



Constitutional Change and Participation of LGBTI Groups

A case study of South Africa

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CONSTITUTIONAL CHANGE AND PARTICIPATION OF LGBTI GROUPS

A CASE STUDY OF SOUTH AFRICA

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1. INTRODUCTION

‘I’m fighting for the abolition of apartheid. And I fight for freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man’.

Simon Nkoli, first Gay and Lesbian Pride March in Johannesburg, South Africa, 1990. (Luirink, 2000)

In 1993, South Africa promulgated its first democratic constitution, which became known as the Interim Constitution, and became the first country in the world to include a prohibition on unfair discrimination on the ground of sexual orientation directly in its constitution. The Final Constitution, passed in 1996, retained this prohibition. In an attempt to develop an analytical understanding of the various factors that led to the successful and express inclusion of this prohibition, this report considers the history and context in which this ground-breaking development occurred. It also considers subsequent developments after the Final Constitution was passed in order to understand how this provision has been interpreted, as well as the features of the constitution that have played a central role in advancing the rights of lesbian, gay, bisexual, transgendered and intersex (LGBTI) persons. The case study is written with the goal of considering what lessons can be drawn from the South African experience concerning the protection of LGBTI persons in other constitution-making processes around the world.¹

¹ It is important to recognize that different legal and social issues and questions may arise in relation to sexual orientation, the romantic, affective, sexual directedness of individuals towards members of the same or opposite sex or both, which would encompass lesbian, gay and bisexual individuals; and gender identity, the biological sex of the individual together with their identification with that sex and the socio-cultural characteristics that develop around it, which would encompass transgender and intersex persons. There has traditionally been a solidarity between these different groups with campaigns being lodged jointly for recognition in the law. This is true too of South Africa, but much of the campaigning and discussion related to the inclusion of ‘sexual orientation’ as a specific term in the constitution, and the focus of this paper will thus relate more to questions of sexual orientation than gender identity.

2. SEXUAL ORIENTATION AND THE INTERIM CONSTITUTION

2.1. CONTEXT AND EARLY HISTORY

After 1948, the South African government pursued a policy of apartheid, which entrenched the separate and unequal treatment of black people and white people. Black people, for instance, were prohibited from voting and participating in the governance of South Africa, they had restrictions imposed on their ability to move freely around the country (through pass laws²) and to own land, they had to live in separate areas from white South Africans and were deliberately provided with an inferior education. An attempt to force black students to learn in Afrikaans, which was seen as the language of the oppressor,³ led to major protests in 1976 which continued throughout the 1980s. A large amount of internal resistance was built through both violent and non-violent actions. Increasingly repressive means were used by the government to maintain power and to try to stop these protests. Internationally, too, significant pressure was brought to bear on South Africa through sanctions and boycotts. Eventually, in 1990, a new leader of the ruling National Party, FW De Klerk, announced major changes such as the release of Nelson Mandela and the un-banning of the African National Congress (ANC). A process thus began which would ultimately lead to a new constitution for South Africa.

The National Party government that came to power in South Africa in 1948 also sought to impose a particular version of Christianity on South African society. Apartheid was often justified in terms of a specific form of Christian doctrine, and early leaders of the National Party professed to be religious (Kuperus, 1999). Many laws were instituted to favour Christianity. For instance, there was a prohibition on trade and public entertainment on Sundays and Christian holidays, a programme of Christian national education was developed in schools, and Hindu and Muslim marriages were prohibited because they did not conform to Christian doctrine (Farlam, 2006: 41). As part of these measures, a conservative and repressive attitude was adopted towards same-sex sexuality and gender non-conformity. Sex between men was prohibited by anti-sodomy laws, which were enforced by the police, contributing to a sense of persecution of gay

² The apartheid government sought to confine black people in South Africa to specific areas where they were allowed to live. Any black person who left these areas had to carry a 'pass', which was a form of identity document containing personal information and the reason why they were permitted to be outside their designated areas. These laws entrenched the segregation between black and white people as well as the control of white people over the urban areas and most of South Africa.

³ The first white European settlers in the Western Cape were Dutch in origin. During the 18th century, the language spoken began to diverge from Dutch, taking on a variety of influences including Malay, Portuguese and some indigenous languages. In the 20th century, Afrikaans was recognized as a distinct language and an official language of South Africa. The Nationalist Party, which came to power in 1948, was made up largely of Afrikaners (people whose home language was Afrikaans) and thus Afrikaans became associated with being the 'language of the oppressor', despite the fact that it was spoken by many people from different racial groups.

men. Black men were prosecuted for sodomy more frequently than white men (Currier, 2012: 29).

In 1966, the police notoriously raided a private party in northern Johannesburg, arresting the white gay men in attendance (Gevisser, 1994: 30). This raid prompted the South African Parliament to embark on a process of tightening the laws relating to homosexuality in South Africa, making them more draconian and restrictive. It also created a catalyst for organized lesbian and gay resistance, which took the form of the Homosexual Law Reform Fund. The first gay public meeting ever held in South Africa took place on 10 April 1968 (Gevisser, 1994: 32). The strategy of this group involved lobbying law-makers to soften the legal amendments that were being considered; for instance, they lobbied for the most severe criminal measures to be dropped, such as the express criminalization of sex between women, and campaigned against any increase in the penalties for sex between men. The lobbying campaign was successful and the eventual amendments to the Sexual Offences Act 23 of 1957 were not as severe as had originally been proposed. The law still, however, banned the commission of any acts intended to cause 'sexual gratification' between two men at a party, and prohibited the sale and distribution of dildos. It also increased the age of consent for sex between two men to 19, although sex between men above that age could still be prosecuted under the crime of sodomy. After this initial spate of political organization, however, the law reform campaign did not continue to generate political activity. It had been a 'narrowly-defined, single-issue campaign aimed at blocking potential legislation rather than at building an enduring gay and lesbian community' (Gevisser, 1994: 36). Moreover, few activists wished to continue the fight, and those who did faced a state that used the sodomy laws to quash any nascent LGBT movement (Gevisser, 1994: 43). For these reasons, the gay and lesbian movement entered a period of general political invisibility in the 1970s (Currier, 2012), although a club and bar social scene developed in the major cities.

2.2. GAY AND LESBIAN ORGANIZATION

In April 1982, white middle class gay men and lesbians launched the Gay and Lesbian Association of South Africa (GASA), which was the first national lesbian and gay movement in South Africa. GASA focused very much on providing support services and social events. It maintained a stance of being strongly 'apolitical', and refused to condemn apartheid or connect with wider political struggles. This led in 1987 to its expulsion from the International Lesbian and Gay Association (ILGA) and ultimate dissolution (Rydstrom, 2005: 43).

