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*SEXUAL ORIENTATION AND THE CONSTITUTION: A TEST CASE FOR HUMAN RIGHTS**

* Inaugural lecture delivered by Edwin Cameron, ad hominem Professor of Law, Centre for Applied Legal Studies, University of the Witwatersrand, on Tuesday 27 October 1992.

I INTRODUCTION

The present constitutional debate in South Africa has focused largely on three issues:

1 the form and powers of the constitution-making bodies and their relation to the exercise of governmental authority during the transition to democratic rule;

2 the way in which a future constitution, once adopted, will be capable of being amended (the question, in other words, of 'minority rights', minority vetoes and 'group', including regional, protection); and

3 the extent to which social and economic rights should be enshrined in, and capable of enforcement through, a bill of rights.[1]

Beyond these issues, notwithstanding justified concerns that the interests of women, for instance, will not be adequately protected under the new dispensation,[2] a large measure of consensus appears already to have been reached. Thus the draft bills of rights of both the government-appointed Law Commission[3] and the African National Congress[4] accept -

1 the centrality of individual rights of equality;[5]

2 that limitations must be placed on governmental power; and

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1 This debate is illuminated by an exchange between E Mureinik and D Davis: see Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 SAJHR 464; Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 SAJHR 475.

2 See generally Cathi Albertyn 'Achieving Equality for Women - the Limits of a Bill of Rights', Centre for Applied Legal Studies, University of the Witwatersrand, Working Paper 17, June 1992.

3 SA Law Commission, Project 58: Group and Human Rights, Working Paper 25 (1989); Interim Report (August 1991).

4 'A Bill of Rights for a New South Africa - A Working Document by the ANC Constitutional Committee' (Centre for Development Studies, University of the Western Cape, 1990); 'Policy Guidelines for a Democratic South Africa' as adopted at the ANC National Policy Conference, May 1992.

5 ANC Bill of Rights article 1; Law Commission Bill of Rights article 3(a).

that its exercise must be subject to oversight by the judiciary.[6]

At the same time both documents recognise -

4 the need for affirmative action to redress existing race- and gender-based inequalities.[7]

Yet the struggle over the three disputed issues - transition; regionalism and minority vetoes; and socio-economic rights - shows the obvious: that constitution-making is not merely nor even primarily about texts and words. It concerns the exercise of power and the assertion of claims to the allocation of resources.

In this context the debate about the inclusion of sexual orientation as a specifically protected condition in a new constitution takes on an especial significance. Gays and lesbians are notoriously uncohesive politically. In addition, there are still substantial inhibitions on their forming open organisations. It is therefore fanciful to suppose that gays and lesbians will in the foreseeable future constitute a significant political power block, either in lobbying or in electoral terms.[8]*

The debate about protecting them from discrimination therefore does not reflect and is not responsive to considerations of power. What is more, entrenching non-discrimination against lesbians and gays in the constitution does not presage any claim to resource allocation: it embodies a quintessential 'first generation' right. Yet the issue goes to the root, I will argue, of the ethics of our constitution-making. The debate about sexual orientation occasions a test of the integrity of the constitution-making process and those who dominate it.

II SYNOPSIS

The argument here proceeds in five stages. After addressing questions of terminology and definition, I first examine the present legal and social position of gays and lesbians. Next I argue that the unique features of their position render them a category specially in need of legal safeguarding. I then examine what form their constitutional protection should take. Finally I submit that the question whether sexual orientation should be included in our constitution as a specially protected condition is a crucial test of our good faith and integrity - as lawyers, as politicians and as citizens - in making

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6 ANC Bill of Rights articles 2(24) and 16; Law Commission Bill of Rights articles 31 and 35.

7 ANC Bill of Rights article 13; Law Commission Bill of Rights article 3(b). The same commitments are in essence reflected in the Democratic Party's Draft Bill of Rights released in May 1993: see amongst others articles 2, 5 and 6.

8 Whether gays and lesbians constitute ten or one per cent of the population - a matter much debated in the United States at the moment: Time Magazine *** - does not affect this point.

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III WHO ARE GAYS AND LESBIANS?

First a question of definition. Who are lesbians and gays? The term 'homosexual' was an invention of the late nineteenth century. The word 'gay' predated it by several centuries.[9] The latter term is currently preferred in especially American activist circles[10] not only because 'homosexual' is seen as condescending, but because its use elevates a defining characteristic (sexual attraction or sexual functioning) to an exclusive basis of definition.

Whatever the term (and I will use 'homosexual' and 'lesbian and gay' indiscriminately), 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. But the question of definition is obviously not only terminological: it is also political and theoretical. While male-male and female-female erotic attraction has always existed, the emergence of homosexual identity as a political fact is a recent phenomenon[11] and one whose social roots are the subject of deep controversy.[12] People who are attracted to the same sex are therefore currently more numerous and historically have existed for longer than those who would recognise themselves as 'gay' or lesbian.

The law has been less concerned with homosexual identity than with homosexual conduct. But social discrimination at large occurs principally on the basis of perceived categories of sexual orientation. In other words, men and women are discriminated against not only because they perform sexual acts with others of their own gender, or because they would accept for themselves the labels 'gay' or lesbian, but because they are perceived as likely or disposed to perform homosexual acts - even if in fact they never do.

Discrimination thus reaches well beyond the self-conscious political categories of orientation.

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9 John Boswell Christianity, Social Tolerance and Homosexuality (1980) pages 41-6.

