

# THE FIFTH ANNIVERSARY OF THE SOUTH AFRICAN CONSTITUTION: A ROLE MODEL ON SEXUAL ORIENTATION

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The passage of the 1996 South African Constitution constitutes one of the many highlights during my nearly thirty year involvement with South Africa.<sup>1</sup> In my opinion, it is one of the most progressive documents on the planet, in no small part due to the inclusion of sexual orientation within its equality clause. Article 9(3) states: "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."<sup>2</sup> Article 9(4) extends this language to include private actions.<sup>3</sup> Because this Constitution was the first to include sexual orientation protection,<sup>4</sup> it is only fitting to pay tribute to the visionary nature of this clause on its fifth anniversary.<sup>5</sup>

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1. The author's work on South Africa includes: Adrien K. Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254 (2000); Adrien K. Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943 (1997); Adrien K. Wing & Eunice P. de Carvalho, *Black South African Women: Towards Equal Rights*, 8 HARV. HUM. RTS. J. 57 (1995); Adrien K. Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WISC. INT'L L.J. 295 (1993); Adrien K. Wing, *Effects and Effectiveness of Economic Sanctions: South Africa*, 84 AM. SOC'Y INT'L L. PROC. 203 (1990); Adrien K. Wing, *Southern Africa: Prospects for Peace?*, 83 AM. SOC'Y INT'L L. PROC. 350 (1989).

2. S. AFR. CONST. art. 9(3).

3. S. AFR. CONST. art. 9(4).

4. 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) (referring to the South African 1993 Interim Constitution in summarizing the legal status of gays and lesbians around the world).

5. Two other constitutions contain protections on the basis of sexual orientation.

**Ecuador:** art 23(3). La igualdad ante la ley. Todas las personas serán consideradas iguales y gozarán de los mismos derechos, libertades y oportunidades, sin discriminación en razón de nacimiento, edad, sexo, etnia, color, origen social, idioma; religión, filiación política, posición económica, *orientación sexual*; estado de salud, discapacidad, o diferencia de cualquier otra índole.

**ECUADOR CONST. art. 23(3)(1998)** ("All individuals persons are considered equal and shall enjoy the same rights, liberties, and opportunities, without discrimination for reasons of . . . sexual orientation.").

Perhaps South Africa will serve as a role model for other countries in the twenty-first century on the issue of sexual orientation. The United States remains unable to pass even an equal rights amendment that would incorporate gender into the Constitution. I dare say, it will be many years, if ever, before we will see sexual orientation included in the U.S. Constitution.

I decided to address this topic on the panel for an important reason. I have found that many heterosexuals, like myself, who are progressive with respect to various types of discrimination, may be quite homophobic. Their progressivism does not extend to an issue like sexual orientation and they may make snickering comments among friends. All the progressive networks in a country are not uniform in their support for the rights of sexual minorities. For example, I know that in my own community of African Americans, many civil rights groups are church-based and do not endorse homosexuality. Similarly, African leaders who are progressive politically may not endorse gay rights.<sup>6</sup> As a race/gender scholar,<sup>7</sup> I fervently believe that it is important for all of us who are interested in ensuring anti-discrimination to embrace civil rights for gay, lesbian, bisexual or transgendered individuals.

In the United States, some local jurisdictions have enacted sexual orientation protections in codes and ordinances.<sup>8</sup> Some European countries have gone much further with respect to their protection of sexual minorities.<sup>9</sup> In addition, the European Court of Human Rights has endorsed protections for gay people in several cases.<sup>10</sup>

Fiji: art. 38(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics of circumstances, including race, ethnic origin, colour, place of origin, gender, *sexual orientation*, birth, primary language, economic status, age or disability.

FIJI CONST. art. 38(2) (emphasis added).

6. For example, Tanzanian leader Julius Nyerere articulated that homosexuality was alien to Africa. CHRIS DUNTON & MAI PALMBERG, HUMAN RIGHTS AND HOMOSEXUALITY IN SOUTHERN AFRICA 18 (1996).