The connection between the struggle against apartheid and the cause of lesbian/gay liberation was to become crucial in encouraging the recognition of gay and lesbian rights in the new South Africa. Early in the 1980s, the young activist Simon Nkoli started organizing a group of black gays and lesbians within GASA (Gevisser, 1994: 52). In 1984, Nkoli was arrested and tried along with several prominent anti-apartheid activists as part of an attempt to crack down on the United Democratic Front (UDF), a movement formed from a range of civil society groups that came together to oppose apartheid and organize popular protests against the apartheid government. (The trial famously became known as the Delmas treason trial.) While in prison awaiting trial, Nkoli came out as gay to his fellow anti-apartheid activists, and played an important

role in convincing them of the importance to the struggle of freedom and respect for lesbian and gay people (Lekota in Hoad, 2005: 152–153). Nkoli became a key figure in giving legitimacy to the gay and lesbian cause through his involvement in the wider anti-apartheid struggle, and in helping to convince senior members of the anti-apartheid movement that lesbian and gay people should also be liberated in a new society. After being acquitted of treason, Nkoli formed the Gay and Lesbian Organization of the Witwatersrand (GLOW), which ‘combined a strong anti-apartheid agenda with public assertiveness around lesbian and gay identity’ (Reid in Hoad, 2005: 31). In 1990, GLOW arranged the first Gay and Lesbian Pride march through the streets of Johannesburg.

In the late 1980s, various other small gay and lesbian organizations had been formed, which sought to position gay and lesbian activism within the wider anti-apartheid struggle and to enable gay men and lesbians to come out within the anti-apartheid movement. These included: the Rand Gay Organization, a multiracial lesbian and gay organization based in Johannesburg formed by Alfred Machela; and Lesbians and Gays Against Oppression (LAGO) in the Western Cape, which was followed by the Organization of Lesbian and Gay Activists (OLGA). Given the proliferation of small organizations, there were some attempts to create a wider alliance, such as in the Congress for Pink Democrats in 1987, but this did not last long due to divisions within the movement (Nicol, 2005: 76). OLGA importantly collaborated with other progressive organizations outside the lesbian and gay world, such as the Organization of People Against Sexism (OPAS), and thus connected with feminist and other causes fighting for social change. A significant moment occurred when OLGA joined the UDF. Its membership of this wider coalition helped to spread knowledge about the issues surrounding lesbian and gay rights (Nicol, 2005: 79). OLGA, as an affiliate of the UDF, made an important written submission to the Constitutional Committee of the African National Congress in September 1990, lobbying for the protection of lesbian and gay rights in its draft constitution.

2.3. THE INTERNATIONAL DIMENSION

The ANC’s draft constitution of November 1990 included a prohibition on discrimination on the grounds of sexual orientation. In addition to the lobbying and submissions from within South Africa, it is important to understand this development in the light of an earlier international incident. In 1987, Peter Tatchell, a well-known British political activist who had been active in the anti-apartheid movement since 1971, raised the issue of homophobic attitudes and the victimization of lesbian and gay people within the African National Congress. While interviewing Ruth Mompati, a prominent ANC leader who in 1956 had led a protest of 20,000 women against laws restricting the freedom of movement of black people, Tatchell raised the question of the human rights of lesbians. Mompati replied that lesbians and gays were ‘not normal’, that they were not persecuted and that this issue was a ‘red herring’ (Tatchell, 2005: 142). The ANC’s chief representative in London, Solly Smith, was also interviewed and confirmed that the ANC did not have a policy on lesbian and gay rights. He also refused to comment on whether an ANC government would repeal anti-gay laws.

Tatchell published these comments in *Capital Gay*, a major lesbian and gay newspaper in London, which caused an outcry among lesbians and gays who were supportive of the anti-apartheid struggle. The interviews were publicized widely within the anti-apartheid

movement and the ANC received many letters of condemnation, which embarrassed the leadership. Tatchell then wrote a letter to a senior member of the ANC, the future President of South Africa, Thabo Mbeki, arguing that all forms of discrimination should be rejected in the South Africa of the future. He also emphasized the role of individuals such as Simon Nkoli in the anti-apartheid struggle. After several weeks, Tatchell received a reply from Mbeki which committed the ANC to ‘removing all forms of discrimination and oppression in a liberated South Africa...[t]hat commitment must surely extend to the protection of gay rights’. (Tatchell, 2005: 145). The ANC thus, for the first time, publicly committed itself to ensuring respect and protection for gay and lesbian rights. Tatchell continued to engage with exiled ANC leaders in London, including Albie Sachs—a member of the constitutional working committee. Tatchell presented draft provisions that drew on examples from anti-discrimination statutes in Denmark, France and the Netherlands. He also presented proposals to local activists in OLGA and GLOW, and arranged for an important meeting between an OLGA representative and Albie Sachs.⁴ OLGA also engaged with several other senior ANC leaders, who expressed support for the constitutional proposals.

2.4. THE CONSTITUTIONAL NEGOTIATIONS

The inclusion of a specific anti-discrimination provision in the ANC’s own draft constitution in 1990 was an important victory. However, the long period of negotiations that followed created uncertainty about whether such a provision would make it into the Interim Constitution of South Africa. Of particular concern for lesbians and gay men was the anti-gay defence employed by the prominent ANC leader, Winnie Madikizela-Mandela, in her trial for murder and the assault of four youths. The defence had painted her as rescuing four young black men from homosexuality, which they sought to portray as a perversion and a product of colonialism and apartheid (Currier, 2012: 40). The ANC executive did nothing to combat these claims, and this raised questions for many about their commitment to lesbian and gay rights.

There was also significant debate within the gay and lesbian movement about how far to go in pursuit of the demand for equality. A leading human rights lawyer, Edwin Cameron, argued in favour of being: ‘Utopian in our thinking but not Utopian in our demands. Utopian in our thinking in that we should state the principle: the principle is a society free from all forms of irrational and unjustified discrimination’ (Cameron, 2005: 186). Cameron argued for a focus on enshrining a principle of non-discrimination, including on the grounds of sexual orientation, in the constitution, as well as some specific legal targets such as the abolition of criminal offences. The campaign, however, should be pragmatic and avoid trying to press directly for same-sex marriage and adoption at that stage, which were highly controversial issues even within the anti-apartheid movement.

In the end, Cameron’s suggested approach was adopted in the constitutional negotiations. At this stage, technical legal arguments and lobbying were of great importance. A

⁴ Albie Sachs was a trained lawyer who became heavily involved in the anti-apartheid struggle. After being imprisoned on several occasions, he was forced to leave South Africa. He became a target for the apartheid government, which placed a bomb in his car leading to the loss of the sight in one eye and one of his arms. He became an important member of the ANC’s Constitution Committee and was later appointed a judge in the Constitutional Court.

second prominent lawyer and activist played an important role: Kevan Botha. Botha was hired by the Equality Foundation as a lobbyist for the lesbian and gay movement, to spend time at the constitutional negotiations and engage with all the key parties. Cameron assisted Botha and provided some of the key legal arguments and strategies.

