
NOTES

SOUTH AFRICA'S GAY REVOLUTION: THE DEVELOPMENT OF GAY AND LESBIAN RIGHTS IN SOUTH AFRICA'S CONSTITUTION AND THE LINGERING SOCIETAL STIGMA TOWARDS THE COUNTRY'S HOMOSEXUALS

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South Africa implemented a new Constitution in 1996 that included a bill of rights that explicitly listed sexual orientation as a protected class.¹ The clause demanded the equality, as well as prohibited the discrimination, of South Africans on the basis of their sexual orientation.² One could conclude that such a progressive piece of legislation, in a region that sees the complete opposite when it comes to the treatment of gays and lesbians, suggests that the South African people are a society that has developed an acceptance of the homosexual lifestyle. However, a more in-depth analysis does not provide support for that conclusion. This paper proposes the conclusion that the addition of sexual orientation in South Africa's Bill of Rights³ was made possible not because of the country's tolerance for its homosexual citizens, but because of the tactical decisions made by pro-gay groups that allowed them to include gay rights in the agenda of anti-apartheid groups following the fall of the National Party's rule of South Africa.

This paper will first investigate the early history of the apartheid and the new laws that were implemented by the National Party ("NP")

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¹ S. AFR. CONST., 1996, § 9(3)-(4).

² *Id.*

³ *Id.*

that affected all minorities in South Africa, with a focus on homosexuals. Following the fall of political dominance by the NP, South Africa experienced a period of rebirth where a new constitution was drafted. A thorough understanding of this period is key to the hypothesis of this paper because this is when strategic decisions of pro-gay groups were made and executed. Finally, the paper will discuss these decisions to suggest that it was the proactive nature of these groups that led to a new accumulation of rights for homosexuals in South Africa and not any sudden change in domestic or international acceptance of their lifestyle.

I. THE APARTHEID AND ITS IMPACT ON SOUTH AFRICAN BLACKS AND GAYS

A. *Early Apartheid Laws*

The NP's policy of apartheid was notorious for inflicting new laws on black South Africans, but what many people do not know is that it also set forth laws affecting the gay and lesbian populations of the African country.⁴ NP apartheid doctrine was not only interested in keeping the races separate, but was also "hostile to the mixing of social classes, urban culture, and intellectuals, and played up the confusion between homosexuality and pedophilia."⁵ Because of its focus on keeping a pure population, clean of black South Africans and homosexuals, the "Apartheid government[] placed high values on heterosexual marriage, reproduction, and family life and established strict racial and social requirements to determine when procreative sexual activity . . . would be considered legitimate in the eyes of the state."⁶ Not surprisingly, "[h]omosexuality was problematic under that arrangement to the extent that homosexual object choice prevented sexual subjects from meeting their procreative obligations."⁷

⁴ See, e.g., Immorality Amendment Act 57 of 1969 § 20A(1), *held unconstitutional* by Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) (declaring that "[a] male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence").

⁵ Pierre Albertini, *Africa, Southern*, in THE DICTIONARY OF HOMOPHOBIA: A GLOBAL HISTORY OF GAY & LESBIAN EXPERIENCE 33, 34 (Louis-Georges Tin ed., Marek Redburn trans., 2008).

⁶ William L. Leap, *Language, Belonging, and (Homo)sexual Citizenship in Cape Town, South Africa*, in SPEAKING IN QUEER TONGUES: GLOBALIZATION AND GAY LANGUAGE 134, 138 (William L. Leap & Tom Boellstorff eds., 2004).

⁷ *Id.*

Prior to the NP government, the Dutch and British colonialists ruled South Africa.⁸ In the early 1650s, Dutch colonialists descended upon South Africa, specifically the Cape, in hopes of turning it into a settlement to be used by Dutch companies as a halfway point for trade between their country and those in Asia.⁹ “Almost from the start it became a permanent settler colony.”¹⁰ This brought not only Dutch settlers to the country, but also a new ruling law, Roman-Dutch law.¹¹ “The Roman Dutch common law . . . criminalized a number of sexual acts between adults—whether between men, between woman [sic], or between a man and a woman—if not directed towards procreation.”¹² The law also made it illegal to take part in any sexual acts that were “contrary to the order of nature.”¹³ This included a number of things, like sexual acts between men, sexual acts between women, bestiality, heterosexual sodomy, and masturbation, the majority of which were punishable by death.¹⁴

When the NP government took over, the majority of these prohibitions under “the common law against ‘unnatural’ sexual activity had become obsolete and [could not] be committed between a man and a woman.”¹⁵ While common law had become significantly more progressive in relation to heterosexual sexual activities, the Dutch-influenced law still prohibited sexual activities between men.¹⁶ One of the first NP apartheid laws passed was the Prohibition of Mixed Marriages Act of 1949.¹⁷ This act prohibited any marriages between people of different races.¹⁸ The NP government went on to pass the Immorality Act of 1950,¹⁹ which prohibited “illicit carnal intercourse between

⁸ *South Africa Profile: Timeline*, BBC NEWS (Dec. 10, 2013), <http://www.bbc.co.uk/news/world-africa-14094918>.

⁹ Patrick J. Furlong, *South Africa*, in UNDERSTANDING CONTEMPORARY AFRICA, 283, 286 (April Gordon & Donald Gordon eds., 1992).

¹⁰ *Id.*

¹¹ Oliver Phillips, *Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa*, in LAW AND SEXUALITY: THE GLOBAL ARENA 17, 19 (Carl Stychin & Didi Herman eds., 2001).

¹² Pierre de Vos, *On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution*, 12 S. AFR. J. ON HUM. RIGHTS 265, 274 (1996).

¹³ *Id.* (quoting *R. v. Gough & Narroway* 1926 CPD 159 at 161).

¹⁴ *Id.* at 274-75.

¹⁵ *Id.* at 275.

¹⁶ *Id.*

¹⁷ Prohibition of Mixed Marriages Act 55 of 1949.

¹⁸ *Id.*

¹⁹ FUNSO AFOLAYAN, CULTURE AND CUSTOMS OF SOUTH AFRICA 36 (Toyin Falola ed., 2004).