10 See Dennis Altman The Homosexualization of America (1982) p 6; Daniel J Kane 'Homosexuality and the European Convention on Human Rights: What Rights?' Hastings Comparative and International Law Review 1988 vol 11 p 447 at 448n6.

11 See Altman (above) chapter 2 pages 39-78.

12 On the debate about 'constructivism' and 'essentialism' in the politics of gender and sexuality see Richard D Mohr Gays / Justice - A Study of Ethics, Society, and Law (1988) pages 41-2, 268ff; Altman (above) chapter 2 pages 39-78; Martin Duberman, Martha Vicinus and George Chauncey Jr Hidden From History: Reclaiming the Gay and Lesbian Past (1989) Introduction pages 5-6 and the chapters by Boswell, Halperin and Padgug.

it touches all those who have, or are perceived to have, an erotic predisposition to those of their own sex. The constitutional significance of this in my argument is that it renders general protection, rather than just decriminalisation of criminal prohibitions, necessary.

IV GAYS AND LESBIANS: THE PRESENT LEGAL POSITION

Our law has never treated lesbians and gays kindly. In both the criminal and civil spheres the law's approach has been to punish and to exclude. In Roman law, homosexuals were barred from legal practice - together, apparently, with those suffering from physical handicaps such as deafness or blindness, and gladiators.[13] Roman criminal law expressly prohibited 'unnatural practices' between men.[14] In the Roman Dutch common law a large number of sexual acts between adults - whether between men or between a man and a woman - were criminal if not directed towards procreation. 'Any gratification of sexual lust in a manner contrary to the order of nature', in other words, 'was a crime'.[15] Thus male-female sodomy and bestiality were grouped together with male-male intercourse as 'crimes against nature'.[16] They were punishable by death.[17]

An indication of how broadly the common law authorities regarded 'crimes against nature' - or, rather, how narrowly they regarded what was 'natural' - is the fact that masturbation, whether assisted or solitary, was criminally punished,[18] because it was considered a 'punishable misuse of the organs of creation'.[19]

More difficult to rationalise as a misuse of the organs of creation is the fact that a number of common law authorities regarded heterosexual intercourse between a Christian and a Jew,[20] Turk or Saracen[21] equally as a crime against nature and punishable by death.

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13 W A Joubert The Law of South Africa vol 14 para 234, citing D 3.1.1.

14 J R L Milton SA Criminal Law and Procedure vol II Common Law Crimes (revised reprint 1990) p 267.

15 R v Gough and Narroway 1926 CPD 159 161.

16 C R Snyman Strafreg (3 ed 1992) pages 388, 390-1; J R L Milton (above) pages 267-8.

17 R v Gough and Narroway 1926 CPD 159 162; Milton (above) page 267n5.

18 Milton (above) p 268

19 R v Gough and Narroway 1926 CPD 159 161.

20 Milton (above) p 268.

21 Snyman (above) pages 388n3, 390.

It seems likely that in the Roman Dutch common law sexual acts between women were also criminally punished.[22]

As far as sexual conduct between humans is concerned, most of these many-faceted prohibitions have into current South African law become obsolete.[23] Today only male-male sexual acts are still the subject of criminal inhibition. Anal intercourse between two men is still considered a crime.[24] In addition, as recently as 1967, a two-judge court in the Eastern Cape held that mutual masturbation between two men is criminal as an 'unnatural offence'.[25] What other male-male sexual acts might still be held criminal is uncertain. But recent judicial decisions have shown a clear distaste for expanding the categories of the common law crimes.[26] In one clearly reformist judgment Kriegler J with characteristic strong-mindedness denounced the narrow-mindedness of the common law categories of 'so-called unnatural offences' and called for their restrictive interpretation.[27]

While female-female sexual acts are not by themselves criminal,[28] in 1988 Parliament extended the existing prohibition on 'immoral or indecent' acts between men and boys under 19[29] to those between women and girls under 19.[30] The first prosecution under the extended provision was greeted by wide publicity.[31]

The under-age sex prohibition discriminates against gays and lesbians in two ways. First, the heterosexual age of consent is 16 and not 19[32] (which for gays and lesbian is considerably higher than

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22 R v Gough and Narroway 1926 CPD 159 161, 162, citing the Criminal Ordinance of Charles V; Milton (above) page 268; Snyman (above) p 388n3.

23 Milton (above) p 270.

24 Snyman (above) pages 388-9; Milton (above) pages 271-3.

25 S v V 1967 2 SA 17 (E) 18C.

26 S v C 1983 4 SA 361 (T) 364F; S v C 1987 2 SA 76 (W) 79G. See too the statement in S v M 1990 2 SACR 509 (E) 514b-f ('society accepts that there are individuals who have homosexual tendencies and who form intimate relationships with those of their own sex').

27 S v Matsemela 1988 2 SA 254 (T) 257D, 258C.

28 Milton (above) p 270; Snyman (above) page 389n17, p 391.

29 Sexual Offences Act 23 of 1957 s 14(1)(b).

30 Sexual Offences Act 23 of 1957 s 14(3)(b) as substituted by s 5 of the Immorality Amendment Act 2 of 1988.

31 'City woman on child-sex charge' Cape Times 14 November 1989; 'Women who prey on little girls' Sunday Times 19 November 1989.