One of the key debates was whether to include a general equality clause that prohibited discrimination in broad terms, or to have a clause that enumerated specifically the grounds on which discrimination was to be prohibited. In the case of the former option, it would be left to the courts to determine whether a prohibited ground should be included in the protections offered by the constitution. If the grounds were specifically enumerated, however, this would leave much less room for discretion for the courts, which would have to provide remedies for discrimination on all these grounds. Botha and Cameron focused their arguments on the importance of specifically including an enumerated equality clause that included sexual orientation (Reid in Hoad, 2005: 175). They produced a specific submission to the technical committee that advocated such a detailed equality clause (Hoad, 2005: 210–211).

The main focus of the discussion surrounding sexual orientation was on trying to create a South Africa that could embrace all of its citizens.⁵ This emphasis on inclusivity in the negotiations aided the lesbian and gay movement and provided the basis for other arguments related to equal treatment and freedom from oppression. An open-ended enumerated clause⁶ was seen as recognizing the diversity of South Africans and thus indicating the inclusivity of the new legal regime. There also was a strong political imperative to expressly mention race and gender, which opened the door to the inclusion of other grounds (Stychin, 1996: 458). Emphasis was also placed on the oppression and vulnerability of lesbians and gay men. Some concern was expressed about the legal implications—such as for gay marriage or adoption rights—of expressly mentioning sexual orientation in the equality clause. The response to this concern was that the determination of the exact scope of the equality guarantee would need to be left to the courts, and they would have the power to limit rights where necessary (Stychin, 1996: 459).

No political party at this stage wished to actively oppose the thrust of inclusivity, including the National Party government. The Democratic Party and the Inkatha Freedom Party had already followed the ANC by including protections for lesbians and gay men in their draft constitutions. All the key parties to the negotiations thus supported the inclusion of sexual orientation in an enumerated equality clause. When the Interim Constitution was adopted, it therefore contained an enumerated equality clause that included sex, gender and sexual orientation as specific grounds on which discrimination was prohibited.

The Interim Constitution set the stage for the first democratic elections in South Africa. It was regarded as providing:

⁵ The approach adopted to these arguments was confirmed in an oral interview with Kevan Botha.

⁶ This meant that the clause would enumerate several grounds on which unfair discrimination was to be prohibited but not be exhaustive, and leave open the possibility that there would be other forms of discrimination which would also be proscribed.

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

(Postscript to the Interim Constitution)

The Interim Constitution was specifically agreed between opposing parties for purposes of laying down the principles for the future Final Constitution. Once people had had a chance to express themselves through a vote, a Constitutional Assembly would be formed based on the democratic will of the people to negotiate a Final Constitution, which would have to comply with certain entrenched principles in the Interim Constitution. For the LGBTI movement, the focus shifted to ensuring that sexual orientation was retained in an enumerated equality clause.

2.5. KEY SUCCESS FACTORS AND CHALLENGES

Overall, the lesbian and gay movement was successful in having the express recognition of a prohibition on discrimination on grounds of sexual orientation included in the Interim Constitution. A number of key factors can be identified that led to the success of this campaign:

- Connection to the wider struggle

The struggle for recognition of lesbian and gay rights had little success when it was confined to lobbying for a small minority group disconnected from the wider political context. Events in the 1980s around GASA demonstrated that gay and lesbian organizations could not disconnect themselves from the struggle against apartheid. Moreover, integration into the wider political struggle was key to the later successful efforts to protect lesbian and gay rights. These were not new issues for the anti-apartheid movement when they were raised in constitutional negotiations. Engagement between lesbian and gay people and the struggle of other groups helped motivate the inclusion of express protections for them in the future South Africa.

- Lesbian and gay organizing

The inclusion of sexual orientation in the constitution would not have happened without lesbian and gay people lobbying for it to happen. The organizational environment, as briefly detailed above, was fairly splintered, and a number of small organizations existed in the late 1980s. It proved difficult to create a wider coalition among organizations at the time. Nevertheless, these small organizations were effective beyond their numbers and recognized early on in the process the opportunity that the new constitutional framework provided. The organization of lesbian and gay groups was never a mass-based movement that touched all lesbian and gay people, but instead concentrated on a small group of individuals. The individuals concerned—who included both grassroots organizers and professionals—were well connected to some of the decision makers who would shape the new constitutional order. While this could be criticized, it had the

benefit of enabling a fairly concentrated strategy to be developed which allowed a clear and unified message to be sent to the negotiators.

- The personal is political

For lesbian and gay people, it is often true that the personal has become political. Coming out to friends, family and colleagues often shifts attitudes and develops support for lesbian and gay people.⁷ The personal courage of Simon Nkoli in coming out to his co-accused in the Delmas Treason Trial played a significant role in shifting the attitudes of senior leaders of the anti-apartheid movement to lesbian and gay rights. Simon Nkoli showed a commitment to both causes, but also spent time with senior leaders of the UDF, helping them to develop an understanding and acceptance of lesbian and gay people. Other organizations and individuals also created personal connections, which again helped to shift the attitudes of senior leaders. While there was some involvement from the wider LGBTI community, in general the inclusion of sexual orientation in the constitution occurred as a result of contacts and lobbying by a small group of lesbians and gay men. Thus personal connections were key.

- International pressure

The international dimension was of particular importance in changing the ANC's approach to lesbian and gay rights. During the 1980s, the anti-apartheid movement became a global phenomenon, which placed it under significant pressure. Many of those who supported the movement supported non-discrimination across the board. When Peter Tatchell exposed homophobic attitudes among the ANC leadership, this caused significant embarrassment and threatened to undermine support for the anti-apartheid movement. Consequently, in addition to the liberal voices within the ANC, it made strategic sense for the ANC to adopt a more progressive line towards gay and lesbian rights in order to achieve the goals of the organization. Having come out in favour of protecting lesbian and gays in the new South Africa, it became difficult for the ANC to shift position in the constitutional negotiations. This shows the importance, also when dealing with international solidarity, of addressing lesbian and gay issues in the context of wider liberation struggles, which helps set the tone for future developments. It also helps to create international pressure not to backtrack on the wider agenda when constitutional negotiations take place.

- International advice and comparisons

It was also of great importance to the eventual inclusion of sexual orientation in the constitution that there was some precedent for such a move. Models were presented to senior members of the ANC based on non-discrimination legislation in Scandinavia, which suggested the legal approach that could be followed. Local groups also drew on developments in relation to LGBTI rights elsewhere to make their claims.

⁷ *The Economist* (2014: 21) provides an interesting graphic on the relationship between changes in social attitudes towards lesbian and gay people and people's personal knowledge of friends, relatives and co-workers.

- Dedicated lobbying

During the constitutional negotiations, money was raised to ensure that there was a dedicated person present at the multiparty negotiations to lobby on behalf of the lesbian and gay community. This individual was supported by academics and other members of the lesbian and gay community who were well known and well connected to the constitutional negotiators. Having an informed, dedicated person focused on a particular goal and engaged with all the parties was an important part of the successful strategy for the inclusion of the sexual orientation clause. It was also important in ensuring that sexual orientation remained on the agenda, given that many other matters became the focus of decision-makers' attention.