Europeans and non-Europeans.”²⁰ The Act goes on to define a European as “a person who in appearance obviously is, or who by general acceptance and repute is a European”²¹ and a non-European as the opposite. Seven years later, the Act was amended and renamed the Sexual Offences Act of 1957.²² The amended sections included Section 16, which prohibited sex between a white person and any non-white person.²³ Lastly, Section 14 prohibited sex between a man and a boy or girl under the age of sixteen.²⁴ Up until this point, common law still ruled over the majority of sexual activities between gays and lesbians. In the mid-1960s, South African Police raided a gay party that “catalyzed the development of the first gay law reform movement . . . [which is] referred to as South Africa’s ‘Stonewall.’”²⁵

B. *The Apartheid and Gays: The Forest Town Party*

South African Police conducted a raid in 1966 on a private gay party in Forest Town, Johannesburg²⁶ that was being attended by some 350 guests.²⁷ As described in a report by the South African Police to Parliament:

There were approximately 300 male persons present who were all obviously homosexuals. . . . Males were dancing with males to the strains of music, kissing and cuddling each other in the most vulgar fashion imaginable. They also paired off and continued their love-making in the garden of the residence and in motor cars in the streets, engaging in the most indecent acts imaginable with each other.²⁸

By the end of the raid, ten men had been arrested: nine for “masquerading as women” and one for “indecent assault on a minor.”²⁹ The raid was described as “the most organized and most publicized the po-

²⁰ Immorality Amendment Act 21 of 1950.

²¹ *Id.* § 3(i).

²² Sexual Offenses Act 23 of 1957.

²³ *Id.* § 16.

²⁴ *Id.* § 4.

²⁵ Mandisa Mbali, *Gay AIDS Activism in South Africa Prior to 1994*, in FROM SOCIAL SILENCE TO SOCIAL SCIENCE: SAME-SEX SEXUALITY, HIV & AIDS AND GENDER IN SOUTH AFRICA 80, 83 (Vasu Reddy, Theo Sandfort & Laetitia Rispel eds., 2009).

²⁶ *Id.*

²⁷ Albertini, *supra* note 5, at 34.

²⁸ Glen Retief, *Keeping Sodom out of the Laager: State Repression of Homosexuality in Apartheid South Africa*, in DEFIANT DESIRE 99, 101 (Mark Gevisser & Edwin Cameron eds., 1995).

²⁹ Mark Gevisser, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to 1990s*, in Defiant Desire, *supra* note 28, at 14, 30.

2014] *Development of Gay and Lesbian Rights in South Africa* 459

lice had ever attempted.”³⁰ The most plausible explanation for the large-scale raid, as one commentator put it: “led by Prime Minister Verwoerd’s clampdown on the liberation movements and his formalization of apartheid, the South African authorities were . . . expelling from the laager anything that was deemed threatening to white civilization.”³¹

Following the raid in Forest Town, the South African Police, as well as religious conservative lobbies, pushed for new anti-gay legislation.³² Police officers around the country were informed of the “gross indecency [that was] being practiced between male persons throughout [South Africa] . . . and that offenders [were now] pursuing an organized modus operandi.”³³ A South African Police circular “recommended that [police] . . . infiltrate queer parties” and take effective action to stop them.³⁴ At the same time, Minister of Justice, P.C. Pelser, was in the process of proposing new “draconian anti-homosexuality legislation to the House of Assembly in March of 1967”³⁵ and warned that “if unchecked, homosexuality would bring about the utter ruin of civilization in South Africa.”³⁶ Luckily for gays and lesbians across the country, the motion was deferred until the following year, which left them a small window of time to organize.³⁷

The call for new anti-gay legislation, and the fear of the criminalization of homosexuality altogether, brought about the first ever gay and lesbian organizations in South Africa.³⁸ These groups were mainly made up of urban, white, and middle-class, gay South Africans.³⁹ Instead of the broad anti-gay legislation that people like Pelser were calling for, pro-gay groups were able to curb new legislation to three new amendments added to the Immorality Act which were passed in March of 1969.⁴⁰ The new laws changed “the age of consent for male homosexual acts . . . from 16 to 19, [which the legislature explained was] designed to prevent ‘child-molestation’ by protecting teenage boys.”⁴¹

³⁰ *Id.*

³¹ *Id.* at 30-31.

³² *Id.* at 37.

³³ Retief, *supra* note 28, at 101.

³⁴ *Id.*

³⁵ Gevisser, *supra* note 29, at 31.

³⁶ Retief, *supra* note 28, at 101.

³⁷ Gevisser, *supra* note 29, at 31.

³⁸ *Id.* at 35.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

The legislation also “outlawed the manufacture, sale or supply of any article which is intended to be used to perform an unnatural sexual act.”⁴² Lastly, the law introduced the “infamous ‘men at a party’ clause,”⁴³ which was in direct reaction to the Forest Town raid. This clause “criminalized any ‘male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification.’”⁴⁴ The definition of a party was given by the Act as “any occasion where more than two persons are present.”⁴⁵

These new provisions were clearly discriminatory towards gays in South Africa in a number of ways. First, the law created a three-year difference between the age of consent for heterosexuals and homosexuals, with the heterosexual age of consent at sixteen.⁴⁶ Second, “the heterosexual prohibition [was] limited to having or attempting to have ‘unlawful carnal intercourse’ with a boy or girl under sixteen or soliciting or enticing such a boy or girl ‘to the commission of an immoral or indecent act.’”⁴⁷ On the other hand, the homosexual prohibition “extend[ed] to committing or attempting to commit with an under-age girl or boy any ‘immoral or indecent act.’”⁴⁸ So for heterosexuals, short of intercourse, “merely committing or attempting to commit an immoral or indecent heterosexual act with an under-age boy or girl [was] not punishable unless solicitation or enticement [was] present.”⁴⁹ The same could not be said for homosexual acts, which did not require solicitation or enticement at all.⁵⁰

While the development of pro-gay groups following the Forest Town raid may have had some influence in the development of anti-gay legislation, these new laws “had actually tightened [the apartheid government’s] grip on the freedom of gay people.”⁵¹ “The message from the authorities was clear: the status quo remained.”⁵² While the total criminalization of homosexuality was not successful, these new

⁴² Immorality Act 57 of 1969 § 18A(1).

