest policy decisions set up inclusion as the default position of the ANC.

Even more tellingly, the inclusion of sexual orientation protections in the Interim Constitution created a tremendous likelihood that gays and lesbians would also be protected by the final Constitution. No categories of anti-discrimination protection were removed from the interim draft by the Constitutional Assembly. Inclusion in the Interim Constitution all but insured later inclusion; removal even of a possibly unpopular area of human rights protection would have been a politically-charged act without precedent in the drafting process. South Africa in the mid-1990s was not a place where any mainstream political parties would have suggested removing an extant anti-discrimination protection and thereby opened themselves up to charges of apartheid-era sentiments.

2. *Limited Number of Decision-Makers*

Although the drafting process claimed to be democratic and inclusive, very few people actually had influence on the text of the equality provisions of the Bill of Rights. Three groups—a small ANC meeting in Lusaka, a slightly renegade Technical Committee during the Interim Constitution drafting period, and a Theme Committee with clear biases—either made or critically endorsed the inclusion of sexual orientation protections during the three historical periods examined by this Note. The only possible threats to inclusion—a seemingly ignored public, a fringe political party, and a party-loyal Constitutional Assembly—were either distracted by more pressing concerns or were insufficient for the task.

As a consequence, personal biases of some of the drafters, including leading members of the ANC Constitutional Committee, figured prominently in the final result. The biases of such internal allies consisted of personal notions of equality and experiences with foreign rights traditions and international legal norms. As one such leader said: "Confident as

those of us struggling for democracy are in the strength and resilience of our South African-born human rights convictions, we can only benefit from the great store of human rights wisdom accumulated in many countries over many centuries."[216] Of course, the category of gay rights was something South Africans were particularly less confident about, yielding the need to rely more strongly on international wisdom.

The zealous crafting of a nearly exhaustive Bill of Rights by the Technical Committee for Fundamental Rights During the Transition, far in excess of its original mandate, also played a critical role. With the support of party documents, Technical Committee "experts" authored a Bill of Rights destined for permanence. It is theoretically possible that overwhelming public opinion in the Public Participation Programme could have created pressure to remove "sexual orientation" from the Equality provisions, but the structure of the process—with a limited scope of decision-making for the popularly-elected representatives of the Constitutional Assembly and consideration of public opinion only after the ratification of the Interim Constitution—made such popular impact unlikely. Indeed, the early public response to the Bill of Rights was overwhelmingly in favor of removing sexual orientation, and yet it remained. Many accusations that popular will was ignored have been leveled against the Assembly.[217]

---

216. Sachs, *supra* note 48, at 20.

217. According to the ACDP:

> The Constitutional Assembly, contrary to their claims, swept under carpet, and therefore, ignored public submissions on important issues like the preamble and moral issues. Millions of taxpayers' money was used to finance a propaganda campaign that deceived the public into believing that their opinions would be counted in the constitution making process. The truth is, they were ignored. The [African Christian Democratic Party] had no choice but to come against a process (and it's product) that did not promote a transparent democracy but autocracy in its worse form.

ACDP, *Twelve Reasons Why the ACDP Voted Against the Adoption on the South African Constitution*, at http://www.acdp.org.za/doc_twelve_reasons.asp (last visited Sept. 15, 2000).

Additionally, a 1996 survey of public attitudes (and rank and file party member attitudes) related to two contentious issues formally supported by the ANC leadership throughout the drafting period—abolition of the death penalty and legalization of abortion—showed a dramatic gulf between public attitudes and the ANC leadership. *See* HENNIE KOTZE, KONRAD ADENAUER FOUNDATION, THE WORKING DRAFT OF SOUTH AFRICA'S 1996 CONSTITUTION:

In general, it appears that the Public Participation Programme had little effect on the text of the Constitution. It may have impacted the way the Constitution was viewed by the general public (and may be defensible on those terms), but it exhibited negligible tangible influence on the Bill of Rights provisions. Neither the success of the Programme—its effective educational component and the high number of submissions—nor the democratic election of the representative Constitutional Assembly necessarily translates into practical effect on constitutional outcomes. And since the most important and controversial decisions were made in the secrecy of the Constitutional Committee rather than in the more public forum of the Constitutional Assembly, it is doubtful that the impact of popular participation on the final text will ever be known for certain. This additional, elitist aspect of the drafting process is also vital for understanding how sexual orientation protections remained in the final Constitution.

Additionally, the involvement of fewer people in the decision-making process for the final Constitution facilitated the National Coalition for Gay and Lesbian Equality strategy of direct lobbying over grassroots organizing.[218] The full involvement of only a discrete number of people (and the Assembly's short two-year timeline) also had the effect of shifting attention away from less divisive issues—including sexual orientation, which was formally opposed by only one party—in order to concentrate on areas of greater inter-party conflict. Under such circumstances, the default positions of the parties were sufficient for non-contentious issues. At each phase, the elitist, pragmatically non-democratic aspects of the drafting process

---

ELITE AND PUBLIC ATTITUDES TO THE "OPTIONS" 16-18 (Occasional Papers 1996), *cited in* H.A. Strydom, *Minority Rights Issues in Post-Apartheid South Africa*, 19 LOY. L.A. INT'L & COMP. L.J. 873, 912-913 (1997). "In the area of social values, opinion polls have shown that the beliefs, preferences, and values of politically powerful elite groups do not coincide with important elements in the attitudinal and value systems of members of the public and often of the parties own supporters." Strydom, *supra*, at 912. Of course, opposing results alone would not indicate that the Public Participation Programme submissions were ignored. But, many commentators other than the ACDP have questioned whether the Public Participation Programme had any impact whatsoever. There is little evidence of the Constitutional Assembly referencing the public submissions with any frequency. *See generally*, CA DEBATES, *supra* note 29.