- Expert knowledge

It was important that the lobbyist was a lawyer, and that there was expertise in human rights and constitutional law available. This enabled persuasive submissions to be created that could draw on comparative developments that were occurring internationally in the field of non-discrimination.

- A single issue

One of the key elements in the successful inclusion of sexual orientation was the highly focused campaign on a single issue: the inclusion of sexual orientation in the prohibition on unfair discrimination. This allowed gay and lesbian organizations and lobbyists to make the campaign about non-discrimination and inclusion rather than specific demands that were more controversial. The approach was also rather modest: it did not ask much from negotiators but to agree to a principle of non-discrimination. A more aggressive approach may have struggled to succeed.

- Incompletely theorized agreements

The campaign was also rather vague about the concrete implications of the demand for a prohibition on unfair discrimination. Importantly, lesbian and gay community leaders never specified exactly what concrete outcomes could be expected from the inclusion of such a clause in the constitution. Many people who were comfortable with the inclusion of such a clause would not have been comfortable with all the implications, which were to range from the decriminalization of sodomy to the extension of marriage rights to same-sex couples. The gay and lesbian community did not focus its campaign at this stage on marriage or partnership rights, but rather on the inclusion of a rather abstract principle that was to be left up to judicial interpretation. This follows the logic of what Cass Sunstein (2001: 56–60) terms 'incompletely theorized agreements'. When drafting constitutions, it is often good to specify the general principles on which people can reasonably agree rather than either specifying concrete consequences or delving into deeper theoretical underpinnings. The approach adopted by the gay and lesbian lobbyists and technical drafting committee exemplified this and thus maximized agreement on a general principle of non-discrimination. Adopting this approach, however, requires a range of other constitutional elements to be in place in order to ensure the general principle achieves concrete results.

3. THE RETENTION OF SEXUAL ORIENTATION IN THE FINAL CONSTITUTION

After the Interim Constitution was passed in 1993, the first democratic elections were held on 27 April 1994. These elections were the first in which all South Africans were able to vote regardless of race, and they ensured that the institutions that arose were representative of the wishes of the South African populace. One of the crucial tasks of the two houses of parliament—sitting jointly—was to function as a Constitutional Assembly in order to negotiate a Final Constitution for South Africa. For the lesbian and gay community, the central priority became ensuring the retention of the specific inclusion of sexual orientation in the Final Constitution.

3.1. GAY AND LESBIAN ORGANIZATION

Unlike the position during the lead-up to the Interim Constitution, an umbrella organization representing the LGBTI community was formed during the second stage of the process. The National Coalition for Gay and Lesbian Equality (NCGLE) was formed by LGBTI representatives of a range of up to 78 affiliated organizations from around the country. These organizations elected representatives to an interim executive committee.

The NCGLE modelled itself on other single-issue political campaigns. The goal it set itself during the period leading up to the Final Constitution was to have the phrase ‘sexual orientation’ included in its equality clause. It would then seek to use this development to embark on a process of incremental law reform. The NCGLE sought to ‘co-ordinate the lobbying process and generate a coherent voice from a hitherto relatively weak and fractious gay and lesbian community’ (Reid in Hoad, 2005: 176). The single issue focus of the NCGLE was part of the reason for its success and its ability to unite the gay and lesbian movement around a single cause.

3.2. PARTICIPATION AND SUPPORT

The Constitutional Assembly sought to encourage extensive participation in its work and invited public submissions on the new constitution. This posed a strategic challenge for the NCGLE, given that lesbian and gay people were a minority and market research suggested that the majority of South Africans were not in favour of lesbian and gay equality (Reid in Hoad, 2005: 176). There was a recognition by the NCGLE that it would not be able to compete with a strong campaign organized by conservative religious groupings. Interestingly, this fear proved unfounded: there were 7032 submissions in favour of retention of the prohibition against discrimination on grounds of sexual orientation and 13000 people signed petitions. By contrast, there

were only 564 submissions against the inclusion of sexual orientation in the clause (Botha, quoted in Cock, 2005: 194). It appears that there were only limited efforts by conservative religious groupings to mobilize opposition to the sexual orientation clause. This perhaps reflects the fact that gay and lesbian rights were not a central issue for the wider population in the constitution drafting process.

The NCGLE also sought to compensate for its potential weakness in numbers by garnering letters of support from affiliated organizations and a number of high profile individuals, which it submitted close to the deadline for submissions. Importantly, the NCGLE was able to get the support of a number of icons of the anti-apartheid struggle, some of whom were religious leaders. In particular, Desmond Tutu, the Anglican Archbishop of Cape Town and a famous anti-apartheid campaigner, came out strongly in favour of including a prohibition of discrimination on grounds of sexual orientation in the Final Constitution. Tutu expansively recognized the need for the Final Constitution to guarantee the ‘fundamental human right to a sexual life, whether heterosexual or homosexual’ (Tutu in Hoad, 2005: 222). In 1995, the NCGLE organized a meeting between President Nelson Mandela, a number of NCGLE leaders and the British actor and gay rights activist, Sir Ian McKellen, where Mandela affirmed his support for gay and lesbian rights.

3.3. ARGUMENTS AND STRATEGY

The key approach of the NCGLE was to focus squarely on a narrative of equality and non-discrimination. As Graham Reid explained, ‘it was important that the coalition wouldn’t speak about gay rights, only about equality’ (Cock, 2005: 193). Once again, Kevan Botha was tasked with lobbying the Constitutional Assembly, and its key sub-committee tasked with drafting the bill of rights. The issue was again raised of whether there should be a general prohibition on discrimination in the constitution without specifying any particular grounds, or such a clause should have specifically enumerated grounds. Given the history of South Africa, all parties recognized the importance of expressly prohibiting unfair discrimination on grounds of race. Once a specific ground of prohibition was recognized, other similarly situated groups claimed that they too should be specifically included in the constitution in the same way as had occurred in the Interim Constitution. The constitutional protection of gay men, it was argued, ‘is no doubt the product of our peculiar history, where institutionalized discrimination against people on the ground of race was perfected through the legal system. The racial legacy has given the majority of South Africans a repugnance for the use of legal processes for irrational discrimination’ (Botha and Cameron, 1997: 37).

The submissions by the NCGLE to the Constitutional Assembly emphasized this theme. The argument was made that there was a similarity in all forms of unfair discrimination and that discrimination against gay men and lesbians exhibited the same basic features as discrimination on the grounds of race and gender (Cock, 2005, 193). The submission also contended that sexual orientation was fixed, natural and could not be changed, and based these claims on scientific evidence (Stychin, 1996: 471). Given these features of sexual orientation, the NCGLE asserted the universality of same-sex sexuality—it was found in all parts of society and in every culture. The submission also emphasized the fact that protections for lesbians and gay men did not infringe on the rights of heterosexuals (Stychin, 1996: 471–3). Throughout the process, gay and lesbian claims

were thus presented as non-threatening and as a basic demand for equality. One writer argues that the NCGLE presented a 'moderate and disciplined image of respectable LGBTI activism to targeted political parties and state leaders' (Stychin, 1996: 466). In addition, the full implications of the inclusion of a sexual orientation clause were not elaborated or focused on.