⁴³ Gevisser, *supra* note 29, at 35.

⁴⁴ *Id.*

⁴⁵ Immorality Act 57 of 1969 § 20A(2).

⁴⁶ Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, SALJ 429, 454 (1993).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Gevisser, *supra* note 29, at 36.

⁵² *Id.*

laws demonstrated to gays across South Africa that the NP's apartheid policies were in no way solely targeting blacks in the country, but also any group that threatened a white civilization.

II. THE FALL OF THE NP AND THE BEGINNING OF THE END OF APARTHEID

“The South African state was substantially weakened by the late 1980s and early 1990s.”⁵³ The NP government was facing pressures from both international players as well as domestic groups to change its way of governing. “Many activities were beyond the reach of state control: corruption, dirty tricks, and clandestine murder among them.”⁵⁴ The president at the time, P.W. Botha, sent his justice minister, Kobie Coetsee, to meet with the imprisoned Nelson Mandela, the face and one of the leaders of the African National Congress (“ANC”).⁵⁵ Even though Mandela was imprisoned and the ANC had been officially banned in 1960, the group made a comeback in popularity during the 1980s because of the status of “Mandela and other imprisoned leaders, its selective use of violence, and its alliance with the independent trade-union movement.”⁵⁶ Discussions between the two men were kept secret because “the prospect of a negotiated settlement brought great risk as well as opportunity for the government, as it did for the ANC.”⁵⁷ These “talks about talks” eventually resulted in a meeting between Mandela and Botha, which did not result in any real change because of the extreme differences in opinions the two men held.⁵⁸

Botha suffered a stroke in 1989, which finally opened the door to productive talks between Mandela and the new president, Frederik de Klerk.⁵⁹ By the end of February 1990, talks between the two leaders resulted in the unbanning of a number of political parties, including the ANC, and the release of Mandela and a number of his compatriots.⁶⁰ In 1985, cooperation also led to the removal of the “racial provi-

⁵³ GRETCHEN BAUER & SCOTT TAYLOR, *POLITICS IN SOUTHERN AFRICA: TRANSITION AND TRANSFORMATION* 265 (2011).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Hermann Giliomee, *South Africa's Emerging Dominant-Party Regime*, in *DEMOCRATIZATION IN AFRICA* 140, 142-43 (Larry Diamond & Marc Plattner eds., 1999).

⁵⁷ BAUER & TAYLOR, *supra* note 53, at 265.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

sions of the [Immorality] Act”; however, “all [of] its other provisions were kept intact,” including those addressing homosexuals.⁶¹

Commentators put forward a number of reasons as to why de Klerk was willing to work with Mandela and other anti-apartheid parties. Hermann Giliomee argues that the different pressures, including the growing black population, a poor economic climate, and the black resistance to the NP government, led apartheid leaders like de Klerk to reevaluate their focus on apartheid policies and instead fight for their position in the inevitable new government.⁶² Others, like Pierre du Toit, argue that both the NP and the ANC believed they would be the ruling party to come out of this period of history—the NP “because of its control over the state apparatus” and the ANC “because of its numerical superiority.”⁶³ Whatever the reason, these two parties led by de Klerk and Mandela began “more than three years of negotiations.”⁶⁴ Throughout this period, gay and lesbian groups, “along with some political leaders and sympathetic journalists, continually put pressure on the state to ensure that gay and lesbian rights”⁶⁵ would be a priority of whatever party came out as the next governing body of South Africa.

A. *Early Reactions of ANC Members*

While it was eventually the ANC that first called for the formal acknowledgement of gay and lesbian rights, early statements from a number of ANC members gave the impression that the ANC had no interest in fighting for the rights of homosexuals in South Africa. In 1987, a London newspaper quoted Ruth Mompoti, an ANC National Executive Committee member as saying, “lesbians and gay men were ‘not normal.’”⁶⁶ Mompoti continued, “I cannot even begin to understand why people want lesbian and gay rights.”⁶⁷

Another major ANC member, Winnie Mandela, had many gay and lesbian groups worried that the ANC would not push for gay rights after a majority of her defense during her trial was centered on the

⁶¹ Retief, *supra* note 28, at 100.

⁶² BAUER & TAYLOR, *supra* note 53, at 266.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Zethu Matebeni, *Sexing Women: Young Black Lesbians’ Reflections on Sex and Responses to Safe(r) Sex*, in FROM SOCIAL SILENCE TO SOCIAL SCIENCE: SAME-SEX SEXUALITY, HIV & AIDS AND GENDER IN SOUTH AFRICA, *supra* note 25, at 100, 101.

⁶⁶ Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement*, in DEFIANT DESIRE, *supra* note 28, at 269-70.

⁶⁷ *Id.*

horrors of homosexuality.⁶⁸ Throughout Winnie Mandela's case, for kidnap and assault, Mandela's attorney "codified homosexuality as sexual abuse, and characterized homosexual practice as a white, colonising depredation of heterosexual black culture."⁶⁹ Outside of the courthouse during the trial, a number of ANC supporters picketed, carrying signs such as "Homosex is not in black culture."⁷⁰ While many ANC members condemned the actions of these demonstrators, they did not express their concern publicly.⁷¹ It was clear that while a number of leaders from the party supported the idea of equality for gays and lesbians, it would take some time to sway the opinions of many of their colleagues.⁷² Leadership had to "accept that [they were] not just confronting bigots, people with horns, but that [they] need[ed] to take on this debate with [their] families and those closest to [them]. Only then [could they] begin to shift the position in society."⁷³

B. *Changing ANC Attitudes*

Starting in 1988, a number of gay organizations began the quest of not only bringing the plight of gays to the attention of the nation, but more importantly to the many parties negotiating a new constitution for South Africa.⁷⁴ Up until this point, the majority of gay rights groups were made up almost entirely of white members.⁷⁵ However, during this period a number of organizations, like the Gay and Lesbian Organization of the Witwatersrand ("GLOW"), which was founded in 1988,⁷⁶ began to appear and were made up primarily of black South Africans. GLOW entered the political arena with the hopes of "positioning itself within the broad anti-apartheid coalition."⁷⁷ The group understood that the ANC would most likely be the new governing party of the country and did all it could to court the party and its members.⁷⁸ GLOW released a manifesto that called "upon 'All South Afri-

⁶⁸ *Id.* at 272.