218. *See* STYCHIN, *supra* note 92, at 74.

benefited gay rights advocates as much as the earliest lobbying of the parties did.

V. CONCLUSION

Inclusion of anti-gay discrimination prohibitions in the South African Constitution is yet another surprising aspect of the stunning history of South Africa. Without precedent in domestic or foreign law, the South African Constitution secured equal protection and benefit of law for its gay and lesbian citizens. This Note suggests a three-part explanation, positing the interrelation of an historic, an ideological, and a procedural element. The stage for this unprecedented protection was set by the unique history of South Africa: the rise of gay and lesbian visibility contemporaneously with the post-apartheid reformulation of the country as a human rights state. Justification was provided by the examination of sexual orientation protections as a presumptive corollary of the ANC anti-discrimination ideology. And, an autocratic constitutional drafting process codified progressive human rights standards despite uncertain claims of public support and ambiguous international law precedent.

While the constitutional drafting process was far from perfect, there are several ways in which inclusion of sexual orientation protections reflected some of the best aspects of the constitutional process. It reflected a commitment to human rights broadly defined, reflected liberal and progressive interpretation of international and foreign legal precedent, and represented a dramatic denial of the politics of division and acceptance of inclusivity and difference. Furthermore, while the efforts of gay rights advocates in the South African constitutional process offer little direct application in other countries, they set an important legal precedent. The human rights decisions of the South African Constitution are uniquely valued because of the nation's history. Hence, inclusion of gay rights discourse as a "universally accepted fundamental human right" ratifies the aspirations of gay and lesbian activists world wide and affirms South African claims that their Constitution creates a nation that "belongs to all who live in it, united in our diversity."[219]

---

219. S. AFR. CONST. (1996) preamble.

Since the conclusion of the drafting process, hopes have remained high for many South African gay and lesbian activists. Legally, the Constitutional Court has risen to the challenge presented by unprecedented legal protection for an unpopular segment of South African society. In the 1998 decision *NCGLE v. Minister of Justice and Others*, the Court decriminalized consensual same-sex sexual activity between adults,[220] and in the 1999 decision of *NCGLE v. Minister of Home Affairs and Others*, the Court examined immigration provisions and "read in" comparable benefits for "same-sex life partners" as those available for heterosexual "spouses."[221]

It cannot be denied that the continuing practical value of legal equality for gays and lesbians—as opposed to its mere symbolic value—is closely linked to the social and economic health of the nation. Economic transformation would ratify the ideology of non-racialism[222] and thwart development of a conservative, multi-racial political coalition with a strong social agenda. Such a coalition, united by opposition to several of the more progressive and controversial aspects of the Constitution, would represent a genuine threat to advancing gay rights beyond the courtrooms. A religiously-based, multi-racial coalition focused on constitutional amendments to legalize the death penalty, eliminate abortion rights, and revoke explicit protections for gay and lesbian South Africans could fundamentally alter the political landscape of South Africa as a human rights state. For several reasons this is unlikely in the near future: the political appeal of the ANC has continued,[223] a long history of racially-polarized politics argues against such change, and removal of protections from the Bill of Rights has significant structural hurdles as a result of the drafting process.[224]

---

220. 1999 (1) SALR 6, 54-55 (CC).

221. 1999 (3) SALR 173, 190 (C) (announcing that the Act was unconstitutional, but suspending invalidation for one year to allow Parliament to amend it, granting an exemption to make the Act apply to same-sex life partners as it applies to spouses for the one year period only).

222. SPARKS, *supra* note 13, at 235-36; WALDMEIR, *supra* note 10, at 280-83.

223. In the 1999 national elections, the ANC received 66% of the popular vote, one seat short of the necessary votes to change the Constitution. *See Africa: Who Cares, Wins*, BUS. AFR., June 16, 1999, *available at* 1999 WL 2041361.

224. See the brief discussion of the entrenchment of the Bill of Rights and the strengthened constitutional amendment requirements resulting from

Nevertheless, the path ahead is somewhat unclear. For South African gays and lesbians, the Constitution means everything and nothing. It is a statement of dramatic importance and value and yet neither a sufficient nor even a necessary precondition for genuine social equality. As one participant at the 1997 Gay Pride March answered when questioned about the meaning of the equality provisions of the new Constitution,

> It means sweet motherfucking nothing at all. You can rape me, rob me—what am I going to do? Wave the Constitution in your face? I'm just a nobody black drag queen. But you know what? Ever since I heard about the Constitution, I feel free inside.[225]

Although this Note focuses on the issue of legal equality, one cannot ignore the tremendous challenges ahead for South African gays and lesbians seeking social equality. But a first, remarkable step has been taken, the transformative power of which is undeniable, and—hopefully—the moral authority of which will be compelling to constitutional actors around the world.

---

the Constitutional Court's certification of the 1996 Constitution, *supra* at Part II.B.2.

225. Mark Gevisser, *The Word from Johannesburg*, OUT, Aug. 1997, at 107.