

## **Chapter 5: Politics Regarding Homosexuality and Constitutional Recognition for Gay Men in the Late 1980s and Early 1990s.**

### **Introduction.**

Because the versions of masculinity are not fixed gender patterns change. Especially in multicultural societies such as South Africa, there are multiple definitions and dynamics to masculinities.<sup>1</sup> Moreover, different historical situations and different institutions are usually more prominent in the construction of masculinities<sup>2</sup> at different times. This became the case, albeit slowly, with the ANC as it began to allow for a new definition of masculinity to evolve. But how did this come about? The answer lies in the contribution of individuals like Cecil Williams,<sup>3</sup> Archbishop Desmond Tutu,<sup>4</sup> Simon Nkoli, Albie Sachs, Kader Asmal, Edwin Cameron, Kevan Botha, the insistent lobbying of OLGA, the exiled ANC members' exposure to homosexuality, and the influence of the international anti-apartheid movement. All these people contributed to South Africa's move from official homophobia to relative gay acceptance.

But it took time. In 1987 it was clear that the ANC was not committed to gay rights and the gay liberation movement had not used the ANC's lacklustre attitude towards homosexuality to encourage it to support gay rights. The ANC was finally forced to recognise homosexuality owing to remarks by two of its members in 1987, and so began an awareness of gay rights and the gay movement. Nonetheless internal politics continued to be the main focus within the gay liberation movement, as opposed to taking advantage of this window period. There was no such opportunity when it came to the NP government. Nationalist narratives continued to consolidate power for the ruling elite. This further entrenched patriarchy and compulsory heterosexuality as a national identity.<sup>5</sup> Connell, in 1987, saw no value in such hegemonic masculinity: "hegemonic masculinity is no collective asset in a struggle for survival, in fact it is now a general menace."<sup>6</sup>

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<sup>1</sup> Connell, The Men and the Boys, p 10.

<sup>2</sup> Ibid. See introduction.

<sup>3</sup> See p 23.

<sup>4</sup> See p 298.

<sup>5</sup> Hayes, Queer Nations, p 16.

<sup>6</sup> Connell, Gender and Power, p 280.

Because there were many masculinities fighting for recognition in South Africa, the NP government's hegemonic masculinity was threatened. In order for this traditional hegemonic masculinity to remain dominant the NP government would have to consider tolerating or assimilating some of these definitions. Such change is sometimes necessary for hegemony to be reinforced. For the NP government, it might have considered tolerating the gay masculinity in order to secure its own struggle for hegemonic survival.

NP government legislation had always been discriminatory against gay men with the Select Committee in 1968, the President's Council in 1985, and the Sexual Offences Act in 1988.<sup>7</sup> However, South African gay history took a detour in the 1990s from anti-gay legislation and officially sanctioned homophobia to the entrenchment of the most liberal Constitution in the world that protects gay men against discrimination on the basis of their sexual orientation. I think it became impossible to continue with homophobic legislation if equality was to be the catch phrase of the New South Africa. The ANC government made many changes quickly, undoing the NP's definition of hegemonic masculinity.

Relying on research by select committees and councils the NP government had tended to decide how legislation would treat gay men in this country. Authorities such as the SAP advocated discriminatory legislation and these laws in turn directed public opinion. In the 1990s the ANC, too, directed public opinion but this time in support of gay men. In stark contrast, the ANC government decriminalised homosexuality. The ANC government did, however, admit that many individual members were not enthusiastic about gay rights and did not reflect the official ANC position.<sup>8</sup> The ANC said it was made up of everyday South Africans who had the same prejudices that existed in society.<sup>9</sup>

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<sup>7</sup> In reference to the Select Committee and the President's Council E. Steyn, 'From Closet to Constitution: The Gay Family Rights Odyssey' in Journal of South African Law, 1998, (Juta and Co. Ltd, Cape Town, Wetton, Johannesburg), says these caused "mass mobilization of the gay front ..." (p 98). However, I think neither of GASA's Law Reform attempts cannot be constituted as mass mobilization.

<sup>8</sup> G. Kraak, 'Cheryl Carolus Speaks: We Believe in Equality and the Right of People to Choose How They Conduct Their Lives', Equality, (July-Sept. 1995), Issue 2, (C.2) NCGLE, South African organizations, AM 2623, GALA), p 4 and Gevisser, 'A Different Fight for Freedom', p 76.

<sup>9</sup> Kraak, 'Cheryl Carolus Speaks: We Believe in Equality and the Right of People to Choose How

Albeit gay men had constitutional protection in 1996 I believe it became clear that the gay liberation movement and gay organisations were not the driving force behind this success.<sup>10</sup> The gay liberation movement was not unified, in fact neither were individual organisations. There was no movement to speak of in the early 1990s although many organisations were working towards gay liberation. Gay rights were eventually achieved in spite of the movement, not because of it, under the guidance of the NCGLE. It was individual men, gay and straight, who took advantage of the transitional period and achieved successes and secured influence, not the gay liberation movement.<sup>11</sup> For example Sachs, Cameron, the Law Commission, the ANC, the NP government, the constitutional technical committees as well as Kevan Botha, hired by the NCGLE, all worked towards equality for all and the gay and lesbian community benefited from this. It was individuals, more so than any movement who, “took the gap.”<sup>12</sup> Kraak sees this “as a stroke of luck” more so than the result of gay rights political lobbying.<sup>13</sup> Mohlahedi, however, says it was both individuals and the gay liberation movement that played a role in securing constitutional protection for gay men.<sup>14</sup> I think to say the gay liberation movement was successful is inaccurate, even though there were gay rights successes. There were too many leaders, too many ineffective organisations with inconsequential membership, and too much politics.

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They Conduct Their Lives’, p 4.

<sup>10</sup> Steyn is vague when she says sexual orientation in the Constitution “is a counter-reaction to the long denial of gay consciousness,” (Steyn, ‘From Closet to Constitution’, p 99). She does not qualify whether it was a counter-reaction by the ANC, individual advocates of civil rights or the gay liberation movement.

<sup>11</sup> See p 243.

<sup>12</sup> Interview with Kraak.

<sup>13</sup> Ibid.

<sup>14</sup> Interview with Mohlahedi.

### **Political Opinions Regarding Gay Liberation in the Late 1980s.**

By April 1988 there was no official support for lesbian and gay rights from the UDF.<sup>15</sup> OLGA knew the UDF was unimpressed with the CPD as the apparent representative of the gay liberation movement. The UDF felt the CPD was using the democratic struggle in a selfish, opportunistic manner for its own gains.<sup>16</sup> At the ANC's Harare Conference in 1987 it was said, "gay men and lesbians (were) 'jumping on the back of' the democratic movement and exploiting the struggle for their own ends."<sup>17</sup> Consequently "the UDF and various other progressive groups in Cape Town have UNOFFICIALLY come out AGAINST the alliance saying that gay men are trying to hijack the struggle for their own gain."<sup>18</sup>

If the UDF was against gay rights the ANC "was iffy on gay issues."<sup>19</sup> Its stance on homosexuality needed clarification. Initially little effort had been made to raise awareness of gay issues – nor were there any positive statements on gay and lesbian rights. This was because it had not been a leading point of discussion in South African society or in the ANC.<sup>20</sup> There was an obvious "reluctant acceptance of having to work with the homosexual men," although the ANC felt it was keeping an open mind.<sup>21</sup> As the ANC confronted social issues so its policy grew – issues were addressed when they arose.<sup>22</sup> Machela, however, said this is not what the ANC had said. He said the ANC had actually said it would treat every social *problem* as it arose, not social *issue*. This implied the ANC saw gay men as a problem.<sup>23</sup> The ANC believed it would take a

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<sup>15</sup> Letter from Peter to Alfred, (25 April 1988), (Alfred Machela Collection, A2 International, A3 Correspondence, AM 2622, GALA), p 2. There was no official support from COSATU either.

<sup>16</sup> Letter to RGO from former LAGO members: 'The Working Group', (6 Nov. 1987), p 1.

<sup>17</sup> Ibid.

<sup>18</sup> Letter from G. Shelton to A. Machela, (24 April, no year), (Alfred Machela Collection, A4 Position Papers, Talks, Statements, AM 2622, GALA), p 1.

<sup>19</sup> Interview with Knoesen.

<sup>20</sup> F. Ginwala (ANC) in P. Tatchell, 'ANC Affirms Support for Gay Rights', (no publication, n.d.), presumably Capital Gay, (4 Dec. 1987), (Alfred Machela Collection, F. Magazines, Newspapers, Publications, Pamphlets, Programmes, International and South African, AM 2622, GALA).