⁶⁹ Rachel Holmes, *White Rapists Made Coloureds (and Homosexuals): The Winnie Mandela Trial and the Politics of Race and Sexuality*, in *DEFIANT DESIRE*, *supra* note 28, at 284.

⁷⁰ Fine & Nicol, *supra* note 66, at 272.

⁷¹ Gevisser, *supra* note 29, at 76.

⁷² Chris Dunton & Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*, 19 *CURRENT AFR. ISSUES* 46, 47 (1996).

⁷³ *Id.*

⁷⁴ Gevisser, *supra* note 29, at 63.

⁷⁵ *Id.* at 35.

⁷⁶ *Id.* at 63.

⁷⁷ *Id.* at 74.

⁷⁸ *Id.*

cans who are Committed to a Non-Racist, Non-Sexist, Non-Discriminatory Democratic Future.’”⁷⁹ The agenda used similar rhetoric as anti-apartheid groups and also included calls for legal reform, the dispelling of myths, and the need for gay rights that almost mirrored those of anti-apartheid groups like the ANC.⁸⁰ Similar groups, like the Lesbians and Gays Against Oppression (“OLGA”) also took steps to get the attention of the ANC. In 1989, OLGA formulated a response to the ANC’s Constitutional Guidelines draft that was issued the previous year.⁸¹ In that draft “[t]here was no mention of lesbian and gay rights.”⁸²

In May of 1992, the ANC announced at its Policy Conference that it was the platform of the party to recognize lesbian and gay rights.⁸³ This made the ANC the “first mass-based movement in Africa to acknowledge formally, the rights of lesbians and gay men.”⁸⁴

While the impact from groups like GLOW and OLGA played a large role in influencing the ANC to publicly endorse making gay and lesbian rights a priority during constitution negotiations, other factors also played a role in winning over the political party. The coming out of many high-positioned ANC members brought about the acceptability of gay rights within the ANC party.⁸⁵ Simon Nkoli, a member of the ANC and a well-known gay rights activist, was jailed with senior members from the United Democratic Front, a “broad-based coalition of grassroots movements that led the anti-apartheid struggle in the 1980s.”⁸⁶ During their time together, Nkoli, a gay man himself, “had a major impact on their thinking.”⁸⁷ Nkoli also influenced members of the Congress of South African Students when his homosexuality came out and the organization voted to keep him as the group’s secretary.⁸⁸ Having a gay man hold prominent positions in a number of different political groups gave the gay rights movement more legitimacy as well as publicity.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Fine & Nicol, *supra* note 66, at 270.

⁸² *Id.*

⁸³ *Id.* at 269.

⁸⁴ *Id.*

⁸⁵ Gevisser, *supra* note 29, at 75-77.

⁸⁶ *Id.* at 75.

⁸⁷ *Id.*

⁸⁸ Simon Nkoli, *Wardrobes: Coming Out as a Black Gay Activist in South Africa*, in DEFIANT DESIRE, *supra* note 28, at 249, 253.

Another factor that played in favor of changing the attitudes of ANC members towards accepting gay rights was the influence of the “European Leftist position on the matter.”⁸⁹ Because the ANC was outlawed in South Africa, many exiled members that lived in Europe were swayed by the “[l]iberal European notions of gender rights and the political legitimacy of gay rights.”⁹⁰ For example, following the homophobic statements made by ANC member Ruth Mompati, reaction in Britain was amongst the most vocal in opposition.⁹¹ A number of British anti-apartheid and lesbian and gay groups “threatened to withdraw their support for the ANC if it did not retract Mompati’s statements.”⁹² In fact, the ANC offered the London newspaper an exclusive interview to clear up the ANC’s stance on gay rights in which it stated, “The ANC is indeed very firmly committed to removing all forms of discrimination and oppression in a liberated South Africa. . . . That commitment must surely extend to the protection of gay rights.”⁹³ The success of pro-gay groups in courting major parties such as the ANC demonstrated “the willingness of political workers engaged in anti-apartheid struggles to include sexuality . . . in their blueprints for a more progressive society.”⁹⁴

III. DRAFTING THE INTERIM CONSTITUTION

In describing the process of including gay and lesbian rights in the Bill of Rights of South Africa’s 1993 Interim Constitution, scholar A.J.G.M. Sanders explains:

Largely on account of the lobbying work of local gay groups and gay activists within the international anti-apartheid movement, lawyers on the African National Congress’ Constitutional Committee quietly included in the party’s proposed bill of rights “sexual orientation” amongst the grounds on which people could not be discriminated against. In their respective draft bills of rights, the Democratic Party and the Inkatha Freedom Party would follow suit. With so much party political support the provision had an easy ride into the 1993 interim Constitution.⁹⁵

While this account gives the impression that gay rights were always intended to be included in the interim constitution and that there was

⁸⁹ Gevisser, *supra* note 29, at 75.

⁹⁰ *Id.*

⁹¹ Fine & Nicol, *supra* note 66, at 270.

⁹² *Id.*

⁹³ *Id.* at 271.

⁹⁴ Leap, *supra* note 6, at 134.

⁹⁵ A.J.G.M. Sanders, *Homosexuality and the Law: A Gay Revolution in South Africa?*, 41 J. AFR. L. 100, 105 (1997).

little to no opposition to its inclusion, other historical commentators have explained that it was not as easy.