32 Act 23 of 1957 s 14(1)(a), s 14(3)(a).

in most Western European jurisdictions).[33] Secondly, the heterosexual prohibition somewhat curiously is limited only to having or attempting to have 'unlawful carnal intercourse' with a boy or girl under 16[34] or soliciting or enticing such a boy or girl 'to the commission of an immoral act'.[35] The homosexual prohibition by contrast extends to committing or attempting to commit with an under-age girl or boy any 'immoral or indecent act'.[36] The effect is that merely committing or attempting to commit an immoral or indecent heterosexual act with an under-age boy or girl without solicitation or enticement is not punishable.

One of the most curious provisions still on the statute books in South Africa, and perhaps one of the most curious statutory crimes anywhere, is s 20A of the Sexual Offences Act. This provision, inserted after a Parliamentary investigation into gays which was prompted by a police raid on a party in Forest Town in 1967, makes criminal 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.[37] The penalty prescribed is a maximum fine of R 4 000 or two years' imprisonment or both.[38] The striking party of this provision is subsection (2), which defines party as 'any occasion where more than two persons are present'.

The critical jurisprudence this provision has evoked includes a solemn decision by two judges of the Supreme Court that 'a party ' was not constituted when a police major, visiting a well-known gay sauna in Johannesburg for entrapment purposes, barged in on a cubicle where two men were engaging in sexual acts and turned on the light. The court held, no doubt properly and fairly, that the two men's jumping apart when the major switched on the light prevented a 'party' from being constituted.[39] The decision is a happy illustration of the grotesque absurdities the attempt to enforce laws of this kind necessarily gives rise to.

The criminal inhibitions on sex between gay men as well as the differential age of consent for gay men and women have a severely negative effect on their lives. Even when these provisions are not enforced, they reduce gay men and women to what one author has referred to as 'unapprehended

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33 For an informative table see Laurence R Helfer 'Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights' New York University Law Review vol 65 (October 1990) p 1044 at 1089-91.

34 Section 14(1)(a), (3)(a).

35 Section 14(1)(c), (3)(c).

36 Section 14(1)(b), (3)(b).

37 Act 23 of 1957 s 20A(1).

38 Act 23 of 1957 s 22(g).

39 S v C 1987 2 SA 76 (W) 81I-J.

felons'.[40] In Norris v Republic of Ireland, where the European Court of Human Rights ruled that Ireland's blanket prohibition on gay sex breached the European Convention on Human Rights and Fundamental Freedoms, the court quoted with approval the finding of an Irish judge that -

> 'One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow ...'[41]

Apart from misery and fear, a few of the more obvious consequences of such laws is to legitimate or encourage blackmail,[42] entrapment, violence ('queer-bashing')[43] and peripheral discrimination such refusal of facilities, accommodations and opportunities.[44] Even to call someone a gay or a lesbian is defamatory.[45]

It is the 'peripheral discrimination', rather than merely the existence of criminal sanctions, which is the real focus of constitutional debate. I move on, then, to consider whether lesbians and gays deserve broad constitutional protection against such discrimination.

V GAYS AND LESBIANS: A UNIQUELY VULNERABLE CATEGORY

Gays and lesbians are in certain respects in a uniquely vulnerable position as far as legal protection and the exercise of political power are concerned.

(i) Disapproval and disgust:

More than any other group, gays and lesbians are regarded and often treated with distaste and

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40 Mohr (above) p 108. Mohr does however report sceptically on gay activists' claims that anti-sodomy laws specifically 'produce severe psychological damage for many gays'. His view is that such damage and unhappiness 'is the result of a general toxic antigay social climate, to which sodomy laws may or may not be a concomitant' (at p 54).

41 Case 6/1987/129/180, Judgment of 26 October 1988, p 7. At p 16 the Court, in similar vein, reaffirmed its earlier pronouncement in Dudgeon v United Kingdom 45 Eur Ct Hr (ser A) (1981) regarding 'the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation'.

42 See Sunday Times and the Sunday Star 18 October 1992 for reports of a 'blackmail gang' terrorising gay men at known cruising spots by posing as policemen and demanding 'fines'.

43 See the Sunday Times and Sunday Star 22 November 1992 for a graphic description of the violent death of Professor Grant Robinson of the University of the Witwatersrand Business School at Zoo Lake, Johannesburg, a known gay cruising spot. An instance of 'bashing' of a gay sex worker, apparently by two gay men, ended in a conviction of indecent assault in S v F 1982 2 SA 580 (T).

44 See the Sunday Star 1 November 1992 for a report on the refusal by many insurance companies in South Africa to insure men known to be gay, regardless of behaviour profile or medical status.

45 Vermaak v van der Merwe 1981 3 SA 78 (N) ('donderse lesbian').

rejection. The irrationality and unacceptability of racism and sexism has become widely acknowledged. But the history of opprobrium toward gays and lesbians is not only unique, as a social phenomenon it is still everywhere. It is countenanced in the media, in employment and in social attitudes.

This often reflects overtly partial and selective reliance on Judaeo-Christian Biblical doctrine and history.[46]

The tradition of intolerance of gay sexual conduct seems to be deeply ingrained in Western legal culture.[47] What is significant, however, is that while all sexual acts not directed at procreation, even those between men and women, were prohibited at common law, the South African legal system has pronounced the non-homosexual 'crimes against nature' obsolete. The disparity and the historical anomaly are apparent.