<sup>21</sup> Interview with Knoesen.

<sup>22</sup> From a student report, 'Nusas Talks to the ANC' in P. Tatchell, 'ANC Dashes Hopes for Gay Rights in SA', Capital Gay, (18 Sept. 1987), (The Peter Tatchell Collection, AM 2715, GALA), n.p.

<sup>23</sup> P. Tatchell, 'Black, Gay and Angry', Outrage, no. 53, (1987), (The Peter Tatchell Collection, AM 2715, GALA), p. 17.

specific event to bring gay issues to the forefront.<sup>24</sup> When this specific event arose in 1987 by way of exiled ANC officials making homophobic statements to gay publications, it became obvious that some ANC officials did see homosexuality as a social problem. Exiled ANC representatives, Ruth Mompati, an ANC executive member, and Solly Smith, the ANC spokesperson in Britain, embarrassed the European anti-apartheid movement with homophobic declarations. During an interview with the gay, London newspaper, *Capital Gay*, Ruth Mompati said:

I cannot even begin to understand why people want lesbian and gay rights. The gay men have no problems. They have nice houses and plenty to eat. I don't see them suffering. No-one is persecuting them ... we haven't heard about this problem in South Africa until recently. It seems to be fashionable in the West.<sup>25</sup>

She felt that gay men and lesbians were “not doing the liberation a favour by organising separately and campaigning for their rights. The (gay) issue is being brought up to take attention away from the main struggle against apartheid. These other problems can wait till later. They are red herrings.”<sup>26</sup> Mompati believed the ANC was not going to single gay men out for special attention and treatment. She questioned why gay men should have special rights anyway; it was time the majority in South Africa got what it wanted. I think Mompati possibly said such things partly because she recognised white, gay essentialism only. That is, she was only aware of the GASA approach to gay rights, which was essentialist, but also imbued in the protection of the white hegemonic masculinity. Many black people mistakenly perceived homosexuality as white. Ironically gay liberation, even within the greater struggle, was perceived as essentialist, which created prejudice against gay men, even from the progressive, democratic movement.<sup>27</sup>

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<sup>24</sup> Ginwala in Tatchell, 'ANC Affirms Support for Gay Rights'.

<sup>25</sup> P. Tatchell, 'ANC Dashes Hopes for Gay Rights in SA', *Capital Gay*, (18 Sept. 1987), (The Peter Tatchell Collection, AM 2715, GALA), n.p. and T. Trengrove-Jones, 'Fiction and the Law: Recent Inscriptions of Gayness in South Africa', in *Modern Fiction Studies; South African Fiction Under Apartheid*, vol. 46, no. 1, p 125.

<sup>26</sup> Tatchell, 'ANC Dashes Hopes for Gay Rights in SA', n.p.

<sup>27</sup> Ibid.

Mompati, when asked if gay people would be free from oppression if the ANC came into power, went on to say: “I hope that in a liberated South Africa people will live a *normal* life. I emphasise the word *normal* ... Tell me, are lesbians and gay men normal? No, it is not normal. If everyone was like that, the human race would come to an end.”<sup>28</sup> Consequently many Dutch and Scandinavian anti-apartheid and civil rights organisations issued protests.<sup>29</sup>

Mompati’s colleague, Solly Smith thought along the same lines: “we don’t have a policy. Lesbian and gay rights do not arise in the ANC. We cannot be diverted from our struggle by these issues. We believe in the majority being equal. Those people (lesbians and gay men) are in the minority. The majority must rule.”<sup>30</sup> To justify the ANC’s lack of policy on gay and lesbian rights Smith added that South Africa did not have separate rights for flower sellers so it was unnecessary for separate rights for gay men.<sup>31</sup> When asked if an ANC government would repeal NP anti-gay legislation Smith replied he had no comment.<sup>32</sup>

Exit exacerbated the furore. It headlined ‘ANC Turns Anti-Gay’ and reported that the gay community was upset that the ANC was ignoring gay rights.<sup>33</sup> The South African delegation at the ANC Conference in Harare felt the Exit report was “misleading, mischievous and designed to stir up trouble.”<sup>34</sup> I tend to agree with this perception. But I also feel the ANC was hiding behind the white race-based Exit, ignoring the issue that at some stage, it had to face up to the confrontation within the ANC’s own ranks regarding exactly how the party felt about homosexuality. This was an issue it could not ignore forever.

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<sup>28</sup> Ibid.

<sup>29</sup> See p 249.

<sup>30</sup> Tatchell, ‘ANC Dashes Hopes for Gay Rights in SA’, n.p.

<sup>31</sup> B. Luirink and A. Dodd, ‘Black and Gay in Sunny SA’, Cosmopolitan, (March 1998, AM 2704, GALA), n.p. and P. Tatchell, ‘ANC Dashes Hopes for Gay Rights in SA’, n.p.

<sup>32</sup> Tatchell, ‘ANC Dashes Hopes for Gay Rights in SA’, n.p.

<sup>33</sup> ‘ANC Turns Anti-Gay’, Exit, no. 24, (Oct. 1987), (The Papers of LAGO and OLGA, Box 5: The OLGA Papers, File 2: Press Clippings, AM 2801, GALA).

<sup>34</sup> K. Swart, ‘Gays Hit at ANC’, South News, (22-28 Oct. 1987), (AM 2801, Papers of LAGO and OLGA, Box 5: The OLGA Papers, File 2: Press Clippings, GALA), n.p.

Because of these statements by senior ANC officials the international, gay liberation movement challenged the ANC. Many gay organisations overseas supported the ANC and were not prepared to tolerate homophobia from the organisation they saw as liberating all South Africans, including gay men. Some anti-apartheid organisations threatened to withdraw their support from the ANC if the party did not retract what Mompoti had said.<sup>35</sup> Foreign, gay organisations affiliated to the ILGA, specifically those from England and Sweden, believed it was time anti-apartheid organisations committed themselves to the gay cause and expected the ANC to take the lead.<sup>36</sup> Consequently the ANC found itself in an awkward position because it had not seriously addressed the issue of gay rights before. The ANC was not particularly interested in homosexuality but this situation forced it to discuss gay issues.<sup>37</sup> Therefore it was the international, gay rights movement that had the most influence on the ANC and pressurised it on the issue. The international, anti-apartheid movement in Britain and Holland had taken up Nkomo's cause in 1984 and introduced the notion of gay rights to the ANC. Consequently the ANC had acknowledged Nkomo's role. His imprisonment had made the anti-apartheid movement more aware and committed to the gay cause.<sup>38</sup> "This was to exert a major impact on the ANC's later decision to include gay rights on its agenda."<sup>39</sup> But I do not think it was Nkomo, *per se*, who had effected this response from the ANC. More so, it was the overseas, anti-apartheid movement.

Tatchell advised Thabo Mbeki that damage control was necessary to repair the harm caused by Smith and Mompoti's remarks.<sup>40</sup> Consequently, in a letter to Tatchell and the foreign, gay press in November 1987, while in exile in Lusaka, Mbeki assured gay men (and lesbians) that the ANC was firmly committed to removing all forms of discrimination, extending to the protection of gay rights. According to Knoesen, Mbeki

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<sup>35</sup> D. Fine and J. Nicol, 'The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement' in Gevisser and Cameron, *Defiant Desire*, p 270.

<sup>36</sup> Tatchell, 'Black, Gay and Angry. South African Gays Fight Back', p 14. See p 190.

<sup>37</sup> Letter from J. Voss to A. Machela, (12 Feb. 1987), (AM 2622, A. Machela Collection, A2. International, A3. Correspondence, GALA), p 1.

<sup>38</sup> P. Tatchell, 'ANC Affirms Support for Gay Rights', (no publication), (no date), (AM 2622, A. Machela Collection, A2. International, A3. Correspondence, GALA).

<sup>39</sup> Gevisser, 'A Different Fight for Freedom' p 56.

<sup>40</sup> Letter from P. Tatchell to T. Mbeki, (12 Oct. 1987), (The Peter Tatchell Collection, AM 2715, GALA), p 1.



had to rectify the situation because the ANC working in exile was partially homo-dependent. International, anti-apartheid organisations were very gay, “disproportionately so,” and this support had to be retained.<sup>41</sup> Also, when Mbeki had lived in the Netherlands he had resided with Kees van Twist who was gay and very involved in the anti-apartheid movement. It is likely that this had an influence on Mbeki.<sup>42</sup>

By way of apology Mbeki said Smith and Mompati were not suggesting that gay men would be discriminated against or repressed in an ANC-led South Africa. They had expressed their personal opinions, which did not reflect the official ANC position. He said the ANC believed sexual preference was a private matter and did not want to legislate on how people should run their private lives. Furthermore, the ANC appreciated the initiatives taken by gay men in the struggle.<sup>43</sup> The official stand might have been non-discriminatory but regarding Mbeki’s damage control statement Bart Luirink says “whether or not that point of view is shared by the entire movement” is not certain.<sup>44</sup> I am convinced there is ample evidence to conclude it was not.