Four parties, the ANC, the NP, the Inkatha Freedom Party (“IFP”), and the Democratic Party (“DP”), all put forward bills of rights that called for the protection of the rights of gays and lesbians from discrimination.⁹⁶ However, the NP chose a different avenue in achieving that protection and opted to protect groups from discrimination on the basis of “natural characteristics.”⁹⁷ The NP’s proposal read: “[T]here shall be no 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.”⁹⁸ The NP also took the stance that only “government discrimination against [the listed] groups should . . . be prohibited.”⁹⁹ This meant that the NP’s proposed bill of rights would not protect gays and lesbians from “the most pervasive forms of discrimination—which take place by private persons and corporate institutions.”¹⁰⁰ Opponents to the NP’s proposals also argued that the clause “assume[d] that judges will interpret the ‘natural characteristics’ clause to include sexual orientation.”¹⁰¹

“The draft bills of rights of the ANC, the DP and IFP, [on the other hand], expressly made discrimination on the ground of sexual orientation unlawful.”¹⁰² The ANC’s proposed draft read:

- (1) Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.
- (2) Legislation shall provide remedies for oppression, abuse, harassment or discrimination based on gender or sexual orientation.
- (3) Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping.¹⁰³

The IFP’s proposed draft read:

All citizens of the State of KwaZulu/Natal 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 sex, race, colour,

⁹⁶ Edwin Cameron, *Unapprehended Felons: Gays and Lesbians and the Law in South Africa*, in *DEFIANT DESIRE*, *supra* note 28, at 89, 94.

⁹⁷ *Id.*

⁹⁸ *Id.* at 95.

⁹⁹ *Id.* at 94.

¹⁰⁰ *Id.* at 95.

¹⁰¹ Cameron, *supra* note 46, at 466.

¹⁰² Cameron, *supra* note 96, at 95.

¹⁰³ *Id.*

2014] *Development of Gay and Lesbian Rights in South Africa* 467

sexual orientation, language, traditions, creed, religion, political affiliation and belief, and social and personal status.¹⁰⁴

Lastly, the DP's proposal read:

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

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.¹⁰⁵

These three proposals were largely the same in that they all specifically named sexual orientation as a group protected against discrimination.

Not all the parties taking part in drafting the interim constitution wanted sexual orientation included in the bill of rights. The only party to oppose the sexual orientation clause was the African Christian Democratic Party ("ACDP").¹⁰⁶ As Kenneth Meshoe, the leader of the ACDP at the time explains, the ACDP believed that:

[Homosexuality] is a lifestyle that is unacceptable to the majority of South Africans, besides the fact that it is unChristian and anti-all religion. It is against our culture as Africans, although we know that there are people introduced to this lifestyle. I'm sure that they are an embarrassment to their ancestors. This is a white man's disease that has been introduced into the black culture. This definitely comes from Europe.¹⁰⁷

The ACDP was not the only group to express concern with the inclusion of the sexual orientation clause of the bill of rights. Many citizens wrote to the Commission putting together the interim constitution, explaining their disapproval with the clause.¹⁰⁸

"The process of adopting a new constitution in South Africa [was] unique in its popular participation [from many South African citizens.]"¹⁰⁹ Meetings were held throughout the country encouraging citizens to mail in or phone their suggestions to the Commission.¹¹⁰ The sexual orientation clause was one of the biggest issues that drew citizen submissions.¹¹¹ When the first draft of the interim constitution was

¹⁰⁴ *Id.* at 96.

¹⁰⁵ *Id.*

¹⁰⁶ Jennifer Spruill, *A Post-Without a Past? Sexual Orientation and the Post-Colonial Movement in South Africa*, in *LAW AND SEXUALITY: THE GLOBAL ARENA*, *supra* note 11, at 3, 5.

¹⁰⁷ *Id.*

¹⁰⁸ Dunton & Palmberg, *supra* note 72, at 48.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

published for the public, reactions from citizen submissions were equal in favor and in opposition.¹¹² “In the second stage [of] submissions . . . the inclusion of sexual orientation had subsided, with 564 petitions opposing, and 7,032 petitions supporting the inclusion of the clause in the bill of rights.”¹¹³

One issue that many of the petitioners had with the sexual orientation clause was the fear that it would be interpreted to include bestiality or prostitution.¹¹⁴ “The constitution makers themselves were satisfied, however, that the term ‘sexual orientation’ could not be misunderstood.”¹¹⁵ Kevin Botha of the Equality Foundation assured citizens that “[the Foundation’s] research indicates that sexual orientation is the preferred terminology and is consistently employed in numerous jurisdictions to describe only the sexual orientation of heterosexuals, bisexuals and homosexuals.”¹¹⁶

In the end, the Commission chose the proposals put forward by the ANC, the DP, and the IFP which expressly prohibited discrimination on the grounds of sexual orientation.¹¹⁷ The sexual orientation clause of the bill of rights applies both “‘vertically’ (between individuals and the State), [and] also ‘horizontally’ (between individuals and juristic persons).”¹¹⁸ The clause also only allows discrimination based on sexual orientation if it is “limited in terms of a 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.”¹¹⁹

IV. THE 1994 ELECTION AND MOVING AWAY FROM APARTHEID LAWS

The Interim Constitution came into effect following the April 1994 election,¹²⁰ which the country celebrated as its first nonracial election ever held.¹²¹ The ANC won an easy majority with 62.6% of the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 49.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Cameron, *supra* note 96, at 97.

¹¹⁸ Sanders, *supra* note 95, at 106.

¹¹⁹ *Id.* These factors include: “(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.” *Id.*

¹²⁰ BAUER & TAYLOR, *supra* note 53, at 268.

¹²¹ Giliomee, *supra* note 56, at 140.

vote and the NP came in far behind with only 20.4%.¹²² The government that was elected into office in 1994 was tasked with fine-tuning the constitution for its final implementation in 1996.¹²³ During this period, no changes were made to the sexual orientation clause that was first included in the interim constitution.

The constitution was finally sent to then-President Nelson Mandela, who signed the document on December 10, 1996, with it coming into effect the following year in February.¹²⁴ When the constitution was finally adopted by the South African Parliament in 1996,¹²⁵ the sexual orientation clause in the bill of rights read:

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).¹²⁶

By including the sexual orientation clause in its country's constitution, South Africa became the first country in the world to explicitly prohibit the discrimination of gays and lesbians.¹²⁷

A. *Post-1996 Constitutional Court Cases*

The first major court case following the implementation of the new Constitution, regarding the rights of homosexuals, was *National Coalition for Gay and Lesbian Equality v. Minister of Justice*.¹²⁸ This case challenged the common law offenses of sodomy and unnatural sexual acts and the "men at a party" clause of the Immorality Act.¹²⁹ The constitutional court unanimously ruled all of these laws unconstitutional "in a judgment that clearly enunciated the court's view on homosexu-

¹²² Wilmot James & Daria Caliguire, *The New South Africa: Renewing Civil Society*, in DEMOCRATIZATION IN AFRICA, *supra* note 56, at 83, 84.