7. I write in both Critical Race Theory and feminist jurisprudence. See, e.g., CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997); GLOBAL CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 2000).

8. Eric C. Christiansen, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 N.Y.U. J. INT'L L. & POL. 997, 1024 (2000).

9. For example, gay men and lesbians have been given the right to marry under registered partnership laws in Denmark, Norway, and Sweden. Paula Gerber, Case Comment, *South Africa: Constitutional Protection for Homosexuals—A Brave Initiative. But is It Working?*, 9 AUSTRALASIAN GAY & LESBIAN L.J. 37, 56 (2000).

10. See, e.g., *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 Art. 8 of the European Convention on Human Rights concerning respect for privacy and family life); *Norris v.*

In this brief piece, I would first like to provide a short history on how sexual orientation came to be included in the South African Constitution. People often ask me why a country in Africa would decide to put sexual orientation protection into its constitution. They ask if South African people are all "you know, pro-gay?" Essentially, they just want to know if South African people differ from many Americans on this issue. It is my observation that no matter which South African ethnic community is involved—Afrikaner, British, Coloured, Asian, or any of the numerous other African ethnic groups, it is a socially conservative group. Many people in these groups are Christians of various denominations. Many are conservative, some of them fundamentalist. The Muslim population is conservative as well. Clearly, it is not the case that there were a multitude of radical people willing to embrace sexual orientation protection. As a matter of fact, surveys conducted in the 1980's showed that a majority in many different communities felt that homosexuality was wrong, immoral, against God's way, et cetera.<sup>11</sup>

The African National Congress (ANC), the governing party in South Africa, was the central liberation movement from the beginning of the twentieth century, yet it had no policy concerning the issue of sexual orientation until the late 1980's.<sup>12</sup> In 1987, one of the Executive Committee members of the ANC, Ruth Mompoti said, "I cannot even begin to understand why people want lesbian and gay rights."<sup>13</sup> She went on to conclude that homosexuals are not normal, and she was dismissive of the notion that the ANC would adopt any kind of sexual orientation policy when she said, "We don't have a policy on flower sellers either."<sup>14</sup> Her comments generated a controversy in the anti-apartheid movement, and in certain communities in Europe. Actually, some groups threatened to withdraw their support from the ANC because of Mompoti's comments.<sup>15</sup> By 1988, Thabo Mbeki, then ANC Minister of Information (now the President of South Africa), summarized the developing ANC policy when he stated: "The ANC is indeed firmly committed to removing all forms of discrimina-

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Ireland, 13 Eur. H.R. Rep. 186, 201 (1988) (Court report) (ruling that Ireland's sodomy law violated Art. 8); *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993).

11. A 1987 Capetown survey revealed that over twenty percent believed homosexuality to be legally unrecognizable. GORDON ISAACS & BRIAN MCKENDRICK, *MALE HOMOSEXUALITY IN SOUTH AFRICA: IDENTITY FORMATION, CULTURE AND CRISIS* 141 (1992).

12. Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement*, in *DEFIANT DESIRE* 270 (Mark Gevisser & Edwin Cameron eds., 1995).

13. *Id.*

14. *Id.*

15. Christiansen, *supra* note 8, at 1025.

tion and oppression in a liberated South Africa. . . . That commitment must surely extend to the protection of gay rights.”<sup>16</sup> The ANC, as the leading liberation movement, was beginning to realize that in order to carry the banner for equality, it could not ignore this issue, even if individual members or a majority of the population did not agree.

In the early 1990’s, the ANC began developing what it called “A Draft Bill of Rights,”<sup>17</sup> always mindful of the need to rectify the legacy of apartheid. Many internal debates arose as to the types of protections that should appear in this document. Despite the disagreements, the ANC was determined to follow the progressive tendency around the world in recognizing the need to grant constitutional protections to a broad variety of minority groups, including sexual minorities. I was privileged to be involved with the ANC Constitutional Committee as a pro bono adviser for over three years. During that period, I worked closely with a number of the committee members, and we had several discussions on sexual orientation.