The situation was helped by the fact that Mompati and Smith later expressed more sympathetic views.<sup>45</sup> Mompati became conciliatory and admitted she did not have an understanding of the issue. She said *Capital Gay* had interviewed her for fifteen minutes about her personal feelings, not that of the ANC. She had been pushed into a corner and lost her temper; that is why she said the things she did.<sup>46</sup>

ANC spokesperson, Frene Ginwala, also helped with damage control: “the apartheid system is based on distinctions, discrimination and divisions and amongst these are vicious laws discriminating against gay men and lesbians which we deplore.”<sup>47</sup> She

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<sup>41</sup> Interview with Knoesen.

<sup>42</sup> Ibid.

<sup>43</sup> Letter from T. Mbeki (Lusaka) to P. Tatchell (London), (24 Nov. 1987), (The Peter Tatchell Collection, AM 2715, GALA), p 1.

<sup>44</sup> Luirink, *Moffies*, p 26.

<sup>45</sup> Tatchell, ‘ANC Affirms Support for Gay Rights’, (no publication), (Magazines, Newspapers, Publications, Pamphlets, Programmes, International and South African, AM 2623).

<sup>46</sup> Ibid.

<sup>47</sup> Ginwala (ANC) in Tatchell, ‘ANC Affirms Support for Gay Rights,’ (no publication).



reiterated that just because the ANC had not previously commented on gay and lesbian rights did not mean there was no concern or consideration of the topic. The ANC was supportive of gay rights but did not want to make a big issue of it because gay rights were secondary to the main struggle.<sup>48</sup> “We are not saying it is an unimportant matter but we feel there are more burning issues at stake right now.”<sup>49</sup> Some people had not yet developed an understanding that all forms of discrimination against gay men and lesbians had to be eradicated.<sup>50</sup> One can deduce from Ginwala’s further remarks and references to GASA, that GASA had not realised that if it wanted to fight discrimination against gay men and lesbians it could only do so successfully if it included *all* gay men and other oppressed groups in South Africa.<sup>51</sup> I think Ginwala recognised GASA’s essentialism of agitating for white, gay rights only while at the same time maintaining white hegemonic masculinity. This did not help men in the broader struggle, gay or straight.

Regardless of Mbeki’s pledges the ANC as an organisation was still somewhat lacking in a pro-gay stance, but it had no shortage of individual members who supported the gay rights movement. I think it was obvious the ANC as an organisation needed to make more of an effort when it came to a policy on gay rights, but it did have a foundation of individual civil rights activists who proved to be beneficial during constitutional negotiations.<sup>52</sup>

Although the ANC had no official policy on gay men and lesbians it seemed more than likely that if the ANC came into power it would guarantee gay and lesbian freedom.<sup>53</sup> It had to because it was recognised that certain clauses of the 1955 Freedom Charter

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<sup>48</sup> Swart, ‘Gay men Hit at ANC’.

<sup>49</sup> Ibid.

<sup>50</sup> Ginwala in Tatchell, ‘ANC Affirms Support for Gay Rights’.

<sup>51</sup> Ibid.

<sup>52</sup> Not so on Robben Island. In 1989 the prisoners were allowed to watch videos. The leadership of the ANC on the island said no to films with gay scenes after *9½ Weeks* was screened in which two women passionately embrace. Consequently Indres Pillay asked for *Kiss of the Spiderwoman*, saying the movie was about a prison relationship between a revolutionary and a sympathiser. He failed to mention it was a gay relationship. The ANC prisoners stopped the video because it was, what they euphemistically called, anti-social. (Luirink, *Moffies*, p 39).

<sup>53</sup> According to Claire Wright, the Johannesburg representative for the National Union of South African Students (NUSAS) and president of the University of the Witwatersrand’s SRC, J. Beaumont, ‘Gay OK, Says ANC’, *Exit*, (June 1986), (AM 2583/A, *Exit* 6-60, GALA).

concerning discrimination and equality would force the ANC to cater for gay rights. Kraak says that for the ANC the Freedom Charter was non-negotiable and the party stood by what was contained therein.<sup>54</sup> Considering that the ANC had individual members that recognised gay rights were human rights, the ANC, as a political party, would eventually have to admit to the same. There were individual members who were homophobic but it seems this would ultimately not be tolerated by the party, especially considering the external pressure of the international anti-apartheid movement that would also insist the ANC remain true to the 1955 Charter.

The Inkatha Freedom Party's (IFP) opinions on homosexuality fell in line with that of the ANC. Mohlahedi says that initially the issue was a difficult one for some members of the IFP because many of them were gay but they elected to keep quiet because they did not want to come out.<sup>55</sup> In the late 1980s the IFP discussed sexual orientation at national council meetings. According to Susanne Vos of the IFP, a liberal view regarding homosexuality was expressed and recognised as the predominant opinion. However, she clearly remembers a conservative element that was alarmed, almost hysterical, she says, at the idea of toleration of homosexuality. This same element was conservative on all perceived morality issues, for example abortion, which the IFP supported. The IFP's documentation regarding homosexuality was consciously cautious and deliberately vague and Vos says the liberal quarter managed to slip the toleration of homosexuality in. The conservatives did not pick up the notion of blatant non-discrimination, which included sexual orientation.<sup>56</sup>

In 1988 the NP government's reaction to homosexuality still portrayed its fear of loss of power and insistence on the maintenance of white, hegemonic masculinity. The Immorality Amendment Act was repealed because it was recognised that to secure grand apartheid petty apartheid had to be dismantled<sup>57</sup> but sections of the act relevant to gay

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<sup>54</sup> Interview with Kraak.

<sup>55</sup> Interview with Mohlahedi.

<sup>56</sup> Interview with Susanne Vos, (20 October 2003, Johannesburg, 9:30am).

<sup>57</sup> Interview with Knoesen.

men were put in the new Sexual Offences Act.<sup>58</sup> The 1970s and 80s saw urban uprisings and the gap between the younger and older generations widened. The young were allowed some self-expression and this may have influenced the NP government to retain the homophobic legislation.<sup>59</sup> I think the NP government possibly also retained the homophobic legislation because it did not want to be seen as slacking in its fight against homosexuality, that is, relinquishing its power.<sup>60</sup>

### **OLGA and Albie Sachs**

OLGA took the forefront in gay politics in the late 1980s. To me it seems OLGA had a greater understanding of politics than any other gay organisation. According to Hayes, resistance is the overthrowing of oppressive systems whereas opposition, which is what OLGA opted for, is the transforming of oppressive systems from within.<sup>61</sup> OLGA realised the ANC would be the new government “and it recognize(d), as no gay movement ha(d) before, the value in courting this sector.”<sup>62</sup> This thinking benefited the gay community in 1989.

Albie Sachs, the ANC’s constitutional expert, and a senior member of the ANC’s Legal and Constitutional team, asked OLGA to send the ANC proposals for the protection of lesbian and gay rights in the future constitution. Consequently OLGA held an informal meeting with Sachs to discuss how best to go about this. Sachs said he was speaking as an individual, and not on behalf on the ANC.<sup>63</sup> He warned OLGA it would be an uphill battle that could potentially be unsuccessful: “do not raise your hopes in general too

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<sup>58</sup> The men at a party clause remained, one could be fined R4 000 or imprisoned for two years, the age of consent remained at 19 years of age, and homosexual acts were still immoral and indecent. However, for the first time it became an offence for an adult woman to have sex with a girl under 19 years. “This is the only known prohibition on lesbian sex.” (Basil, Edwin, Adrian, ‘Law Reform and Gay Rights’ in Glowletter, June 1990, D. South African Organisations, D1-7, AM 2623).

<sup>59</sup> J. Steinberg, ‘Removal of Sodomy Laws Unlikely to Have Broad Social Effect’, Business Day, (29 Sept. 1998), (AM 2704, GALA).

<sup>60</sup> This was also one of the reasons the Select Committee and the President’s Council were set up: to retain NP power. (See chapters 2 and 5 respectively).