While negative attitudes to women and blacks are found in our legal sources, these do not compare with the widespread and emphatic disapproval and even revulsion judges have in the past displayed towards gays. These took the form of regarding homosexual conduct both as a defilement and abomination of human nature and thus as immoral and depraved [48] and as a disease or disorder [49]. It is striking that many of the cases do not disclose whether one of the parties to the homosexual conduct was under-age: the sole fact of relevance is homosexuality, and this was sufficient to trigger expressions of moralistic revulsion.

Even liberal commentators like Barend van Niekerk saw homosexuals as a 'third sex',[50] as if

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46 In particular Leviticus chapter 20 verse 13. For discussion see Mohr (1988) 99 ('the long shadow of Leviticus'; Boswell (1980); Law 'Homosexuality and the Social Meaning of Gender' Wisconsin Law Review 1988:2 p 187 at pages 214-218.

47 Compare the concurring opinion of Burger CJ in Bowers v Hardwick 478 US 186 (1986) 196-7.

48 R v Gough and Narroway 1926 CPD 159 163 ('There has been no change in public opinion, which would cause such conduct [ie any "unnatural acts"] to be regarded as otherwise than abhorrent'); R v Curtis 1926 CPD 385 387 (letters proving criminal offence of male-male masturbation 'filthy' and 'disgusting'); R v Baxter 1928 AD 430 431 ('acts of indecency' between two consenting adult men 'of so disgusting a nature that I refrain from repeating them' (Solomon CJ)); Baptie v S 1963 1 PH H96 ('proper that the court should suppress its dismay and disgust at the nature of the offence' between two consenting males in order to assess sentence); S v C 1987 2 SA 76 (W) 79G-H (statute aimed at conduct 'which, from time immemorial, has to many people been profoundly repulsive as depraved and repugnant to nature'); S v M 1990 2 SACR 509 (E) 514b ('[t]he majority of people, who have normal heterosexual relationships, may find acts of sodomy unacceptable and reprehensible'.

49 Baptie v S 1963 1 PH H96 (N) ('it is now well understood as a result of the recent advances in medical knowledge that offences of this kind, involving perversity, are offences which have a background in the disordered mental condition of the perpetrators and that they can usually cured by psychiatric treatment'); S v Mafuya 1972 4 SA 565 (O) 568F-G (a person with a problem of this sort [homosexuality] should, where possible, be helped to overcome his difficulty, and not be punished with a jail sentence); S v K 1973 1 SA 87 (R, AD) ('in many of these cases, the desire to commit these unnatural offences [between adults] stems from some form of mental disease'.

50 'The "Third Sex Act' (1970) 87 SALJ 87. Van Niekerk states that the 1969 amendment (Act 57 of 1969) to the Immorality Act 23 of 1957 (in 1988 renamed the Sexual Offences Act), which introduced s 20A, 'seeks to punish acts which are progressively regarded by medical science and enlightened legal systems as symptoms of an illness and

sexual orientation had anything to do with gender;[51] while the most authoritative English textbook on the criminal law in South Africa remarks that the 'real reason' for the criminal proscription of sodomy 'is the extreme disgust and abhorrence such conduct arouses'.[52] On law reform this book, in wording unchanged since its first edition in 1970,[53] expresses the view that, unlike the position in Britain, 'South African *mores* are not yet ready ... to accept the abolition of sodomy (and other 'unnatural' acts) as criminal [even] *when practised in private between consenting adults*'.[54]

More enlightened current attitudes approach homosexuality as a natural sexual variant unlinked to any pathology,[55] part of what Susan Sontag refers to as 'the ineradicable variousness of expression of sexual feeling'.[56] Research has shown that homosexuality is encountered not only across all classes and sectors in any single culture,[57] but in most cultures historically[58] and in the natural world outside human society.[59]

(ii) *Minority:*

Traditionally disadvantaged groups such as women and blacks both constitute a majority of the South African population. Gays and lesbians, by contrast, are by definition a minority. Paradoxically, their perpetuation as a social category is dependent on the survival of the heterosexual majority. Their seclusion from political power is in a sense thus ordained, and they will never on their own be able to use political power to secure legislation in their favour.

(iii) *Deviance:*

Stemming from their minority, gays and lesbians, like left-handers, are necessarily deviant in that

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not of criminal conduct' (at 89).

51 On constructing homosexuals as a third sex, 'an inversion of the natural process, defying traditional male-female roles' see Gordon Isaacs and Brian McKendrick Male Homosexuality in South Africa - Identity Formation, Culture and Crisis (1992) p 65. Expanding on the prejudices inherent in this sort of terminology, Law 'Homosexuality and the Social Meaning of Gender' Wisconsin Law Review 1988:2 p 187 argues that proscription and condemnation of homosexual behaviour is directed not at sexual acts, but at the violation of socially prescribed gender roles.

52 J R L Milton SA Criminal Law and Procedure vol II Common Law Crimes (revised reprint 1990) p 271.

53 By P M A Hunt.

54 pages 270-1.

55 American Psychological Association Diagnostic and Statistical Manual (3 ed, 1980, reflecting resolutions adopted in 1973); Law (1988) page 205n92, p 206, pages 213-4.

56 AIDS and its Metaphors (1989) p 75.

57 Mohr (1988) pages 21, 174; Isaacs and McKendrick (above) p 65.

58 Mohr pages 27, 32.

59 Mohr p 38.

their sexual orientation differs from the norm. This attracts prejudice and opprobrium in ways that racial variation and gender no longer, or rarely, do.