3.4. LIMITED OPPOSITION

Opposition to the inclusion of gay and lesbian rights arose from a number of ideological quarters. It was mostly based on two sources: a claim by African traditional leaders that homosexuality was 'unAfrican', and claims made by conservative religious groups. These two elements came together in the African Christian Democratic Party (ACDP), which argued strongly for the removal of mentions of sexual orientation from the Final Constitution. The party's own legitimacy was limited, however, given that it had won only 88104 of the 32 million votes cast in the 1994 election. The reality was, however, according to various surveys conducted at the time, that these opposition voices probably represented a large segment of the South African population (Cock, 2005: 1994).

However, the majority party, the ANC, as well as all the other opposition parties did not oppose the inclusion of sexual orientation in the Final Constitution. The matter was not one that could cost any of these parties substantial support. The atmosphere of inclusivity continued in the drafting and ratification of the Final Constitution. Given South Africa's history of discrimination, it can be surmised that none of the parties wished to be seen as standing against a particular grouping or taking rights away that had already been granted in the Interim Constitution (Stychin, 1996: 476). The focus on rights and equality meant that none of these parties wished to be perceived as oppressing a particular minority. Most of the drafting of the bill of rights also took place among a group of experts who were largely sympathetic to the inclusion of sexual orientation in the equality clause. In the end, virtually all the parties supported the inclusion of sexual orientation in the equality clause of the Final Constitution and the clause was retained.

3.5. ANALYSIS

The retention of the sexual orientation clause in the Final Constitution was a major victory for the LGBTI community. To understand how this came about, a number of factors should be considered.

- Momentum

The fact that a sexual orientation clause had been included in the Interim Constitution created a certain momentum in favour of it being retained. It would have been difficult for negotiators to justify keeping an enumerated clause but omitting some of the categories recognized in the Interim Constitution. The initial achievement thus set a process in motion that made retention likely.

- A unified lesbian and gay umbrella organization

The NCGLE was an important development in that, despite the diversity within the LGBTI community, it united a range of disparate LGBTI organizations and

was able to speak with a single voice in favour of retention of the sexual orientation clause. Members involved in the organization testified to the discipline this involved and the clear need to manage the message that was portrayed.

- Strategy

The NCGLE adopted a clear but multi-pronged strategy in seeking to secure the retention of sexual orientation in the constitution.

- High-profile support

The NCGLE was able to secure high profile support from leaders with strong moral legitimacy, which assisted its campaign.

- Divided religious groups

It was helpful to the LGBTI advocates that religious groupings did not speak with one voice. Some of the progressive, anti-apartheid religious organizations supported the inclusion of the sexual orientation clause. It was conservative religious groupings without a strong electoral base that were strongly opposed to the clause.

- Equality, race and sexual orientation

Importantly, South Africa's history provided a strong reason to oppose unfair discrimination on grounds of race. All parties recognized the need to do away with this form of unfair discrimination and virtually none wished to be seen to support new forms of such discrimination. Consequently, the wider political and moral values underlying the new order supported the eradication of unfair discrimination in all its forms. Argumentation that discrimination on grounds of sexual orientation was similar to that on grounds of race successfully ensured support for the inclusion of sexual orientation in the equality clause.

- Single issue focus

As in the process that led to the Interim Constitution, the exclusive focus on the non-discrimination clause was an important factor.

- Incompletely theorized agreements

The NCGLE focused on the non-discrimination clause and did not focus on specific, concrete claims such as equal marriage rights, which would have been more controversial.

- Dedicated lobbying and expertise

Individuals spent time lobbying the new parliament and making personal connections to encourage support for the cause. This lobbying took place against a backdrop of expertise in human rights and constitutional law, which, once again, was able to assist the committee involved in drafting the bill of rights.

4. THE CONSTITUTION'S PROMISE: HAS THE SEXUAL ORIENTATION CLAUSE DELIVERED EQUALITY?

The inclusion of a specific prohibition of discrimination based on sexual orientation in the Final Constitution was a significant achievement. South Africa's constitution was the first such foundational document to include such a provision. Nonetheless, at the time the constitution was passed, laws remained on the statute books which criminalized same-sex sexuality, and there was no legal recognition provided to same-sex relationships. There were also widespread negative social attitudes to LGBTI people. To become truly meaningful in the lives of ordinary people, it was necessary to move beyond constitutional change to further legal and social changes. This section considers some of the changes that have taken place, and focuses in particular on the constitutional provisions and arguments that have played an important role in securing legal equality for LGBTI people. It seeks to show that the sexual orientation clause, while crucially important, must be considered together with other important features of South Africa's Final Constitution to explain the progress that has been made. The limits of constitutional processes in changing social attitudes are also briefly explored.

4.1. LITIGATION

Early on in the discussions around the constitution, Edwin Cameron argued for a gradualist approach to change within the law. After the adoption of the constitution, Cameron and some of the other activists involved in the process helped to devise a litigation strategy for the NCGLE. The strategy listed a number of goals the movement would seek to achieve and the order in which this should be done. It started with what were regarded as the least controversial and most winnable objectives, such as the decriminalization of same-sex sexuality and achieving an equal age of consent. Thereafter, the strategy sought to develop a range of specific partnership rights, which would eventually result in the recognition of same-sex marriage and adoption. As with all important public interest litigation, close attention was paid to the particular litigants and the arguments that were being made.

4.1.1. *Constitutional supremacy and judicial review*

The litigation strategy was predicated on a very important feature of the new constitutional order in 1996: the recognition of the supremacy of the constitution (section 1(c) and 2). This crucial principle means that any law or conduct inconsistent with the constitution is invalid. A second key feature of both the Interim and Final constitutions was the recognition of the principle of judicial review. This meant that the superior courts were provided with the powers to declare any piece of legislation or conduct by the president or executive inconsistent with the constitution (section 172(1)(a)), and to make any further order that is just and equitable (section 172(1)(b)). Judges were thus

entrusted with a large amount of power to determine the constitutionality of legislation and executive conduct.

Given the history of South Africa, however, the judiciary under the apartheid government had been almost exclusively white, male and often conservative. In order to entrust the power of judicial review to the judiciary, the negotiators agreed that there would be a need to establish a new Constitutional Court, which would have the final say over the constitutionality of legislation and the conduct of the president (section 172(2)(a)). Special procedures were adopted for the appointment of judges to the court. A judicial services commission was formed to nominate a list of judges to the president, from which he or she would have to choose. The constitution expressly referenced the need for the judiciary to reflect the broad racial and gender composition of South Africa (section 174(2)). Overall, these provisions meant that a new court would be appointed that was diverse in its nature. Many of the judges appointed had a history in the anti-apartheid struggle, progressive politics and academia, which was important in terms of charting developments in the arena of LGBTI rights.