<sup>61</sup> Hayes, Queer Nations, p 215.

<sup>62</sup> Ibid, p 74.

<sup>63</sup> OLGA Report of Meeting with Albie Sachs, (14 May 1989), (C3) South African Organisations, OLGA, LAGO, AM 2623, GALA), p 2.

much because of the fact that I am having this meeting with you.”<sup>64</sup> He warned that lesbian and gay rights were not a major issue in a quantitative sense. Therefore heterosexual people who supported the gay cause needed to be involved. Sachs felt the ANC was still in the very early stages regarding the gay and lesbian issue. What OLGA needed to do first was to get the gay issue accepted as a valid cause. I think this is additional proof that the gay liberation movement had achieved little in the past decade if the ANC still did not consider gay and lesbian rights a valid cause.<sup>65</sup>

Once the gay liberation movement could get the ANC to validate its cause, Sachs felt there were three levels of possible guarantee to safeguard gay and lesbian rights: a broad constitutional statement, a Bill of Rights, and a Charter of Rights. A broad constitutional statement would achieve little, except to show the concern of the gay and lesbian community. A Bill of Rights would provide broad principles, for example a general clause specifying no discrimination on the grounds of creed, origin, etc, including sexual orientation.<sup>66</sup> Sachs admitted, “it won’t be easy, but it won’t be impossible.”<sup>67</sup> The third option, the Charter of Rights, would deal with specific matters such as harassment and employment. Sachs advised that a Charter was not an option at this early stage: there was no chance demands such as child custody would be accepted and should therefore be looked at later. Sachs also suggested that the gay community not go for broke and place all its demands on the table. A more moderate approach was advisable because the wider public was being dealt with. Sachs advised the gay movement to “go for the arguments about diversity, tolerance and freedom; don’t go for the concept of a protected minority group. I sense it’s better this way.”<sup>68</sup> I think such advice made sense. Sachs was encouraging the gay movement to exploit the positive aspects of human rights, which had an impact on everyone, as opposed to demanding that the ANC concentrate on the specific rights of gay men and lesbians. Such rights exclude other members of society, some of whom were also members of other minority groups. A more global approach

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<sup>64</sup> Ibid.

<sup>65</sup> The only people really recognised in the gay cause were Nkoli and Toms who had helped to bring a greater acceptance of the movement. (See Weekly Mail, Oct. 1989).

<sup>66</sup> Sachs called it sexual preference, which is still a misnomer.

<sup>67</sup> OLGA Report of Meeting with Sachs, p 2.

<sup>68</sup> Ibid, p 3.

seems less self-centred. The gay and lesbian community therefore were advised to look to securing rights in a Bill of Rights and then work towards specific rights guaranteed by a Charter. The gay and lesbian community also had to work on “destroying the idea that the gay and lesbian issue is merely a ‘white’ issue.”<sup>69</sup>

Sachs’ advice to OLGA in 1989 was more his personal aspirations and changes he felt were possible and necessary, changes, which he would encourage the ANC to institute. However he did confirm that the gay liberation movement had the support of the ANC and that the ANC Legal and Constitutional Affairs Department specifically had no problem with gay and lesbian rights. There was already an understanding that the protection of these rights would be part of the ANC’s democracy, they just had to be secured.

### **GLOW and the ANC in the Early 1990s**

South Africa’s (and Africa’s) first Gay Pride Parade was held in Johannesburg in October 1990, initiated by Nkoli and GLOW who realised they were making history.<sup>70</sup> The parade occurred a few short months after the unbanning of the liberation movements. “It is significant that this new politics only found popular support at the very moment of the collapse of the apartheid regime ... this shift came about at the very moment black homosexual activity began to formalize into a flourishing township gay subculture.”<sup>71</sup>

The 1990 march comprised of four hundred participants, most of whom were white. The few black participants, fearful of victimisation, wore paper bags over their heads to preserve their anonymity. The marchers carried hand-drawn fliers that said, ‘Let’s March! For Unity in the Community’ and some told the press they lived in a homophobic society.<sup>72</sup> They marched to boos and derogatory signs from the spectators.<sup>73</sup> Some of the public said the march was “bullshit” and “disgusting.”<sup>74</sup> The marchers were

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<sup>69</sup> Ibid, p 2.

<sup>70</sup> Video: ‘Steps for the Future’.

<sup>71</sup> Gevisser, ‘A Different Fight for Freedom’ p 67.

<sup>72</sup> Ibid.

<sup>73</sup> *Cosmopolitan* says there were 800 marchers, (p 75).

<sup>74</sup> Video: ‘Steps for the Future’.

concerned they would be hit by the public and the reaction of both the marchers and those preaching religion who lined the streets was militant.<sup>75</sup>

The march was a political statement, recognised by the ANC, but somewhat lacking, I think, in overt, visible ANC support. The ANC's PWV<sup>76</sup> regional office sent a message supporting the "historic and courageous step in the long march for gay rights in South Africa."<sup>77</sup> The ANC might have sent messages of support to the Pride Marches but it did not address or participate in the marches despite many invitations. There was the perception that the ANC felt that "support on paper might be acceptable, but open and public identification (was) not."<sup>78</sup> I view the ANC's support of gay rights, what it said and what it did, almost as contradictory as GASA's apparent support of the anti-apartheid movement.<sup>79</sup> Regardless the march was considered a success by white, gay men.<sup>80</sup>

The ANC's commitment to gay rights was still lacking the following year. In 1991 GLOW questioned the ANC's supposed support for gay rights after Winnie Mandela accused Soweto priest, Paul Verryn, of trying to sexually molest some of her bodyguards. There was still the misconception amongst black communities that only white people were gay.<sup>81</sup> Consequently there was much homophobia in black society.<sup>82</sup> Winnie Mandela therefore appealed to the gay prejudice of the black communities to divert attention from herself and her involvement in the murder of Stompie Seipei.<sup>83</sup> For

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<sup>75</sup> Ibid.

<sup>76</sup> Pretoria, Witwatersrand, Vereeniging area. Today it is the greater Gauteng region.

<sup>77</sup> T. Trengrove-Jones, 'The Gay Files', *Sunday Times*, (27 Sept. 1998, AM2704, GALA), n.p.

<sup>78</sup> Ibid.

<sup>79</sup> There was also later the contradiction that the ANC supported gay rights yet each advance of those rights had to be fought in the courts. (T. Trengrove Jones, 'Fiction and the Law', p 118. See chapter 6).

<sup>80</sup> Video: 'Steps for the Future'.

<sup>81</sup> Luirink and Dodd, 'Black and Gay in Sunny SA', p 75.

<sup>82</sup> In most discourse on homosexuality in South Africa in the 1990s the trial of Winnie Mandela is referred to in reference to Africans and homophobia. That is, those who have included this trial in their journal or newspaper articles have contextualised Winnie's defence as homophobic because she exploited the homophobia of black people to justify her actions. In this way she would gain the support of African society.

<sup>83</sup> Stompie Seipei was a member of Winnie Mandela's child wing of demonstrators against apartheid. They were part of the MK. She publicly portrayed them as a soccer club. This was her legal way of getting these demonstrators to meet. Seipei apparently witnessed something he should not have and according to lawyers in this court case Winnie Mandela consequently had Seipei kidnapped, tortured, and killed. She was charged for this but never convicted.

GLOW (and other gay organisations) her assault trial became a gay issue. Her defence used the notion that she was saving black youths from the homosexual advances of Verryn.<sup>84</sup> There was therefore much work to be done on black acceptance of same-sex relations and I do not believe the ANC was doing much to encourage this.

The ANC decided to remain silent regarding Winnie Mandela's trial. They had succeeded in getting the black majority behind them and possibly did not want that jeopardised by bringing up the emotionally charged subject of homosexuality. The ANC wanted to win the 1994 election and could therefore not punt gay rights too openly. Some ANC local branches condemned Winnie Mandela's homophobic trial but most of these were urban with a large white membership. The issue of gay rights was not spoken about in the township branches.

GLOW was alarmed that the ANC's national executive committee had not responded to Winnie Mandela's homophobic case and that the ANC had not officially condemned her defence. This caused GLOW to question the ANC's commitment to gay and lesbian rights. It seemed the ANC was not ready to accept that homosexuality could be part of the African culture, not something brought in by whites.<sup>85</sup>

### **Constitutional Protection of Gay Rights in the Early 1990s.**

Carl Mischke poses the question: "should one expect the law to change attitudes of society, to somehow 'coerce' society into accepting homosexual men ...?"<sup>86</sup> Some gay men and lesbians believed this would bring their return to society. But Mischke says this is a dream; liberation is elsewhere.<sup>87</sup> Some gay men, and some in the legal field, originally felt that to get a gay rights clause inserted in the 'New' South African Constitution was ambitious. There was no doubt that a challenging legal future lay ahead for South African gay men but because homophobic legislation was still on the Statute Books it was felt by some that the Constitution would more than likely give gay people

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<sup>84</sup> Steyn, 'From Closet to Constitution', p 103.