(iv) *Invisibility or non-obviousness:*

Contrary to popular preconceptions, it is not possible to ascertain a person's sexual orientation by observation. Sexual orientation here again differs from race and gender. At least one United States court has used this very characteristic to deny specially protected status to gays and lesbians. It did so on the ground that non-visibility entails exemption from discrimination based on overt characteristics.*[60] But the reasoning should in fact be the opposite: given current discrimination and stigmatisation, non-obviousness constricts gays' and lesbians' political and social power by imposing on them powerful incentives to continue to suppress or conceal their sexuality.[61]

(v) *Choice and immutability:*

Non-obviousness has a further effect. It encourages the belief that there is an element of volition in sexual orientation. The fact that homosexual orientation is generally immutable has been recognised in our case law,[62] and is widely accepted by psychologists:[63] recent research may indicate that sexual orientation is a product of physiological or genetic factors.[64] Yet the idea of non-immutability continues to contribute to blame and rejection stemming from moral and physical aversion, in that people assume that gays and lesbians can by volition remove the conduct or condition giving rise to disapproval. While it clear that our constitution should protect choices people make, and guarantee their autonomy to make choices affecting their own lives, the moral arbitrariness of discrimination against a person solely on the ground of a characteristic over which he or she has no choice is evident.

(vi) *Sex and sexuality:*

Three factors have contributed to the liberalisation of attitudes to sex and sexual conduct:

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60 Dronenburg; compare Law (1988) p 231n208: orientation is 'not readily observable and hence is not persistently stigmatizing in the way race and sex are'.

61 cf Law (1988) 212: 'The closet metaphor is more powerful for gays, since heterosexism demands that they deny their identity and central life relationships. Gender, by contrast, is visible, like race, and women confront powerlessness, not invisibility'.

62 R v K, referred to in R v C 1955 2 SA 51 (T) 52-3 ('congenital homosexuals, congenitally disposed towards having relations with others of their own sex'); R v C at 52A-B ('a biological condition which it is very difficult to cure - very difficult indeed'); at 53F (possibility that 'treatment' might be effective 'remote'); S v S 1965 4 SA 405 (N) 409E-G (making a distinction between conduct evincing 'a temporary aberration' as opposed to 'a tendency to perversion'); contrast Baptie v S 1963 1 PH H96 (N) ('they can usually be cured by psychiatric treatment'); S v K 1973 1 SA 87 (R, AD) 90C-D ('the reformation of the accused, in the sense that he might be cured of his disease').

63 Law (1988) 205, citing Freud; see also Storr (1964) 81, 118 'It cannot be too often reiterated that sexually deviant persons do not consciously choose to be so'.

64 Sunday Star Review 26 February 1989; Time Magazine 9 September 1991; Saturday Star 1 August 1992; Star Wednesday 5 August 1992. Cf Dennis Altman The Homosexualization of America (1982) pages 44-5.

* The women's movement has led to an assertion of women's sexuality and to very explicit discussion of it.[65]

* The HIV epidemic has made it necessary for governments and public authorities to publicise materials about sexual practices which before would have been unimaginable.[66]

* Popular culture and entertainment since the Second World War have depicted sexual conduct ever more explicitly.

Despite this, significant inhibitions remain: sex is to many still an embarrassing or taboo subject. And no corresponding accommodation of gay sexuality has occurred in mainstream media or entertainment. The reason for the continuing embarrassment surrounding homosexuality is not merely that discussion of it involves sex, but that the difference-defining characteristic itself consists in sexuality. This triggers all the old anxieties and inhibitions about sex, and the constraints of sexuality become combined with and become the focus of the alienating effects of differentness.

(vii) *Corruption and corruptibility:*

Unlike those who experience discrimination on the ground of their sex or race, gays and lesbians face an additional source of social blame in that it is often claimed that sexual orientation is contagious, or subject to conversion (especially in adolescents) by corruption.

Gay men in particular are accused of child-abuse, with its associated implication of contamination and infectious spread of the condition.[67] These beliefs are irrational, but that does not seem to diminish their power to reinforce prejudice and discrimination. In 1987 the Committee for Social Affairs of the tricameral President's Council issued a Report on the Youth of South Africa in which homosexuality was categorised as part of a general problem of promiscuity (along with 'extra-marital sexual intercourse', 'prostitution' and 'living together'.[68] Homosexuality was classed as an 'acquired behavioural pattern' and 'a serious social deviation' which was (predictably) damned as 'irreconcilable with normal marriage'.[69] In the Committee's 'evaluation and findings'[70] it classed homosexuality as

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65 see Shere Hite The Hite Report (1976); Nancy Friday My Secret Garden (1973).

66 cf Susan Sontag AIDS and Its Metaphors (1989) 74-6.

67 cf Isaacs and McKendrick (1992) p 190.

68 Report of the Committee for Social Affairs on the Youth of South Africa (Government Printer, Cape Town, 22 May 1987) para 4.3 pages 42ff.

69 para 4.3.4.3 p 48.