4.1.2. Broad standing provisions

The first important case to challenge the constitutionality of existing statutory and common law provisions was related to the criminalization of sodomy (*NCGLE v. Ministry of Justice*, 1999 (1)). Interestingly, the case was brought in the name of the NCGLE as well as the South African Human Rights Commission—a new body established by Chapter 9 of the 1996 Constitution to promote human rights. Another key element of the constitution was its recognition of the broadly defined provisions in section 38, which enabled a range of persons to approach the court to defend their rights. This section allowed ‘an association acting in the interest of its members’ to challenge the constitutionality of legislation or executive conduct. In this case, two organizations used this new provision successfully to bring a challenge to the existing law criminalizing sodomy.

4.1.3. The interpretation of the sexual orientation clause

The inclusion in the constitution of an express prohibition on discrimination based on sexual orientation meant that, in the *NCGLE* case, the majority of the court immediately focused on equality as the central concern. This is important because similar decisions in other jurisdictions have been made in accordance with other rights and values such as privacy and freedom.⁸ The court did raise questions of privacy but the focus of the judgment was on equality. This shows the manner in which the framing of the constitutional discussion affected post-constitutional developments.

The court immediately drew on its developing jurisprudence and tests for determining unfair discrimination (*NCGLE v. Ministry of Justice*, 1999 (1): paras 15–19). In its judgment the court also drew on a well-known academic article by Edwin Cameron (1993), which indicates the significant role academic research can play in legal change.

⁸ See, for example, *Lawrence v. Texas*, 539 U.S. 558 (2003), where the criminalization of sodomy was found to infringe privacy and liberty interests. See also *Toonen v. Australia* Communication number 488/1992 (31 March 1994) UN Human Rights Committee Document No. CCPR/C/50/D/488/1992, where the UN Human Rights Committee held that laws in Tasmania which prohibited sexual activity between men violated the right to privacy in the ICCPR.

Interestingly, the court adopted a wide interpretation of the notion of sexual orientation that also included issues of gender identity within the term. The court then, in its approach to discrimination, considered the harmful social and psychological impact of the criminalization of sodomy on gay men and found that it fundamentally affected their dignity. The provisions were found to be unfair and declared unconstitutional.

Importantly, this first judgment of the Constitutional Court on LGBTI rights set the framework for future judgments (De Vos, 2007: 449). The next major challenge related to the constitutionality of a provision of the Immigration Act that allowed a foreign opposite-sex partner of a South African citizen to live in South Africa but denied the same treatment to a foreign same-sex partner of a South African. The court found that ‘there is still no appropriate recognition in our law of the same-sex life partnership, as a relationship, to meet the legal and other needs of partners (NCGLE v. Minister of Home Affairs, 2000 (2): para. 37). The court recognized that the law essentially accorded far less respect to same-sex relationships than opposite-sex relationships and consequently undermined the dignity of lesbians and gays. It thus found the existing provisions unconstitutional and forced a change in the legal dispensation in this regard.

4.1.4. The use of comparative law

Interestingly, in both judgments the court referred to a range of judgments from other countries to support its approach to lesbian and gay rights. This flows from the inclusion in the constitution of a provision that, when interpreting a provision of the bill of rights, requires it to consider international law and *permits* it to consider foreign case law (section 39(1)(b) and (c)). These provisions enabled the court to refer to progressive developments in overseas jurisdictions that helped to advance the rights of lesbians and gay men.

4.1.5. Wide remedial powers

In addition, once the court had found unfair discrimination in the immigration case, it took a rather novel approach to providing a remedy. It introduced the notion of ‘reading in’ particular words to a statute. The problem with the statute was the unfair exclusion of same-sex couples.⁹ Instead of sending it back to parliament to correct this defect, the court itself required the insertion of the wording ‘or permanent same-sex life partnership’ into the statute. This avoided the need for a legislative process and allowed for immediate vindication of the rights of same-sex couples in this regard. Such an approach was enabled through the wide remedial powers provided to the court by the constitution in section 172(1)(b), which allows a court, on finding a source of unconstitutionality, to make any order that is just and equitable.

Once the important step had been taken of recognizing lesbian and gay partnerships, a variety of cases followed which extended the rights accorded to same-sex life partnerships. These included pension benefits (Satchwell v. President of the Republic of South Africa, 2002 (6)), adoption rights (Du Toit v. Minister of Welfare and Population Development, 2003 (2)) and the right of a lesbian couple to artificial insemination

⁹ Section 25(5) of the Aliens Control Act 96 of 1991 read: ‘Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit.’

(*J v. Director General, Department of Home Affairs, 2003 (5)*). All focused on the unfair discrimination in a particular legal regime at the time, and many involved the courts simply reading in the words ‘or permanent same-sex life partnership’ to extend the rights in question to same-sex couples. In the case of *J*, however, the court expressed its dissatisfaction with these piecemeal challenges, stating that: ‘[c]omprehensive legislation regularizing relationships between gay and lesbian persons is necessary. It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation’ (*J v. Director General, Department of Home Affairs, 2003 (5)*): para. 23).

4.1.6. The separation of powers

Shortly thereafter, the restriction of the institution of marriage to opposite-sex couples was challenged. The reasoning of the court situated the case within the history of South Africa’s discriminatory past of prohibitions on close personal relationships between individuals, for instance, from different racial groups. The court recognized both the practical and the symbolic consequences of marriage and that the exclusion of same-sex couples from this institution ‘represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples’ (para. 71). The Constitutional Court found that the failure of the South African legal system to provide the means whereby same-sex couples could enjoy the same status, rights and responsibilities that heterosexuals have in marriage represented a violation of the rights to equality and dignity (*Minister of Home Affairs v. Fourie, 2006 (1)*): para. 114). Instead of reading into the Marriage Act, the majority of the court sent the matter back to the legislature to remedy the problem within a year, and placed strict conditions on the legislative scheme that would result. In particular, it provided that the legislature was not entitled to pass a scheme that would be separate but unequal in nature.

The court’s order demonstrates clear recognition of the importance of the doctrine of the separation of powers in South African constitutional law, another feature of the 1996 Constitution. The court in this case recognized that the matter touched strong public and private sensibilities (para. 138) and that the legislature is better-suited to finding the best way to include protections for same-sex couples. Moreover, the court indicated that lasting legislative action will be more likely to concretize the search for equality by lesbian and gay people. It also stated that: ‘The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be’ (*Minister of Home Affairs v. Fourie, 2006 (1)*): para. 137).

The court thus recognized the limitation of its own power in the context of bringing about widespread social change. Indeed, while most of the concrete advances for lesbian and gay people in South African law had until this point taken place through the courts, some perceived that these changes took place at a relatively elite level without more general public participation. The legislature is a representative, majoritarian institution and, as such, must also take responsibility for advancing the rights of LGBTI people. It also had to engage in a process of public participation around the new law, which offered an opportunity to widen the discussion around homosexuality and same-sex

marriage nationwide.¹⁰ The court used the doctrine of separation of powers in this case to require the legislature to act within quite narrow constraints to advance LGBTI equality (Bilchitz and Judge, 2007: 498–499). I now turn to considering the action taken by the legislature since the passage of the constitution.