¹²³ *Id.*

¹²⁴ T. R. H. DAVENPORT & CHRISTOPHER SAUNDERS, SOUTH AFRICA: A MODERN HISTORY 572 (5th ed. 2000).

¹²⁵ *South Africa Profile*, *supra* note 8.

¹²⁶ S. AFR. CONST., 1996 § 9(3)-(4).

¹²⁷ Sanders, *supra* note 95, at 105.

¹²⁸ *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC).

¹²⁹ Ronald Louw, *Advancing Human Rights Through Constitutional Protection for Gays and Lesbians in South Africa*, in SEXUALITY AND HUMAN RIGHTS: A GLOBAL OVERVIEW 141, 145 (Helmut Graupner & Phillip Tahmindjis eds., 2005).

ality and sexual identity in the light of the equality guarantee in the Constitution.”¹³⁰ The court explained for the first time that:

Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.¹³¹

As Pierre de Vos explains: “because [the court] defined sexual orientation with reference to the erotic attraction involved and not with reference to sexual acts, the court did not view discrimination in this case as primarily based on the conduct of individuals but rather as based on their sexual identity.”¹³² The fact that the court based its decision on the grounds of equality opened the door to a number of cases that followed challenging other laws that placed gays and lesbians on unequal footing with their heterosexual counterparts.¹³³

The *National Coalition* case also gave rise to the ultimate fight for homosexuals in South Africa, the fight for marriage equality. “It is arguable that the most important legal and jurisprudential development that gays and lesbians could achieve is that of the right to marry.”¹³⁴ Homosexual groups hoped that granting gays and lesbians the right to marry could “enhance their social acceptance.”¹³⁵ The fight finally came before the South African Constitutional Court in May of 2004, with the court announcing its decision seven months later in *Minister of Home Affairs v. Fourie*.¹³⁶

The main question before the court was whether the Marriage Act of 1961 “den[ied] equal protection to and discriminate[d] unfairly

¹³⁰ Pierre de Vos, *Sexual Orientation and the Right to Equality in the South African Constitution* 117 SALJ 17, 17 (2000).

¹³¹ *Nat'l Coal.*, (1) SA at 23.

¹³² de Vos, *supra* note 130, at 23.

¹³³ See *Satchwell v. President of the Republic of S. Afr.* 2002 (6) SA 1 (CC) (holding that the same-sex partner of a judge is entitled to the financial benefits of their spouse just as an opposite-sex spouse); *Du Toit v. Minister of Welfare & Population Dev.* 2003 (2) SA 198 (CC) (holding that a statute permitting the adoption of children limited to heterosexual couples was unconstitutional); *J v. Dir. Gen.: Dep't of Home Affairs*, 2003 (5) SA 621 (CC) (holding that a lesbian couple should both be recognized as the natural parents of a child that was born to one of the spouses via artificial insemination); *Gory v. Kolver* NO 2007 (4) SA 97 (CC) (holding that the spouse of a deceased same-sex couple is entitled to inherit the estate of their partner).

¹³⁴ Louw, *supra* note 129, at 153.

¹³⁵ *Id.* at 154.

¹³⁶ *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC).

2014] *Development of Gay and Lesbian Rights in South Africa* 471

against same-sex couples by not including them in the provisions.”¹³⁷ In ruling in favor of the defendant, the court found that “[i]t is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law.”¹³⁸ The proposed remedy from the court was not a striking down of the Act, but instead, a suspension for twelve months of the Act’s validity to give the opportunity for Parliament “to correct [its] defects.”¹³⁹

The following year, Parliament fulfilled the duty imposed on it by the *Fourie* court and passed the Civil Union Act of 2006.¹⁴⁰ The pertinent parts read:

The objectives of this Act are-

- (a) To regulate the solemnization and registration of civil unions, by way of either marriage or a civil partnership; and
- (b) To provide for the legal consequences of the solemnisation and registration of civil union.¹⁴¹

The Act goes on to define civil union as “the voluntary union of two persons who are both 18 years of age or older which is solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this Act.”¹⁴² While commentators continue to question just what this Act provides gays and lesbians in terms of legal rights and privileges,¹⁴³ one thing is clear: the post-apartheid South African government has come from being one of the most oppressive governments in how it treated its homosexual citizens to one of the most liberal in Africa, if not the world.

V. DISCUSSION

While South Africa can claim to be one of the most liberal countries when it comes to the rights of its gay and lesbian citizens, the

¹³⁷ *Id.*

¹³⁸ *Id.* at 48.

¹³⁹ *Id.* at 103.

¹⁴⁰ Nomthandazo Ntlama, *A Brief Overview of the Civil Union Act*, 13 POTCHEFSTROM ELEC. L.J. 191 (2010).

¹⁴¹ Civil Union Act 17 of 2006 § 2.

¹⁴² *Id.* at § 1.

¹⁴³ Ntlama, *supra* note 140.

constant stream of hate crimes centered on homosexuals¹⁴⁴ following the implementation of the new constitution suggests that the country is still home to a high level of homophobia. The bill of rights may state that homosexuals in South Africa are equal to their heterosexual counterparts, but “the day-to-day reality for many LGBTI individuals remains grim due to the ongoing harassment, intimidation, and violence motivated by a sexual orientation or gender identity bias.”¹⁴⁵ Gay rights activists in particular have been targets of this hatred, resulting in the deaths of many.¹⁴⁶ Lesbians also face a growing crime in the country called “corrective rape” which is the act of raping lesbians in the hope of correcting their homosexual tendencies.¹⁴⁷ The high level of hate crime targeting gays suggests that the country is not as accepting of its homosexual citizens. It is the premise of this paper that the success of pro-gay groups, in acquiring their equality in the bill of rights, was accomplished through their strategic political moves, and not because the country was accepting of this class of South Africans.