70 Chapter 6.

something by which 'the potential in life' of 'thousands of young people' was 'being destroyed':

> '[T]here is cause for concern about the promising young people who fall prey to these evils [ie, including homosexuality] and have little chance of tasting the joys of achievement and of the realisation of one's own potential.'[71]

VI RACISM, SEXISM AND HOMOPHOBIA

Arguments traditionally used to denigrate people and exclude them from social opportunities and political power on the grounds of race or sex include:

(i) arguments from **'nature'** - what is natural, appropriate, ordained;

(ii) (often though not necessarily linked to the above) arguments from **biblical or other authority** - the immorality or godlessness of liberation and assertion;

(iii) arguments from **inherent impediments** - women are weaker or have less judgment; blacks are inferior or have less ability at specified occupations or activities;

(iv) the **moral threat** from attempts by women or 'other' races to change the existing order - change as a precursor of social and moral disintegration

These arguments have usually been accompanied by demeaning epithets and characterisations of women and of people of other races. While it has become widely accepted as unfashionable, or socially or politically inexpedient, to be a racist or a sexist, and while public rhetoric now largely endorses non-racism and non-sexism, the position is different with gays and lesbians. It is still frequently acceptable to deride and taunt persons on the ground of their sexual orientation and to try to justify discrimination and prejudice against them.[72]

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71 para 6.4 p 89.

72 Kirk and Madsen (1990) 3ff; 63-106; Altman (1982) 60-70; 98-102.

VII THE RATIONALE AND BASIS FOR CONSTITUTIONAL PROTECTION

Two possible arguments for constitutionally protecting gays and lesbians from discrimination have been raised in European and American courts.

PRIVACY: The argument that gays and lesbians deserve special constitutional protection has not been successful in the United States Supreme Court.[73] The US Supreme Court has rejected as 'at best, facetious' the suggestion that its jurisprudence in regard to substantive due process privacy confers 'a fundamental right to engage in homosexual sodomy' so that states cannot criminalise it even when consenting adults engage in it in private.[74] The European Court of Human Rights, by contrast, has found that the protection of privacy guaranteed in article 8(1) of the European Convention on Human Rights and Fundamental Freedoms is violated by criminal penalties against private consensual homosexual activity.[75]

It is important to note that the majority of the US Supreme Court in the Bowers case rejected the claim that the court's jurisprudence entitled gays to protection against sodomy laws on two bases: the first was the court's rejection of the claim that homosexual privacy was 'implicit in the concept of ordered liberty';[76] the second was the majority's finding that the nation's history counted against the argument for non-discrimination against gay men.

Neither we in composing our constitution, nor a future South African constitutional court, will be encumbered by these considerations. In both spheres we operate free of the burdens of legal history: we can therefore try to do better than the majority of the US Supreme Court managed to do.

Recognition of a right to privacy, free of the Bowers court's historicism,[77] would almost certainly guarantee decriminalisation of consensual homosexual conduct in private. But this alone barely begins the process of legal protection which full recognition of the rights of gays and lesbians would entail.[78]

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73 at least in regard to 'due process' arguments under the Fourteenth Amendment to the US Constitution: Bowers v Hardwick 478 US 186 (1986); but contrast Watkins v US Army 837 F 2d 1248 (9th Circuit) acknowledging political exclusion of gays; and see Matthews (1988) 792ff; Mohr (1988) 137-187.

74 Bowers v Hardwick at 191, 192.

75 Dudgeon v United Kingdom 45 Eur Ct Hr (ser A) (1981); Norris v Republic of Ireland, Judgment of 26 October 1988.

76 Palko

77 see Dubber (1990) 208-213.

78 cf Kane (1988) 466ff.

In addition, the privacy argument has detrimental effects on the search for a society which is truly non-stigmatising on the question of sexual orientation. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not so. On the other hand, the privacy argument reinforces the idea that gay sex is shameful or improper.

Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.

DIGNITY AND EQUAL PROTECTION: The only plausible argument for the full recognition of sexual orientation as an impermissible ground of discrimination is the homosexual individual's entitlement to the equal protection of the laws, based on his or her claim to human dignity.

This premise entails acceptance of three critical premises. These are that -

(a) sexual orientation and consensual conduct expressing it do not in themselves justifiably evoke social censure (contrast moral censure);

(b) they are not in themselves evidence of illness or depravity;

(c) homosexual and heterosexual orientation are indifferent factors in the distribution of social goods and services and the award of social opportunities.

If these premises are accepted, as recent research indicates they should be, then there can be no morally non-arbitrary reason for denying gays and lesbians the equal protection of the laws.

VIII POSSIBLE FORMS OF CONSTITUTIONAL PROTECTION

Both the government-appointed Law Commission and the African National Congress have accepted that gays and lesbians are entitled to some measure of constitutional protection. But their means to this end differ markedly.

Law Commission proposals

In its initial paper on Group and Human Rights the Law Commission suggested that, along with women, children and disabled persons, gays and lesbians constitute a 'natural group'. The common characteristic of these groups is that 'they have not chosen to have a particular status in a particular

group, but have been assigned to that status by nature'.[79] Governmental discrimination against these groups should be prohibited. Beyond this, however, '[f]urther protection of these groups is not a problem which should be solved by a bill of rights. ... The proper place for introducing a prohibition on discrimination by one individual against another, or, for example, by an employer against his employees, etc, is in a civil rights charter or civil rights legislation'.[80]

Thus in its original draft Bill of Rights the Law Commission proposed protecting the right to human dignity and equality, 'which means there shall be no discrimination on the ground or race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic'.[81]

In its Interim Report on Group and Human Rights,[82] the Commission's final suggested Bill of Rights included a provision guaranteeing 'the right to equality before the law'. This right expressly proscribes legislative, executive or administrative conduct from favouring or prejudicing 'any person' on the grounds enumerated above, including 'disabilities or other natural characteristics'.[83]

The Law Commission's proposals give rise to a number of problems. First, the reach of the protections afforded is limited to state action. This would not be sufficient to outlaw many of the most pervasive forms of discrimination. In addition, there is a drafting problem in that the formulation implies that 'natural characteristics' are 'disabilities': hence only 'disabilities' that are 'natural characteristics' will be protected from governmental discrimination.