4.2. LEGISLATION

As the history of litigation around lesbian and gay rights indicates, the legislature was slow to respond to the unfair discrimination against lesbian and gay people that had been entrenched in the apartheid legal order. From the decriminalization of sodomy to same-sex marriage, the legislature did not take the initiative. Several explanations can be suggested for this: the post-apartheid government was thrown into a major project of social change and, as a minority, LGBTI rights were simply not prioritized. The social changes involved were also controversial among the ruling party, as the same-sex marriage debate would highlight. The LGBTI community was never fully mobilized and organizations such as the NCGLE, which was later replaced by the Lesbian and Gay Equality Project, focused on court-based change rather than creating a grassroots movement. The legislative changes that were effected in relation to LGBTI people thus, in general, did not specifically address the legislature during the first ten years of democracy. Instead, they followed the pattern set by the constitution—developing laws prohibiting unfair discrimination on a range of grounds, which included sexual orientation. It was only in relation to same-sex marriage that the legislature was forced to act by the courts.

4.2.1. Ending labour discrimination

The Labour Relations Act 66 of 1995 was a ground-breaking piece of labour legislation which included the right of employees not to be unfairly dismissed. Section 187(1)(f) provided that a dismissal would automatically be unfair if it was based on any form of unfair discrimination on any of the prohibited grounds in the constitution, including sexual orientation. Similarly, the Employment Equity Act 55 of 1998, which specifically provides for affirmative action measures in the workplace, mandates employers to take active measures to achieve equal opportunity in the workplace and eliminate unfair discrimination (section 5). Section 6(1) reiterates the prohibition of unfair discrimination on numerous grounds, including sexual orientation.

4.2.2. Ending all forms of discrimination

Having established a prohibition on unfair discrimination in the workplace, the legislature passed the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which expressly prohibits unfair discrimination in any sphere of South African society. This was in response to a clear constitutional mandate to pass such legislation. It also established special equality courts to adjudicate on

¹⁰ Unfortunately, many of these consultations were not run well and often became an opportunity for community members to express homophobic attitudes. Very few LGBTI people felt comfortable speaking in this hostile environment. The public participation process raises important questions about how such an approach can be designed to enable all voices to participate and encourage a social discussion that will enhance rather than impede social equality.

cases of such discrimination.¹¹ The prohibited grounds once again included sexual orientation, and the law also included a ban on hate speech on any of the prohibited grounds. The importance of the inclusion of sexual orientation in the equality clause of the constitution can be seen in all these pieces of legislation. In general, all the grounds for prohibiting unfair discrimination that are in the constitution are included in the legislation, and thus the constitutional inclusion helped shape future legislative developments.

4.2.3. Legislative change for transgender and intersex persons

In relation to gender identity, the legislature passed the Alteration of Sex Description and Sex Status Act 49 of 2003, which allows transgender and intersex persons to change their sex in official records. Such a change can occur without genital surgery. Moreover, in 2005 the legislature amended the PEPUDA specifically to include a prohibition on unfair discrimination against intersex people, by including the notion of intersex within the definition of sex (Judicial Matters Amendment Act 22 of 2005).

4.2.4. Achieving same-sex marriage and the sexual orientation clause

Finally, in response to the Constitutional Court's order that it must remedy the legislative defect, the legislature was forced to engage with the question of same-sex marriage. The initial draft bill proposed a regime in which lesbian and gay people could form a civil partnership that would have the same legal rights and responsibilities of marriage, but would not be referred to as a marriage. Several lesbian and gay organizations opposed this draft bill, arguing that the creation of a separate legal regime smacked of apartheid logic, relegating lesbian and gay people to a separate but unequal status. The argument was also made that the foundational values of the South African Constitution, equality, dignity and freedom, supported the rights of same-sex couples to marry if they so wished (submission by Joint Working Group, 2006). These arguments, together with lobbying and social activism, had an effect, and the government changed the draft law to meet the demands of the lesbian and gay community.

The draft bill was changed to enable same-sex couples officially to marry in South African law, and to enable straight couples to marry under the terms of the new law. The Civil Union Act 17 of 2006 was passed and South Africa became the first country in Africa, and only the fifth in the world, to recognize same-sex marriage. The achievement of same-sex marriage in South Africa can also be traced to the inclusion of sexual orientation in the bill of rights and the earlier debates that had surrounded this. The court framed the issues in terms of unfair discrimination, but arguments rooted in South Africa's history and the more general values of the bill of rights continued to play an important role in this key legislative development.

4.3. SOCIAL CHANGE

The inclusion of sexual orientation in the constitution has had a significant impact on the post-apartheid legal regime as it affects lesbians and gay men. This is a major

¹¹ Equality Courts are staffed by specially trained presiding officers in specific magistrates courts and High Courts. They were set up under the terms of the PEPUDA Act specifically to deal with cases of unfair discrimination, hate speech and harassment.

achievement. Legal changes have also had concrete effects on people's lives: no longer can people be arrested for consensual same-sex relationships, people cannot be discriminated against in the employment context, and same-sex relationships now attract a number of legal benefits. At the same time as these momentous changes have taken place, however, it is important to consider whether legal change has become a catalyst for or accompanied concomitant changes in attitudes towards LGBTI people and the lived experiences of LGBTI people in South Africa. This is a large subject that can only briefly be addressed here.

4.3.1. *Belonging*

A number of studies have been conducted across racial, gender and class lines about the experience of LGBTI persons and their sense of belonging in South African society. Mikki Van Zyl, for instance, conducted interviews with several LGBTI people about their experiences in the workplace in South Africa. Her findings are that:

the judicial framework with its political values of legal rights aiming to protect LGBTI citizens provides a solid foundation for sex/gender/sexuality non-conforming people to express their identities. Although most participants still experienced homophobia, they did not doubt that they belonged inside the boundaries of citizenship and that other citizens needed to change their attitudes. (Van Zyl (interview), 2014: 149)

Similarly, in relation to their experience of same-sex marriage, many participants indicated that their marriages were significant not only to them personally but to their families. Their marriages also led them to feel a sense of acceptance and safety, despite continuing violent crime against lesbian and gay people. Van Zyl concludes that, '[d]espite the dangers of being out, these couples show that the Civil Union Act is a crucial cornerstone in lesbian belonging in South Africa' (Van Zyl, 2011a: 63).

4.3.2. *Violence*

Despite these positive results, there have also been a number of negative developments. There have been numerous murders and rapes of black lesbians, who appear to have been targeted specifically because of 'who they are—non-gender-conforming women, black and living in a township' (Van Zyl, 2011a: 56). Many black lesbians and some gay men express fear of being subjected to violence because of their sexuality. This violence suggests that, in some quarters, social attitudes have not advanced, and prejudice and discrimination have become more entrenched. This has become a major issue, which has led to a taskforce being set up by the Department of Justice to investigate whether specific hate crime legislation should be passed. It also demonstrates the manner in which forms of oppression and discrimination—based on race, gender, class and sexual orientation—overlap.