<sup>85</sup> Gevisser, 'A Different Fight for Freedom', p 70.

<sup>86</sup> C. Mischke 'Big Law – Little Wrong: Discrimination on the Basis of Sexual Orientation and the New South African Constitutional Order', in Codicillus, vol. 36, no. 1, May 1995, p 42.



access to law creation, not necessarily entrench their rights. The first priority was therefore to get rid of discriminatory legislation. However, more gay men would have to come out before this could be achieved. If this occurred it was presumed attitudes towards gay men would change. This would make it easier to justify a change in legislation. Therefore intense lobbying was necessary before any rights protection would be achieved.<sup>88</sup>

All political parties that published draft Bills of Rights adopted the idea that the Constitution should have an equality clause: all people are equal before the law and discrimination is unconstitutional. The DP was the first political party to call for the protection of gay rights in its equality clause and had a history of campaigning for equal rights for gay men.<sup>89</sup> In 1990 Tony Leon and Lester Fuchs introduced a private member's motion into the House of Assembly. This was the first time gay men had ever been on the parliamentary agenda. Fuchs and Leon felt that private, consensual homosex should be legalised. Current legislation was oppressive and discriminatory against 5 to 10% of the adult population.<sup>90</sup> Existing legislation allowed the state to intrude in the privacy of citizens, it was impossible to police, it brought the law into disrepute, and it suppressed information about the spread of HIV/AIDS.<sup>91</sup> The DP was allowed to put two statutes before Parliament each session but the DP vote of thirty to two against the Leon/Fuchs' proposal within the party caucus showed that its members felt there were more important issues than gay rights. Fuchs and Leon then tried to get the bill onto the parliamentary order paper independently but "this attempt was doomed to failure from the start."<sup>92</sup> There were four hundred MPs in Parliament and the chance of individual members getting independent bills on the order paper was negligible. Instead the DP used this track record to canvass votes:

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<sup>87</sup> Ibid.

<sup>88</sup> Basil, Edwin, and Adrian, 'Law Reform and Gay Rights', 'Glowletter', (June 1990), (South African Organisations D1-7, AM 2623), p 19.

<sup>89</sup> Hayward, 'History of the Equality Clause', p 2.

<sup>90</sup> A. Johnson, 'Decriminalise Homosexual Conduct – DP', *The Cape Times*, (16 Feb. 1990, Publication No: 0060, Date: 200216047, Subject No: 159, Document No: 1120, Instituut vir Eietydse Geskiedenis, University of OFS, Micro-Fiche RAU), n.p.

<sup>91</sup> Ibid.

<sup>92</sup> Basil, Edwin, and Adrian, 'Law Reform and Gay Rights', p 19.

'The NP has legalised homophobia and encouraged discrimination against 'sodomites'. The ANC has publicly said it has no truck with what it calls 'social deviants and perverts'. It is only the DP with its proud tradition of freedom and its record on human rights that is deserving of our vote'.<sup>93</sup>

The DP continued fighting for gay rights and by 1994 of four thousand canvassing calls in Johannesburg East only one person objected to the DP's pro-gay stance. "There probably won't be an openly gay MP in the new parliament. But for the first time in South African politics, gay issues are squarely on the agenda."<sup>94</sup>

The NP also supported the inclusion of sexual orientation but would not accept the inclusion of gay marriage. (This was never considered as an inclusion in the Constitution anyway). The NP was possibly not sure of its own stance because it avoided the question of gay rights from the press, saying the matter still had to be resolved.<sup>95</sup> However, the fact that the NP recognised that homosexuality constituted a natural characteristic that was not chosen showed a major policy shift.<sup>96</sup> The Law Commission had initiated this stance<sup>97</sup> and it was more than likely adopted by the NP as well because there would have been no sense in not doing so. If the NP was going to maintain some degree of sway and bargaining power during negotiations it would not pay to overtly argue against an issue that the other major political parties all agreed on.

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<sup>93</sup> Democratic Party advertisement in Liason, (April 1994, AM 2704, GALA), p 4.

<sup>94</sup> Ibid.

<sup>95</sup> 'DP Now Out the Closet on Gay Discrimination', Cape Times, (12 May 1993), (Papers of LAGO and OLGA, Box 5: The OLGA Papers, File 2: Press Clippings, AM 2081).

<sup>96</sup> Steyn, 'From Closet to Constitution', p 100.

<sup>97</sup> See p 262.

Initially the IFP did not bother with the issue of gay rights specifically; it did not have strong feelings about the issue<sup>98</sup> although, on a broader basis, because it opposed discrimination, this included gay men and lesbians.<sup>99</sup> However the IFP eventually included gay protection in the equality clause of its Bill of Rights.

In the early 1990s, the battle within the ANC to be recognised as a supporter of gay rights continued. “Official ANC support of gay issues has been at worst grudging and at best half-hearted.”<sup>100</sup> But it seemed, officially, that the ANC had warmed to the idea of equality for gay people, even coming to recognise the value of the gay vote and wanting to harness it.<sup>101</sup> I feel it is necessary to reiterate that the foundation for the acceptance of gay and lesbian rights by the ANC was laid by European anti-apartheid and human rights organisations, which, after supporting the ANC in exile, expected it to follow suit. Bart Luirink, however, says it was the South African gay and lesbian movement that convinced the ANC leadership that the struggle for freedom and the struggle for gay rights were inseparable.<sup>102</sup> Marc Epprecht says the ANC leaders first proposed that sexual orientation be in the equality clause because they recognised the contribution of gays and lesbians to the anti-apartheid struggle.<sup>103</sup> But I think it was perhaps not as selfless as that. The ANC had to be made to recognise that those supporting the anti-apartheid movement would not tolerate gay and lesbian rights being ignored. The ANC needed this support and consequently had to consider gay rights.

Also, exiled ANC members were exposed to a more liberal approach to homosexuality and equal rights for gay men and lesbians in Europe.<sup>104</sup> “The ANC leadership, in returning from exile from 1990 onwards, brought with them a sensitivity to the issue

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<sup>98</sup> Informal interview with Knoesen.

<sup>99</sup> Spokesperson for the Inkatha Institute, Mr Roy Rudden, in S. Ntshakala, ‘Gay Rights a Sensitive Issue in the Politics of a New SA’, *The Natal Mercury*, (26 Oct. 1991, Publication No: 0132, Date: 911026299, Subject No: 272, Document No: 4044).n.p.

<sup>100</sup> Gevisser, ‘A Different Fight for Freedom’, p 76.

<sup>101</sup> Interview with Mohlahedi.

<sup>102</sup> Luirink, *Moffies*, p vi.

<sup>103</sup> Epprecht, ‘What an Abomination, a Rottenness of Culture’, p 1095.

<sup>104</sup> Many British and Dutch anti-apartheid movements were also gay movements and spoke to senior ANC officials in Europe about gay rights.

gained in their experiences abroad.”<sup>105</sup> Sachs and Kader Asmal were greatly influenced and realised that gay rights were a legitimate political request. Both were influenced by identity politics in Europe and America, which included the notion of sexual orientation within human rights discourse. Consequently I think they became the strongest gay issues lobbyists in the ANC and were largely responsible for the ANC’s Bill of Rights. Ginwala, Sachs, and Asmal, all supported OLGA in its fight for gay rights. “All three unreservedly welcomed the OLGA initiative and saw the need to raise the issue of lesbian and gay rights both as part of the recognition of gender rights and as a broad human rights issue.”<sup>106</sup> It was Sachs specifically who legitimised OLGA’s efforts because he was a staunch civil rights activist and firmly believed in equality for all.

In 1990 OLGA had consulted various lesbian and gay organisations throughout the country and a Charter of Lesbian and Gay Rights was compiled. It was finally recognised “that a proactive campaigning strategy was needed.”<sup>107</sup> Consequently an extensive submission to the ANC’s constitutional committee, which was responsible for formulating the ANC’s draft Bill of Rights, was submitted in September 1990 to include sexual orientation as a ground for non-discrimination. OLGA continued to lobby in 1991 and, partly owing to this, sexual orientation was included in the ANC’s draft Bill of Rights, albeit not in the equality clause (unlike the bills of DP and IFP).