Before analyzing the manner in which pro-gay groups lobbied their agenda to the constitutional committees, it is important to understand that these groups were alone in not only introducing the issue of gay rights into the public discourse, but also in demanding complete equality and an end to any discrimination. No international bodies were in the business of calling for equality for gays and lesbians. The African Union was not established until 2002,¹⁴⁸ and judging from how the majority of other African countries treat their homosexual citizens, any pressure or condemnation from them would have been highly unlikely.¹⁴⁹ The United Nations, while consistently criticizing the NP government for apartheid policies, seemed to be more concerned with the racially-motivated atrocities taking place in the country when the General Assembly suspended the country from participation in 1974.¹⁵⁰

¹⁴⁴ See *Violent Hate Crime in South Africa*, HUM. RIGHTS FIRST, http://www.humanrightsfirst.org/wp-content/uploads/UPR_SA_hate_crimes_submission-FINAL-Human-Rights-First.pdf (last visited Apr. 22, 2013).

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.*

¹⁴⁷ *South Africa Team to Tackle Gay and Lesbian Hate Crimes*, BBC NEWS (May 5, 2011), <http://www.bbc.co.uk/news/world-africa-13291223>.

¹⁴⁸ *AU in a Nutshell*, AFRICAN UNION, <http://www.au.int/en/about/nutshell>.

¹⁴⁹ As of 2010, thirty African countries still outlawed homosexuality. *Homosexuality in Africa is Still Taboo: Transcript*, NPR (Feb. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=123973509>.

¹⁵⁰ *History and Present Status*, DEP'T: INT'L REL. & COOPERATION, <http://www.dfa.gov.za/foreign/Multilateral/inter/un.htm> (last visited Apr. 22, 2014).

2014] *Development of Gay and Lesbian Rights in South Africa* 473

The two major United Nations instruments that speak to human rights, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, speak not once explicitly towards the equality of gays or lesbians.¹⁵¹

The United Nations' International Covenant on Civil and Political Rights, which South Africa has signed and ratified,¹⁵² states that "every human being has the inherent right to life"¹⁵³ and "the right to liberty and security of person,"¹⁵⁴ and that "no one shall be subjected to arbitrary or unlawful interference with his privacy."¹⁵⁵ Each signing country is to respect these rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁵⁶ It could easily be argued that a number of the laws in South Africa before the 1996 constitution was adopted violated this international document in reference to homosexuals. However, South Africa did not sign the treaty until late in 1994, and the country did not ratify the document until 1998, which means that it was in no way binding on the South African government until after the new constitution was implemented and homosexuals had already gained their equality.¹⁵⁷ Furthermore, in a testament again to the homophobia in the country, the government arguing against gay marriage in *Fourie* used the Covenant on Civil and Political Rights to explain that the denial of gay marriage would not violate international law, as the United Nations Human Rights Committee ruled in *Joslin v. New Zealand*.¹⁵⁸

¹⁵¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter Covenant on Civil and Political Rights]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Declaration of Human Rights].

¹⁵² *Chapter IV: Human Rights, International Covenant on Civil and Political Rights*, UNITED NATIONS: TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 22, 2013) [hereinafter *Chapter IV: Human Rights*].

¹⁵³ Covenant on Civil and Political Rights, *supra* note 151, at Art. 6.

¹⁵⁴ *Id.* at Art. 9.

¹⁵⁵ *Id.* at Art. 17.

¹⁵⁶ *Id.* at Art. 2.

¹⁵⁷ *Chapter IV: Human Rights, supra* note 152.

¹⁵⁸ *Fourie*, (1) SA at 63 (citing U.N. International Covenant on Civil and Political Rights, 26 July 2002, Communication No 902/1990: New Zealand, 07/30/2002, CCPR/C/75/D/902/1999 (Jurisprudence), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e44ccf85efc1669ac1256c37002b96c9?Opendocument>).

Pro-gay groups could also have used the United Nations' Universal Declaration of Human Rights, seeing as it "is widely regarded as forming part of customary international law."¹⁵⁹ Again, like the Covenant on Civil and Political Rights, the Universal Declaration of Human Rights lists a number of rights pro-gay groups could have pushed for, arguing that customary international law would bind the South African government to respect: "All human beings are born free and equal in dignity and rights";¹⁶⁰ "everyone has the right to life, liberty and security of person";¹⁶¹ "all are equal before the law and are entitled without any discrimination to equal protection of the law."¹⁶² Unfortunately though, for pro-gay groups again, this document is not a binding treaty, and like the Covenant on Civil and Political Rights, did not list homosexuals specifically as a class protected from discrimination.¹⁶³ This would make an argument that customary law demanded the equality of gays almost impossible to make. Homosexuals saw the government use this document as well in its argument against gay marriage in *Fourie*.¹⁶⁴

Gays saw little to no international response to the NP's apartheid policies that plainly targeted their lifestyles prior to the 1996 constitution. As explained previously, the continuation of hate crimes targeting gays and lesbians throughout the country, even following the inclusion of gays in the bill of rights, also demonstrates the abandonment of homosexuals in South Africa during this period. For these reasons, and as this section will go on to explain, it was the tactical planning of gay rights lobbyists that led to the clause in the bill of rights stating their equality, rather than any growing international or domestic insistence.

The formation of pro-gay and lesbian lobbying groups was an important first step for the gay rights movement. Previously, during the period following the Forest Town raid, gay rights groups were made up almost entirely of urban white males.¹⁶⁵ This was problematic specifically because the NP government was pushing apartheid policies promoting an all-white population; so naturally, white gays and black gays

¹⁵⁹ *Digital Record of the UDHR*, UNITED NATIONS: HUM. RIGHTS (Feb. 2009), <http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx>.

¹⁶⁰ Declaration of Human Rights, *supra* note 151, at Art. 1.

¹⁶¹ *Id.* at Art. 3.

¹⁶² *Id.* at Art. 7.