At that time, ANC Constitutional Committee members Albie Sachs (now a member of the Constitutional Court) and Kader Asmal, (now the Minister of Education) felt that sexual orientation must be included in the Constitution.<sup>18</sup> They and others were heavily involved in the drafting process of the Bill of Rights to ensure that sexual orientation protections were included even though individual ANC members, not to mention most South Africans, did not endorse such provisions.<sup>19</sup> In drafting the equality clause for the 1993 interim Constitution, the ANC Constitutional Committee carried over the policies written into their 1992 Draft Bill of Rights. The interim document contained sexual orientation protection, along with many other progressive provisions.<sup>20</sup>

Drafting began on a permanent South African Constitution almost immediately after the interim Constitution went into effect. At that point, the National Coalition for Gay and Lesbian Equality became involved in the process. Additionally, a number of prominent individuals “came out,” including Edwin Cameron. At that time he was a professor, but he is now a gay white male HIV positive judge.

The only political party formally opposed to including sexual orientation in the permanent Constitution was the African Christian Democratic

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16. Fine & Nicol, *supra* note 12, at 271.

17. African National Congress, A Draft Bill of Rights (1992), discussed in Wing, *Communitarianism*, *supra* note 1.

18. *Id.*

19. Christiansen, *supra* note 8, at 1027.

20. S. AFR. INTERIM CONST. art. 8 (1993), at <http://www.uni-wuerzburg.de/law/st10000.html>. (last visited Mar. 27, 2002).

Party (ACDP).<sup>21</sup> It was composed of many different ethnic groups, but all held a fundamental evangelical Christian viewpoint. They were vehemently opposed to a number of progressive provisions in the interim Constitution, holding conservative positions on such issues as abortion, crime, and homosexuality. Many South African people, not just members of ACDP, felt that homosexuality was a western disease that did not exist in South Africa.<sup>22</sup> Although opposition to inclusion of the sexual orientation provision existed, the ACDP only won two seats during the 1994 Parliament elections. Obviously, their views failed to attract a significant number of voters.

Now that I have noted a few historical highlights, I want to address three questions raised by Paula Gerber in a recent article:<sup>23</sup>

1. How are the South African courts implementing the sexual orientation provision?
2. Are the legislative and executive bodies enforcing the provision?
3. Is the South African culture significantly improving for gay and lesbian people in response to the constitutional provision?

Addressing the first question, the South African courts have incorporated the constitutional provisions into their jurisprudence. There have been four foundational South African cases focused on the Constitution's sexual orientation language. Prior to the interim Constitution's implementation, sodomy was defined as "unlawful and intentional sexual relations per anum between 2 males."<sup>24</sup> That definition of sodomy did not address sexual conduct between lesbians or married people.

In 1997, the High Court, an appellate court below the Constitutional Court, decriminalized common law sodomy in *State v. Kampher*, and held that homosexuals have a fundamental right to engage in sodomy.<sup>25</sup> Since the South African Constitution requires the use of international law and

21. See Carl F. Stychin, *Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights*, 23 J.L. SOC'Y 455, 473 (1996).

22. I have had numerous conversations on this point over the years. See also *supra* note 11.

23. These questions were raised in Gerber, *supra* note 9, at 40.

24. HUNT, 2 SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 248 (3d ed. 1996).

25. *State v. Kampher*, 1997 (9) BCLR 1283 (C). For further discussion of this case, see Jennifer C. Lukoff, *South Africa Takes the Initial Step Toward a Brilliant Twenty-First Century: A Comparative Study of State v Kampher & Bowers v. Hardwick*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 459 (1999). For more on the rights of homosexuals in South Africa, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001); Gerber, *supra* note 9; Voris E. 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 (1997); Stychin, *supra* note 21.

permits the use of foreign law,<sup>26</sup> the *Kampher* court referenced European and American law, including the dissent in *Bowers v. Hardwick*.<sup>27</sup>