This gave rise to problems because sexual orientation was only mentioned once, in the gender clause. The ANC’s equality clause read:

- (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.<sup>108</sup>

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<sup>105</sup> C. Stychin, ‘Constituting Sexuality’, p 459

<sup>106</sup> Ibid, p 271.

<sup>107</sup> Fine and Nicol, ‘The Lavender Lobby’, p 274.

<sup>108</sup> Ibid, p 98.

Sexual orientation was supposedly included in the ANC's term 'or other status'.<sup>109</sup> There were many opportunities for the ANC to include sexual orientation in its draft bill of rights. For example, it was not included in article 14, which demanded state distributions "on a non-sexist and non-racist basis" and required the state to eliminate practices that divided the population on the grounds of "race, colour, language, or creed."<sup>110</sup> The ANC might not have put sexual orientation in its equality clause because "it may be that the drafters of the ANC document were sensitive to the possible controversy that including gay rights could evoke and for this reason perhaps felt it wiser to mention it only in the gender clause."<sup>111</sup> The ANC could also have been relying on the courts to resolve such matters.<sup>112</sup>

Although the NP government Law Commission, appointed in 1990, accepted that gay men and lesbians were entitled to constitutional protection, it did not explicitly state this as such. The ANC's draft Bill of Rights, which was endorsed in May 1992, was more progressive than the Law Commission's proposals because its bill specifically included the term sexual orientation as a ground for non-discrimination.<sup>113</sup> Therefore the two groupings differed on how to ensure gay rights. In its initial paper on *Group and Human Rights*, the Law Commission said gay men and lesbians constituted a natural group (like women, children, and the disabled). The common characteristic of these groups was that "they have not chosen to have a particular status in a particular group, but have been assigned to that status by nature."<sup>114</sup> Therefore gay men should be protected by the Bill of Rights. Sexual orientation was not specified in the Law Commission's first draft bill of rights but fell under 'other natural characteristic.'<sup>115</sup>

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid, p 99.

<sup>111</sup> Ibid.

<sup>112</sup> 'DP Now Out the Closet on Gay Discrimination', Cape Times, (12 May 1993), (The Papers of LAGO, OLGA, Box 5: The OLGA Papers, File 2: Press Clippings, AM 2801, GALA).

<sup>113</sup> Brian Curnn of Lawyers for Human Rights in C. Rickard, 'Right On! Everybody Loves the ANC's Bill', The Weekly Mail, (30 Nov-6 Dec. 1990), (The Papers of LAGO, OLGA, Box 5: The OLGA Papers, File 1: Correspondence O-Z, AM 2801, GALA).

<sup>114</sup> SA Law Commission Working Paper 25 'Group and Human Rights' (1989) as quoted in E. Cameron, 'Sexual Orientation and the Law', in South African Human Rights Yearbook 1992, (Oxford University Press, Cape Town, Centre for Socio-Legal Studies, Durban, 1993), p 9 96.

<sup>115</sup> In its original draft bill of rights the Law Commission proposed the protection of the right to human dignity and equality "which means there shall be no discrimination on the ground or (sic) race, colour,

But according to Cameron and Steyn, the Law Commission's proposals in the *Interim Report on Group and Human Rights* created legal problems. Firstly, the state could not discriminate yet it was not outlawing discrimination by other groups in society.<sup>116</sup> Secondly, the proposal insinuated that 'natural characteristic' was a disability. Many judges did not consider homosexuality a disability, therefore gay men would not be protected by 'natural characteristic' if, for some reason, it became necessary. Thirdly, the Commission assumed judges would include sexual orientation in the natural characteristic clause. This was a risky assumption considering South Africa's prejudicial legal history when it came to gay men. Fourthly, the *Interim Report* stated that the rights granted in the Bill could be limited in the interests of the security of the state and for the prevention of disorder and crime to protect public order, good morals, and the rights of others.<sup>117</sup> However it was not clear what justifiable limitations the Commission could impose on gay rights and on what grounds these limitations could be justified. If one used the proposed limitations of public order, good morals or the rights of others as justifications for limitation of gay rights then discrimination could have been protected by the *Interim Report*. Fifthly, if the Law Commission did not explicitly include sexual orientation in its Bill of Rights this specification may be excluded from other human rights documents in the future.

Part of the South African Bill of Rights negotiations comprised of technical committees of jurists to research and draft the proposed Bill of Rights. The Technical Committee on Fundamental Rights During the Transition mainly drafted the South African Bill of Rights. This resulted in twelve technical reports before the final text was agreed on for the Constitution.<sup>118</sup>

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language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic." (Article 2 in Cameron, 'Sexual Orientation and the Law', p 96).

<sup>116</sup> Steyn, 'From Closet to Constitution', p 100.

<sup>117</sup> Cameron, 'Sexual Orientation and the Law', p 97.

<sup>118</sup> A. Pantazis, 'The Problematic Nature of Gay Identity' in South African Journal of Human Rights, vol. 12, issue 2, 1996, p 299.

The first and second formulations of the equality clause of the Technical Committee did not include sexual orientation. 'All other forms of discrimination' protected Gay men. The third formulation suggested that the list of specific grounds on which discrimination was prohibited be extended to twelve grounds of equality. It seems that because of intensified lobbying and the recognition that there were many minorities that warranted protection, this included sexual orientation. These grounds were finally extended to sixteen and still included sexual orientation. Gay men were repeatedly protected in the 1994 Interim Constitution and the next step was to apply it in the final Constitution.<sup>119</sup>

The NCGLE led the lobbying for the retention of sexual orientation in the final Constitution. Achmat founded the Coalition in 1994 with the specific objective of keeping the equality clause in the Constitution.<sup>120</sup>

Swept along by the momentum of the constitutional reform, the support of the African National Congress, the more open political climate of the transition from apartheid to democracy, the coalition has come closer than previous formations to authentically representing the majority of the country's gays.<sup>121</sup>

On behalf of the gay and lesbian community the NCGLE lobbied very professionally, presenting written submissions,<sup>122</sup> issuing public statements, and courting politicians.<sup>123</sup> According to Kraak the NCGLE was "a bunch of rich, gay men", "an elite thing" that got the job done.<sup>124</sup> There were only two black gay people who represented the NCGLE – Nkoli and Bev Ditsie: Nkoli because he was internationally recognised and Ditsie because she is woman. "They were used as tokens."<sup>125</sup> The NCGLE wanted the gay community to work together but it conceded that not everyone would agree on everything.<sup>126</sup> "This country's lesbian and gay subcultures have not yet matured to the

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<sup>119</sup> It was correctly presumed that sexual orientation would be retained as a ground for non-discrimination in the final Constitution.

<sup>120</sup> Interview with Kraak.

<sup>121</sup> Jara, Lapinsky, 'Forging a representative gay liberation movement in South Africa', p 1.

<sup>122</sup> 7 032 submissions were from gay and lesbian people. (Hayward, 'History of the Equality Clause', p 2).

<sup>123</sup> Interview with Knoesen.

<sup>124</sup> Interview with Kraak.

<sup>125</sup> Interview with Mohlahedi.

<sup>126</sup> Z. Achmat, Editorial, Equality, (July-Sept. 1995), Issue 2, (C.2) NCGLE, South African organisations,



point of being able to constitute an effective, coherent and united political minority.”<sup>127</sup> The NCGLE represented forty-one gay organisations and was successful in that it aimed to facilitate and monitor gay organisations to achieve fruitful lobbying and represent the gay community.<sup>128</sup>

It can be questioned how it was possible that the NCGLE succeeded in presenting a more united and representative face for the gay community, when other organisations, even politically progressive ones, failed?<sup>129</sup>

Ironically, the NCGLE may have been blessed by history. It had a high profile, but it’s celebrated success in keeping the equality clause at the center of the constitution had little to do with the strength or level of political mobilization of the gay community, and more with the times.<sup>130</sup>

Although the NCGLE lacked infrastructure and finance, it took advantage of the ANC’s commitment to human rights and the prominent individual activists who supported gay rights.<sup>131</sup> Kraak says it was Kevan Botha, the NCGLE’s lawyer, who was the success story behind the gay liberation movement’s involvement in constitutional negotiations. Gay organisations made submissions through Botha. He streamlined everything and represented gay rights at the Congress of a Democratically Elected South Africa (CODESA).<sup>132</sup>

The process of the political transition allowed minority groups to emerge. According to Stychin, lesbian and gay rights activists were the main contributors to the equality provisions in the Constitution.<sup>133</sup> No doubt these contributions are noteworthy, but Stychin, I think, is forgetting the influence the overseas, anti-apartheid movement had on specific ANC leaders. Eugene Paton, in Stychin’s book, wrote “the existence of the (sexual orientation) clause is closely linked to a camaraderie among oppressed peoples

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AM 2623, GALA), p 1.