¹⁶³ Covenant on Civil and Political Rights, *supra* note 151.

¹⁶⁴ *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 63.

¹⁶⁵ Gevisser, *supra* note 29, at 35.

had no interest in working together to promote gay rights issues. The development of groups in the late 1980s like GLOW was imperative to the gay movement because it brought about a higher level of participation, not only because of the high number of black citizens willing to work together, but also because this black population came from both urban and rural areas of the country.¹⁶⁶ Unlike its white progenies, GLOW was successful because it used the current political environment to its advantage in aligning its message with the ANC, whom it understood would be the future government.¹⁶⁷

The decision to court the ANC party is one of the most important strategic decisions that the gay rights movement made during the fight for equality. This group was obviously in no mood to even attempt to appease the feelings and support of the NP government. When stepping back and looking at the situation that gay rights groups found themselves in, it is not difficult to understand why the ANC was the natural party that these groups drifted towards. With Nelson Mandela leading the party, the ANC was understood to be the party that would exit the apartheid era with control and the most influence in the formation of a new South Africa.¹⁶⁸ The ANC was fighting the NP government for equality—a society where black South Africans were viewed by the laws in the same way white South Africans were; while the pro-gay groups were also fighting for equality—to be viewed by the law similarly as heterosexual South Africans. It would seem hypocritical for the ANC government to come out and denounce the rights of gays and lesbians, while at the same time demanding equal rights for themselves. Gay rights groups recognized the similarities in goals they were fighting for and those of the ANC, and used these when forming the ideas and rhetoric they would put forward during their rallies and any other time they were lobbying for their cause.

These groups shifted their rhetoric to include “words like ‘confront’ and ‘challenge,’ and . . . embrace[ed] . . . concepts like ‘non-racist,’ ‘non-sexist’ and ‘non-discriminatory.’”¹⁶⁹ In a manifesto drafted by GLOW, the organization called for South Africans to:

- UNITE in the fight for basic human rights of all South Africans, including lesbians and gay men.
- MOBILIZE against discrimination.

¹⁶⁶ *Id.* at 63.

¹⁶⁷ *Id.* at 74.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

- ASSERT the role of lesbians and gay men in the current process of political change.
- CONFRONT South Africa with the presence of its lesbian and gay community.
- DISPEL MYTHS nurtured by years of discrimination and stereotyping.¹⁷⁰

This shift in language placed the organization in line with the message that was constantly being presented by groups such as the ANC.¹⁷¹ The words “blacks and other minorities” could easily be inserted where “lesbians and gays” are and the publication would look as though it was written by an ANC member. By mirroring the message put out by large groups like the ANC, pro-gay groups were able to enter as players in the broad anti-apartheid movement with the largest opponent to the NP government.

This again demonstrates the effect of the efforts of pro-gay groups in achieving their goal of equality rather than a decline in the already existing ill feeling that South Africans held towards the gay population. The goals of the pro-gay groups ran parallel to those of the ANC, so by using similar rhetoric, the gay groups were able to demonstrate the hypocrisy in not accepting complete equality to all South Africans. As explained by Cheryl Carolus, the ANC Deputy Secretary General, in 1995, “[f]or the same reason that I oppose racism and sexism I oppose homophobia.”¹⁷² While “[o]fficial ANC support of gay issues has been at worst grudging and at best half-hearted,”¹⁷³ pro-gay groups were able to ride the coattails of the ANC, and follow its success in achieving full equality. The pro-gay rights groups were successful because of “the support of influential heterosexual sympathizers,”¹⁷⁴ not because of a growing acceptance of their lifestyle throughout South Africa.

Lastly, the decision by gay lobbyists to pursue a constitutional protection of their rights, rather than a campaign to fight for the repeal of each law promoting discrimination against gays, was key in achieving the broad success of equality that homosexuals have gained in South Africa in such a short period of time. The clause in the bill of rights demands the equality for homosexuals as well as the prohibition of discrimination based on sexual orientation.¹⁷⁵ “The most effective legal strategy available to gay and lesbian South Africans[, following the

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Dunton & Palmberg, *supra* note 72, at 47.

¹⁷³ Gevisser, *supra* note 29, at 75-76.

¹⁷⁴ Sanders, *supra* note 95, at 107.

¹⁷⁵ S. AFR. CONST., 1996, § 9(3)-(4).

implementation of the 1996 constitution,] is to develop an arsenal of legal arguments founded upon a nuanced understanding of the equality section of the bill of rights.”¹⁷⁶ Imagine the pain of attempting to get every single discriminatory law off the books without the help of the equality clause of the Bill of Rights. Getting the ANC and other groups to push for total equality based not only on race and gender, but also sexual orientation, has made it easy for pro-gay groups to step into court and demonstrate the clearly discriminatory purpose behind a number of laws put in place by the NP government during the apartheid period. The inclusion of sexual orientation in the equality clause has made the difficulties facing gay rights groups almost nonexistent in the legal realm, but it is important again to remember that gays and lesbians still face a number of stigmas in society.

The implementation of the 1996 Constitution allowed homosexuals to experience the equality afforded to their heterosexual counterparts, but it did not change the high level of homophobia that many citizens in South Africa, as well as Africa, still exhibit. Pro-gay groups must continue to use the equality clause of the bill of rights to repeal the lingering discriminatory laws that were implemented during the apartheid period. The continued existence of hate crimes throughout South Africa as well as recent campaigns from groups like the Congress of Traditional Leaders of South Africa, who are seeking to repeal the inclusion of sexual orientation as a protected class in the bill of rights,¹⁷⁷ suggest that the level of acceptance of homosexuals in South Africa’s society is still far behind what its constitution purports. Gays and lesbians throughout the country must continue to stick together, for the fight for equality does not stop with the laws of one’s country, but also the hearts and minds of all those who live within it.

¹⁷⁶ 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, 608 (1997).

¹⁷⁷ Robyn Dixon, *Gay South African Man Slain in Apparent Hate Crime*, L.A. TIMES (June 13, 2012, 10:58 AM), http://latimesblogs.latimes.com/world_now/2012/06/gay-man-slain-south-africa.html.