There are major additional difficulties with the Commission's approach. The Commission assumes that judges will interpret the 'natural characteristic' clause to include sexual orientation. This assumption may be mistaken. Given the level of prejudice about homosexuals and homosexual conduct our adjudicative history evidences, it is by no means pre-ordained that judicial interpretation will encompass gays and lesbians in the formulation. Indeed, in its interim report the Commission records the response to its suggestion regarding homosexuals in its Working Paper as follows:

'A few respondents, and in particular Mr N van der Mescht, fear that although homosexuals

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79 SA Law Commission, Project 58, Working Paper 25, 'Group and Human Rights' (1989) p 398.

80 p 399-400 (emphasis in the original).

81 Article 2, p 471.

82 SA Law Commission, Project 58, 'Interim Report on Group and Human Rights' (August 1991).

83 Article 3, p 686.

cannot be regarded as a natural group, a conciliatory interpretation of Articles 2 and 11[84] may result in the State being compelled to allow homosexual couples to marry, adopt children, etc.'

The Commission's response is this:[85]

> 'Other considerations aside, this is again an incorrect view of the scope of fundamental rights which, as already noted, do not apply absolutely and are therefore subject to limitations which may be imposed in accordance with Article 30.'[86]

This response clearly indicates that the Commission perseveres in its view that homosexuals deserve constitutional protection. Its dismissive 'other considerations aside', together with the indication that 'fundamental rights' will be accorded gays and lesbians, even though not without limitation, evidence this approach. But why does the Commission not say so explicitly? The apparent delicacy of the topic and the controversy that an explicit view could evoke seem to constrain the Commission from plainer talk. This raises the question whether our post-constitution judges would be prepared to be any more explicit.

What is more, it is by no means clear what 'limitations' the Commission feels will justifiably be imposed on non-discrimination against gays and lesbians in terms of Article 30 of its first draft Bill of Rights.[87] And on what ground will the limitations justified? Public order? Good morals? Or 'the rights of others'? These questions emphasise the problems that arise from an inexplicit or ambivalent approach.

A further aspect is that in failing to be explicit about the inclusion of sexual orientation, the Law Commission approach creates the risk that associated interpretations of other clauses in the Bill, or in other human rights documents or codes (such as an unfair labour practice definition) may exclude sexual orientation.

ANC Proposals

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84 Article 11 guarantees the right 'to the integrity of the family, freedom of marriage and the upholding of the institution of marriage'.

85 SA Law Commission, Project 58, 'Interim Report on Group and Human Rights' (August 1991), pages 283-4.

86 Article 30 reads:

> 'The rights granted in this Bill may be limited to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others or for the prevention of disorder and crime, but only in such measure and in such manner as is acceptable in a democratic society.'

87 Article 34 of the redrafted Bill in the Interim Report.

By contrast to the Law Commission, the ANC's draft Bill of Rights,[88] as endorsed at its Policy Conference in May 1992,[89] in Article 7(2) expressly makes unlawful discrimination on the grounds of 'gender, single parenthood, legitimacy of birth or sexual orientation'. This formulation has the considerable virtue of expressly naming the condition protected against discrimination.

However the fact that sexual orientation is mentioned in Article 7(2), but nowhere else, gives rise to problems of its own. Why, for instance, are gays and lesbians alluded to, along with single parents, those born outside marriage and the disabled, only once and not also in Article 1[90] or for instance in Article 14?[91] Is the intent of the drafters to create separate categories of those protected against discrimination? Are special prohibitions to apply in the case of some conditions but not others?[92] Since sexual orientation is mentioned only once, will some leeway be allowed in permitting discrimination because of it?

Again, as a mere matter of drafting, it seems mistaken to include sexual orientation in the category of 'gender', since the two have no intrinsic connection.

It may be that the drafters of the ANC document were sensitive to the possible controversy that including gay and lesbian rights could evoke and for this reason perhaps felt it wiser to mention it only in the gender clause and not elsewhere. However, the ANC's Policy Conference in May 1992 expressly endorsed the concept of gay and lesbian rights. The introductory section of the Policy Guidelines, dealing with the Bill of Rights, declares that 'The rights of the child will be protected, as will environmental rights, the rights of disabled persons, and the right not to be discriminated against or subjected to harassment because of sexual orientation',[93] while the section on 'Education, training and

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88 'A Bill of Rights for a New South Africa', Working Document by the ANC Constitutional Committee (1990).

89 'Ready to Govern - ANC Policy Guidelines for a Democratic South Africa', adopted at the National Conference 28-31 May 1992.

90 Article 1 reads:

> '(1) All South Africans are born free and equal in dignity and rights.
>
> (2) No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.
>
> (3) All men and women shall have equal protection under the law.'

91 Article 14 deals with 'positive action'. It commands State distributions 'on a non-sexist and non-racist basis' (14(2)) and requires the State to 'dismantle all structures and do away with all practices that compulsorily divide the population on ground of race, colour, language or creed'.