<sup>127</sup> Gevisser, ‘A Different Fight for Freedom’, p 82.

<sup>128</sup> Interview with Mohlahedi.

<sup>129</sup> Jara, Lapinsky, ‘Forging a representative gay liberation movement in South Africa’, p 7.

<sup>130</sup> Ibid, p 6.

<sup>131</sup> Ibid.

<sup>132</sup> Interview with Kraak.

under the apartheid regime, one fostered by the socialist idealism of the African National Congress” and the fact that homosexuals were “invited into the family of the oppressed by the South African liberation movement is *partially* rooted in the pragmatic recognition by the ANC that many overseas anti-apartheid groups had adopted a gay-positive stance.”<sup>134</sup> I question the notion of ‘partially’. Once civil rights activists of the ANC had influenced the party the NCGLE could follow through using this foundation. Again it was not so much the influence of the ANC in its entirety. In his essay ‘Mandela’s Stepchildren’, Gevisser commented that the primary reason the notion of gay equality passed so smoothly into the constitution was because the ANC elite had been exposed to a utopian social progressive ideology of countries that supported the anti-apartheid struggle.<sup>135</sup>

Kraak, however, says he did not experience this “social progressive ideology” while he was in exile.<sup>136</sup> He says he experienced defensiveness from these foreign anti-apartheid organisations regarding homosexuality in that they did not seem to want the anti-apartheid movement to be side-tracked with the issues of other oppressed people. Kraak says it seems these organisations saw any organising that was separate to the national struggle as a betrayal of the aim of national liberation.<sup>137</sup>

The NCGLE showed a face of unity of the gay and lesbian community across lines of race, gender, class, and political allegiance in a campaign on one particular issue. “A delicate balancing act thus ha(d) been undertaken to maintain the unity perceived as necessary for successfully intervening in the constitutional process.”<sup>138</sup> Such unity was necessary to influence decision-makers. It did not necessarily mean there was this unity, more so a display of it, as well as the fact that no other gay groups challenged the work being done by the NCGLE. For success in the process there needed to be the perception

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<sup>133</sup> Stychin, *A Nation by Rights*, p 74.

<sup>134</sup> E. Paton, ‘Heart of Lavender’ in Constantine-Simms, (ed), *Homosexuality in Black Communities*, p 125. (Italics are mine).

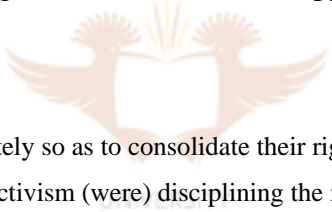
<sup>135</sup> Gevisser in G. Kraak, *Homosexuality and the South African Left: the Ambiguities of Exile*, (26 Aug. 2002), p 4.

<sup>136</sup> Kraak, ‘Homosexuality and the South African Left’, p 4.

<sup>137</sup> *Ibid*, p 5.

<sup>138</sup> Stychin, ‘Constituting Sexuality’, p 466.

of unity so that political parties could support the gay activists. This was the strategy pursued by lesbian and gay activists through the Coalition.<sup>139</sup> Its strategy was “orchestrated (and) managed... deliberately understated, aimed at constitutional insiders, and non-confrontational.”<sup>140</sup> It saw the benefits of lobbying MPs so that their parties would not fight the retention of sexual orientation. The NCGLE even trained over thirty-five lobbyists, matching an activist to an MP for maximum success. It was very much a GASA-type approach, in that it was an insider strategy that was rational and moderate. Even Edwin Cameron was accused of deliberately following “a moderate approach in the constitution-making process to avoid alienating the politicians.”<sup>141</sup> Botha had maintained from the beginning that the demands of the NCGLE were not about labour or family issues but rather equality and the removal of unjust laws.<sup>142</sup> “The Coalition’s agenda was geared exclusively towards the most effective way in which to achieve a single goal.”<sup>143</sup> Many lesbians and gay men wanted to fight for the right to marry. Lawyers consciously stalled this, rather concentrating on “the incremental approach to law reform.”<sup>144</sup> Gay men and lesbians had to



act ‘responsibly’ and moderately so as to consolidate their rights...lawyers involved in lesbian and gay activism (were) disciplining the membership towards a legal strategy of moderation and measured progress...The NCGLE opted for an insider strategy of negotiation and consultation, as opposed to protest politics.”<sup>145</sup>

This, in turn, built a close relationship with the ANC government and avoided any repercussions that could have been forthcoming from the conservative elements of society.<sup>146</sup> Even once the Constitution was accepted it could have been amended to remove sexual orientation therefore gay rights activists were conservative in their

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<sup>139</sup> Ibid, p 461.

<sup>140</sup> Ibid, p 462.

<sup>141</sup> Stychin as quoted in Steyn, ‘From Closet to Constitution’.

<sup>142</sup> K. Botha in Stychin, ‘Constituting Sexuality’, p 466.

<sup>143</sup> Stychin, ‘Constituting Sexuality’, p 462.

<sup>144</sup> Ibid, p 463. Stychin calls this type of activism by lawyers ‘lawyerism’.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid, p 464.

approach, careful not to offend anyone or do damage that might later be detrimental to gay men and lesbians.

Cameron's role in securing sexual orientation in the Constitution illustrates very well the benefits of the insider strategy. His participation in the constitutional process was two-fold. Firstly, he was already involved in the NCGLE and assisted in its lobbying. Secondly, a body of professionals appointed by CODESA drafted the Constitution. Cameron was appointed in his capacity as a law professor and a human rights legal expert, not necessarily for his input on gay and lesbian rights *per se*.<sup>147</sup> The Technical Committee could be lobbied to include sexual orientation so personal contacts by gay rights activists were important. The insider strategy was paramount. "Personal contacts between ...Cameron...and members of the ANC Constitutional Committee cannot be underestimated."<sup>148</sup> Because Cameron was part of the anti-apartheid legal network he could influence ANC constitutional strategies.<sup>149</sup> Other gay rights activists were close personal friends with members of the Technical Committee.<sup>150</sup> Botha and Cameron were important in influencing those who were sceptical about the equality clause stipulating sexual orientation, especially, according to Cameron, when the NP was concerned about the potential of the clause protecting deviant sexual practices such as paedophilia and bestiality.<sup>151</sup> Therefore, considering resources, I maintain that the entrenchment of gay rights was personality-driven and the constitutional development process spearheaded by individual experts.

Gay rights were protected in the Constitution because gay men had pro-gay lobbyists who were sympathetic to their cause and supported them.<sup>152</sup> Archbishop Tutu was so convinced of his views that he wrote to the constitutional assembly supporting sexual orientation.<sup>153</sup> The African Christian Democratic Party (ACDP) accused the gay rights

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<sup>147</sup> Informal interview with Knoesen.

<sup>148</sup> Stychin, 'Constituting Sexuality', p 459.

<sup>149</sup> Stychin, *A Nation by Rights*, p 73.

<sup>150</sup> Stychin, 'Constituting Sexuality', p 475 and Stychin, *A Nation by Rights*, p 81.

<sup>151</sup> Cameron in Stychin, 'Constituting Sexuality', p 458.

<sup>152</sup> Interview with Knoesen.

<sup>153</sup> C. Rickard, 'Fighting for the Freedom to Enjoy Sex Without Fear', *Sunday Times*, (6 Sept. 1998), (AM 2656, GALA), n.p. and S. Bullington, 'The "Devil Dean" of Cape Town: Race, Sexuality and the

movement of aligning itself with the ANC, pushing the party to recognise sexual orientation.<sup>154</sup> This cannot be denied and it was an intentional strategy of the pro-gay lobbyists.<sup>155</sup> Gay men had no choice but to lobby those who could influence the law – ANC members who were sympathetic to gay rights. Some activists who had recognised the relationship between sexual orientation and rights of the broader struggle were also members of the ANC and this established their credibility, allowing for “a sophisticated lobbying strategy” and a deliberate decision to avoid a grassroots campaign.<sup>156</sup> It seems this decision was taken in order to keep the fight for gay rights simple and non-confrontational. A well controlled, insider strategy proved to be far more beneficial. “It would be erroneous to suggest that the inclusion of sexual orientation in the Constitution was the product of a broadly based campaign organized by a lesbian, gay, and bisexual rights movement.”<sup>157</sup>

Once individual members of the ANC lobbied for recognition of sexual orientation in the Constitution most of the ANC membership and other political parties accepted this with little dispute.