4.3.3. *The persistence of discrimination*

There have been a few cases where religious bodies have sought to discriminate against individuals on grounds of their sexual orientation (see, for example, *Strydom* and *De Lange*). From time to time, voices from among conservative religious communities and African traditional leaders speak out against LGBTI people. The tension between religious/cultural freedom and the prohibition of discrimination on grounds of sexual orientation will no doubt generate future case law and pose a challenge for the state authorities (see Bilchitz, 2011).

In one respect, the constitution has a role to play in this regard. Section 7(2) of the constitution places a duty on the state to 'respect, protect, promote and fulfil' the rights in the bill of rights. One of the less explored features of human rights law is the specific duty to 'promote' rights. This duty involves not simply prohibiting discrimination, but an active responsibility on the state to educate and change social attitudes in order to move towards a situation in which equality can flourish (Dafel, 2014: partem). The South African government has an important role to play in fulfilling its duty to promote the right to equality for LGBTI people. Programmes have been launched, but these need to be continually monitored and developed to ensure that they are capable of promoting the society promised by the constitution.

5. CONCLUSION: LESSONS FROM SOUTH AFRICA

There is no question that the legal position of LGBTI persons is fundamentally different in the South Africa of 2014 than it was in the South Africa of 1984. In 30 years, LGBTI people have had their rights protected by a constitutional provision, and various legislative provisions and court decisions. The South African context clearly has a number of particularities and each process of social change will have its own dynamics. Yet, even if we accept this, the question arises whether there are any lessons to be learned from the South African experience to help advance the rights of LGBTI persons in other constitutional processes. A number of factors may be useful in this regard.

- Connection to wider struggles and values

The LGBTI community is always likely to be a minority in whichever constitutional process it participates. It is thus important that the main political parties see a reason to protect LGBTI rights. In South Africa, the LGBTI movement began to be successful in its efforts to win recognition from various organizations and individuals connected with the wider struggle against apartheid. In the words of De Vos (2007: 436), ‘the gay and lesbian movement was ultimately successful because its leaders were fortunate and wise enough to be able to present their struggle as forming part of the broader struggle against the oppression of the apartheid state’. In turn, it was important to recognize that the values—such as equality, freedom and dignity—which were being argued for in the struggle against apartheid supported the case for LGBTI equality. It is thus necessary to consider in what way the struggle for LGBTI rights can connect with the political struggles that lead to constitutional change.

- The personal and the political

The South African case illustrates the importance of the relationship between the personal and the political. The role of an individual like Simon Nkoli was invaluable as he straddled the boundary between general political legitimacy with the ANC and the LGBTI community. Personal connections between constitution-drafters and senior members of the LGBTI community meant that the committees were favourable towards LGBTI rights and equality. The personal dimension also meant that LGBTI people were not simply an abstraction but known as individuals and friends of important political actors. This enabled high-profile supporters such as Desmond Tutu and Nelson Mandela to be enlisted.

- LGBTI organization

The sexual orientation clause would not have been included had it not been for the organizing and lobbying of the LGBTI community. Although there were multiple organizations, there was a common platform that all shared to provide

protection for LGBTI rights in the South African Constitution. For the Final Constitution, one unified body—the NCGLE—was formed and provided a coherent focus for the campaign. In other contexts one could perhaps consider the importance of a unified message and active lobbying on behalf of the LGBTI community. There was, however, no activation of large numbers of LGBTI people in general, although the merits and disadvantages of such an approach are open to debate. Important too was the connection between LGBTI groups and other organizations lobbying, for instance, on behalf of feminist causes.

- Framing

How the claims for LGBTI rights were framed was important in the South African context. There was an attempt to focus on equality and non-discrimination in the light of South Africa's past. The values of freedom and dignity also played a role. The claims did not highlight the specific consequences of protecting LGBTI people from discrimination. Nor did they seek to advocate directly for marriage or adoption rights, which were more controversial. The campaign was successful in focusing on values that most parties shared rather than on divisive concrete questions, which were left up to later interpretation by the courts.

- The importance of multiple elements of constitutionalism

It is important to recognize that many of the advances in LGBTI equality were not due to the inclusion of sexual orientation in the non-discrimination clause alone. Several other features of the South African constitution contributed to these progressive developments. These include the right and value of dignity, constitutional supremacy, judicial review, the interpretation clause in the constitution drawing on foreign case law, wide standing provisions, wide remedial powers of the court, the doctrine of the separation of powers and the development of independent institutions such as a human rights commission. This is an important point for other contexts. The focus on protecting LGBTI rights should not be solely on a specific clause but also on various broader features of constitutionalism. More general rights may sometimes offer significant protection for the LGBTI community in the future if adequate institutional arrangements are provided. It is of course desirable to have a specific clause protecting LGBTI rights, but it is neither necessary nor sufficient to guarantee progressive developments in this regard.

- International solidarity and assistance

The struggle against apartheid took place not only in South Africa but with significant international solidarity. This element played an important role in the shift that took place in ANC policy. Peter Tatchell's important challenge to ANC policy took place before the changes in South Africa but laid the groundwork for future development. It was important to have academics and activists provide templates and suggestions for how the protection of LGBTI rights could be accomplished in the South African Constitution. Such a role for international solidarity and assistance could also help with other constitutional processes, particularly given the even stronger protection LGBTI rights now receive in many countries.

- A divided opposition

Very important in the inclusion of the sexual orientation clause was the marginalization and division of the opposition to the claims of the LGBTI movement. Despite the existence of a significant number of people with negative attitudes towards homosexuality, the opposition was not able to mobilize around this issue or demonstrate the degree of opposition in society. The LGBTI community did not attempt to compete with the opposition in terms of numbers of submissions. However, the chief party opposing the sexual orientation clause, the ACDP, received a very weak electoral mandate. Moreover, it was significant that churches did not speak with one voice, and progressive churches supported the inclusion of sexual orientation. As such, there was no forceful opposition to counteract the claims made by the LGBTI community. This may be different in other contexts but the South African case may provide some assistance in suggesting how to deal with forces opposed to LGBTI rights.

Importantly, the South African experience shows that constitutional entrenchment of non-discrimination against LGBTI people is an important first step on the road to greater legal equality and some important social changes. It is not the whole story, however, and the battle for LGBTI equality is not won by legal victories alone. The manner in which constitutional and legal change take place can also condition the future social movements and changes that emerge. Unfortunately, there continue to be a range of small lesbian and gay organizations and no coherent overarching LGBTI organizational voice in South Africa. These organizations work in various spheres to combat harm and provide conducive spaces for LGBTI communities to flourish. The government still needs to show the commitment and drive to advance LGBTI equality in a more proactive manner. Thus, while on a legal level the constitutional prohibition against unfair discrimination has been entrenched, much still needs to be done by both the state and civil society on a social level to give full expression to the constitutional promise.

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