92 See Cathi Albertyn 'Achieving Equality for Women - the Limits of a Bill of Rights', Centre for Applied Legal Studies, University of the Witwatersrand, Working Paper 17, June 1992, at p 20.

93 para 5, pages 6-7.

scientific development' affirms that 'all individuals should have access to lifelong education and training, irrespective of race, class, gender, creed, age, sexual orientation and physical or mental disability'.[94]

Given this express endorsement, a strategy of circumspection in relation to the ANC's own supporters is therefore, at least on the face of it, unnecessary. Circumspection in regard to opposing negotiating parties seems more understandable. But even here one must ask: will circumspect expression succeed in deflecting attention from the existence of the clause?

The Olivier Commission's final report vigorously attacks the ANC draft bill of rights on the question of its range of application. The attack is not without some warrant. The exact enforceability of the ANC draft Bill is not clear. Thus some clauses impose express duties on private parties[95] while Article 14(1) mandates non-racialism and non-sexism in state activities and functioning, and requires the state to 'encourage the same in all public and private bodies'. Can this be read to imply that racism and sexism is otherwise permitted outside government?

Article 15(1) states that nothing in the Constitution shall be interpreted as implying 'for any person or group the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Constitution, or at their limitation or suppression to a degree other than is authorised by the Constitution itself'. What is the ambit of this prohibition? How will it affect the right to discriminate on the ground of sexual orientation? Article 16(3) provides that the terms of the Bill shall be binding not only on the State and organs of government at all levels, but also 'where appropriate, on all social institutions and persons'. What is 'appropriate'? The fact that sexual orientation is relegated to a mention only in Article 7 makes the answers to these questions difficult to provide.

IX THE CONSEQUENCES OF CONSTITUTIONAL PROTECTION

Whatever the answers, adequate constitutional protection of persons discriminated against because of sexual orientation would entail:

1 *decriminalisation*:[96]

This would require the abolition of the common law 'unnatural sexual offences'; the abolition

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94 p 47.

95 Article 6(10) (employers to provide safe working environments).

96 cf Labuschagne (1986).

of the common law crime of sodomy; removal of sodomy from Schedule 1 of the Criminal Procedure Act 51 of 1977 (sections 40, 42, 49); abolition of s 20A of the Sexual Offences Act 23 of 1957 ('men at a party'); and making the age of consent uniform for hetero- and homosexual acts (sections 14(1)(b) and (3)(b) of the Sexual Offences Act).

2 *legislative enforcement of non-discrimination*

The principle on non-discrimination here would have to be targeted particularly at employment; tenancies; provision of public resources; and insurance, where there is mounting evidence that gay men are blacklisted for insurance regardless of medical status.[97]

3 *rights of free speech, association and conduct*:

Equal protection here would entail no discrimination in public decency laws and in the permissibility of publications and dissemination of information and views, as well as equal rights of commercial association (eg in bars and clubs). This would included the freedom to cross-dress (ie appear in 'drag').[98]

4 *permanent domestic partnerships*

More controversially, genuine recognition of non-discrimination on the ground of sexual orientation would entail granting some recognition to permanent domestic partnerships. This need not take the form of extending heterosexual 'marriage',[99] which both by name and tradition may well be unnecessary and inappropriate.[100] But it would require some institutional recognition of permanent commitment between couples outside heterosexual marriage, in the case of both gay and non-gay couples. Extension of partner benefits in pensions, medical aid, immigration and insurance would be contemplated, as well as rights of intestate inheritance. Where one partner loses the capacity to make conscious choices (of particular significance in the gay and lesbian community given its vulnerability to the AIDS epidemic) the remaining partner's standing should be recognised, whether automatically or through a 'living will' document or power of attorney. There should further be no discrimination in the fair assessment of fostering capabilities in regard to adoption and child care.

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97 See Sunday Star 1 November 1992.

98 See S v Kola 1966 4 SA 322 (A) (dressing in drag may constitute an illegal 'disguise').

99 See the comments of the Olivier Commission: SA Law Commission, Project 58, 'Interim Report on Group and Human Rights' (August 1991), pages 283-4.

100 Even a man who undergoes an effective sex change operation does not count as a woman in the eyes of the law and so cannot marry another man: W v W 1976 2 SA 308 (W).

X CONCLUSION

I have argued that the debate about non-discrimination against gays and lesbians is a test of our integrity and good faith in the constitution-drafting process. Precisely because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitution-making. There is little cost to the majority if non-discrimination against gays and lesbians is to be entrenched except the disavowal of ignorance and irrational prejudice. Conversely, the claims of the gay and lesbian minority to be protected under law are strong: their history of oppression and their still vulnerable position place them uniquely at the mercy of the majority. Their entitlement to constitutional shielding is therefore strong.

The unifying theme of the last three years in our country, despite the awful carnage that has occurred and what seem to be frequent lapses of good faith, has been our search for transformation. As a nation we are laden with the guilt and shame and inhibitions of the past. In our commitment to creating a common future for ourselves we have at least a chance to embrace new principles of dealing with each other.

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 deal not in this coinage but in something different.

William Butler Yeats said, 'We make out of the quarrel with others, rhetoric; but of the quarrel with ourselves, poetry.' We have quarrelled with each other enough in this country: we have quarrelled over race and stigma and hatred and separation. Let us quarrel now rather each with ourself in examining our own deepest prejudices. And from that quarrel, may the constitution we produce consist not of rhetoric, but of poetry in action.