The High Court held in *Langmaat v. Minister of Safety and Security* that the same-sex partner of a female South African police officer was entitled to health insurance benefits under the Constitution.<sup>28</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others* followed.<sup>29</sup> In that case the Constitutional Court decriminalized consensual same sex relationships between adults. The Court went further than *Kampher* in that it voided the common law offense of "unnatural sex acts" between men, the 1957 Sexual Offences Act, and the inclusion of sodomy in the Criminal Procedure Act of 1977. The Court reasoned that the equal protection provisions of the Constitution could not allow the criminalization of male-male sodomy while permitting lesbian or heterosexual sodomy. The Court referenced international law in this case, specifically a United Nations Human Rights Committee Opinion striking down the criminalization of sex between men in the Australian province of Tasmania, as violating the privacy and equal protection provisions of the International Covenant on the Civil and Political Rights.<sup>30</sup>

*National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs and Others* involved immigration law.<sup>31</sup> South Africa, like most countries, gave the spouse of a citizen preference in immigrating, but did not extend that preference to homosexual partners. In response, the court took an incredible stance; rather than void the entire statutory provision for spousal preference leaving immigrant families vulnerable (including heterosexual spouses), it read new language into the statute. The Court essentially stated that the law included spouses and same sex partners.

To briefly address the second question, the legislature has made headway in abiding by and furthering sexual orientation protections. It passed various new laws protecting homosexuals in employment, military service, and same-sex relationships.<sup>32</sup> Of course, there are still many issues

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26. S. AFR. CONST. art. 39(1)(b)-(c).

27. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, Brennan, Marshall & Stevens, JJ, dissenting, opposing affirmation of sodomy laws as applied to homosexual sodomy).

28. *Langmaat v. Minister of Safety and Security*, 1998 (3) SA 312 (T); see also Gerber, *supra* note 9, at 47.

29. *Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC), 1998 SACLX LEXIS 36.

30. *Nicholas Toonan v. Australia*, U.N. Human Rights Committee No. 488, U.N. GAOR, 49th Sess., Supp. No 40, at 226, 235, U.N. Doc. A/49/40 (1994).

31. *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs and Others*, 1999 (3) BCLR 280 (C), 1999 SACLX LEXIS 13.

32. See Gerber, *supra* note 9, at 50-51. Acts amended include the Human Tissues Act (1983), Employment Equity Act (1988), Basic Conditions of Employment Act (1997), Domestic Violence Act

to be addressed, such as the future legality of same-sex parenting and marriage, but the South Africans are off to a promising start.

Lastly, with regard to whether South African culture has improved in dealing with the issue of homosexuality, progress is more slow. There are few homosexuals in positions of power, although some are featured in the media. Gay pride parades have sprung up and Capetown is considered the gay capital of Africa.<sup>33</sup> However, there is still much work to be done before gays are fully accepted into South African society.

In conclusion, I hope that some of you have been intrigued by this brief tribute concerning the sexual orientation provision in the South African Constitution. Globally, eighty-six countries still have laws prohibiting homosexual acts, including the United States.<sup>34</sup> I raise these issues with my students wherever I teach around the world.<sup>35</sup> It will ultimately be up to them in their careers to demand that anti-discrimination clauses and laws extend out to include sexual orientation in the twenty-first century. I remain hopeful as I contemplate the words of South African Nobel Prize winner Archbishop Desmond Tutu: "When I stand up and say I want to oppose discrimination against people because of their sexual orientation, it is not because I want to seem nice. It is because if I don't, everything I have done in my life will be in vain."<sup>36</sup>

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(1998), South African Schools Act (1996), Refugee Act (1998), and the Labour Relations Act (1995).  
*Id.*

33. See *Capetown Pride Committee of 2002 Election*— at [www.gaynetcapetown.co.za](http://www.gaynetcapetown.co.za). (last visited Mar. 27, 2002).

34. Goodman, *supra* note 25, at 647 (referring to 1999).

35. I am the director of the University of Iowa College of Law's summer program in Arcachon, France and taught in South Africa at the University of Western Cape Faculty of Law for six summers.

36. Gerber, *supra* note 9, at 55.