Parliamentarians and most political parties were willing to listen and try to understand our perspective. We didn't expect this in a country with such a deeply ingrained culture of discrimination against gay men and lesbians.<sup>158</sup>

According to Kraak this occurred because the ANC was “onboard” and the other political parties really had no other choice but to join.<sup>159</sup> Human rights were recognised as indivisible. “In the scheme of things they didn't see it as terribly important.”<sup>160</sup> According to Epprecht, the major parties agreed to this clause

not from any newfound ideological commitment to non-discrimination, but rather

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Limits of the Nation in Contemporary South Africa', (IASSCS Sex and Secrecy Conference, 2003), p 4.

<sup>154</sup> Stychin, 'Constituting Sexuality', p 475 and Stychin, A Nation by Rights, p 81.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid and ibid, p 74.

<sup>157</sup> Stychin, A Nation by Rights, p 75.

<sup>158</sup> M. Jara, 'Relating to the New State', (no publication, n.d), (AM2704, GALA), n.p.

<sup>159</sup> Interview with Kraak.

<sup>160</sup> Ibid.

out of the calculation that vague civil rights for the gay minority could be parleyed into specific political rights for the ethnic minorities they represented.<sup>161</sup>

Gevisser says the equality clause was slipped into the Constitution because it was a minority right therefore no other minorities challenged it. It was self-serving; minorities did not want to lose their right or jeopardise it.<sup>162</sup> All minorities wanted to exploit the clause for themselves.

The protection of sexual orientation was also secured in the Constitution partly because nobody wanted to tamper with it.

If you tinker with the equality clause where do you stop taking clauses out? It is not worth the time or money. Once it was written down everything followed suit. There was neither the political will, desire or capital to start tinkering. People were more occupied with the retention of pensions, for example.<sup>163</sup>

Nevertheless, there was still a last hurdle to be crossed before the final Constitution could be passed. Strangely enough, throughout all the discussions the term 'sexual orientation' had never been clearly defined. This had to be done now. Some political parties felt the protection of sexual orientation could justify paraphilia activities, for example bestiality, sex acts with the mentally retarded, and paedophilia.<sup>164</sup> But "just as the protection the equality clause gives to 'religion' will not permit ritual sacrifice, or the protection to 'race' a racist murder, so protection of 'sexual orientation' does not legitimate all sexual

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<sup>161</sup> Epprecht, 'What an Abomination, a Rottenness of Culture', p 1095.

<sup>162</sup> Mark Gevisser in informal discussion at 2003 ISSACS Conference.

<sup>163</sup> Interview with Knoesen.

<sup>164</sup> Mischke, 'Big Law – Little Wrong', p 40. If the Constitution had referred to sexual preference (as opposed to sexual orientation) this could have been interpreted as including all types of paraphilia. Sexual orientations are not considered pathological in psychiatry, but paraphilia is. Therefore paraphilia is excluded from the definition of sexual orientation. In psychological terms 'non-pathology' means erotic activity is consensual, conducted with another human being, and with an adult. "Conduct where one of these elements is not present would render the erotic activity pathological and therefore unlikely to survive judicial scrutiny." (K. Botha and E. Cameron, 'Sexual Orientation' in South African Human Rights Yearbook 1994). Therefore, because paraphilia does not conform to the non-pathological definition of sexual orientation it is pathological; not part of the definition of sexual orientation. Obviously the inclusion of sexual orientation in the Constitution did not allow for or protect any paraphilia.

conduct.”<sup>165</sup> The section of the Constitution that allows for the limitation of equality protection does not protect paraphilia either. The NCGLE’s definition of sexual orientation excluded “what they...called ‘deviant, abusive or otherwise legally repugnant conduct’.”<sup>166</sup>

Once agreement was reached on this the final draft of the Constitution was passed in 1996. It guaranteed homosex the same constitutional status as heterosexual activity. “The Constitution is therefore a truly historic bridge between the oppression of the past to the promise of a new future for all.”<sup>167</sup> But legally homosex was still a criminal offence.<sup>168</sup> Therefore gay men had to use the newly constituted Constitutional Court to challenge legislation that discriminated on the grounds of sexual orientation. This I consider in chapter 6.

### **Opposition to Gay Rights During Constitutional Negotiations.**

Although most political parties accepted the notion of gay rights in the Constitution there was still political debate. It was predominantly religion that provided the backbone to the argument that gay men should not be protected by the Constitution. Those who opposed gay rights did not accept that moral and state law should be differentiated.

Although sexual orientation was protected in the final Constitution, the seventh Progress Report by the Technical Committee on Fundamental Rights in 1993 noted that “certain groups have objected to the inclusion of ‘sexual orientation’ in the list.”<sup>169</sup> Most of the objections were from non-negotiating groups. The Constitutional Committee received two thousand five hundred submissions and thirteen thousand petitions: three hundred

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<sup>165</sup> Botha, Cameron, ‘Sexual Orientation’, p 291.

<sup>166</sup> Stychin, ‘Constituting Sexuality’, p 470.

<sup>167</sup> ‘South African Police Service: Diversity Training Inclusion of Sexual Orientation Module’, document from Senior Superintendent Juan Nel to Equality Foundation, (Kevan Botha Collection, GALA), p 7.

<sup>168</sup> The following Acts discriminated against homosexuality: the Criminal Procedure Act, the South African Police Services Act, the Security Officers Act, the Sexual Offences Act, and the Aliens Control Act.

<sup>169</sup> Extracts from Reports of the Technical Committee on Fundamental Rights During the Transition Recording the Development of the Applicable Articles in the Bill of Fundamental Rights, (Kevan Botha Collection, GALA), p 16.



and eighty of the submissions<sup>170</sup> and four thousand five hundred of the petitions demanded that sexual orientation be excluded from the final Constitution.<sup>171</sup>

The Azanian Peoples' Organisation (AZAPO) did not accept the inclusion of sexual orientation in the Constitution. According to Exit, AZAPO made homosexuality sound like an epidemic and did not consider this sexual orientation a priority because it was a phenomenon that affected the more affluent sectors of the community – that is, white men.<sup>172</sup>

Many Christian churches called on politicians not to entrench special rights for gay men. One thousand ministers and Christian workers at an interdenominational conference – The Kwasizabantu Ministers' Conference – made one such call in 1993. “The Conference noted with shock and disappointment that the leaders of our land decided to give constitutional protection to perverted lifestyles.”<sup>173</sup> The conference believed rights for gay men would give special protection to anti-family and anti-society lifestyles and insisted sexual orientation in the Bill of Rights was broad enough to include paedophilia and bestiality.

The ACDP, the African Muslim Party (AMP) and the Islamic Party (IP) did not support the inclusion of the protection of sexual orientation in the Constitution because it undermined the word of God by legalising homosexuality. Moreover, in their view, homosexual activity was an abomination to God. In 1994 the AMP and the IP spearheaded a million-signature campaign to pressurise the government not to pass, what they termed, the proposed immoral legislation. “We call on the Government to

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<sup>170</sup> Kevan Botha says 564. (Hayward, 'History of the Equality Clause', p 2).

<sup>171</sup> 'Public Submissions to the CA', Equality, (July-Sept. 1995), Issue 2, (C.2) NCGLE, South African organisations, AM 2623, GALA), p 2. This minority did not deter the authorities because people who were against the equality clause were also usually inclined to be anti-abortion, and pro-capital punishment. “They are bigots, anti-democrats.” (G. Kraak, 'Cheryl Carolus Speaks: We Believe in Equality and the Right of People to Choose How They Conduct Their Lives', Equality, Issue 2, (July-Sept. 1995), p 5).

<sup>172</sup> AZAPO's national publicity secretary, Mr Strini Moodley, in Exit, Dec. 1991 as quoted in Gevisser and 'A Different Fight for Freedom', p 71.

<sup>173</sup> 'Don't Give Gay men Special Rights, Church Urges Government', The Citizen, (2 Oct. 1993, Publication No: 0353, Date: 931002275, Subject No:167, Document No: 824, Instituut vir Eietydse

withdraw these laws or hold a referendum to allow the people to decide these issues as they are immoral and go against the teachings of all religions’.”<sup>174</sup> In the same year the ACDP said if it had anything to do with the ‘New’ South Africa the ban on homosexuality would be maintained.<sup>175</sup> The ACDP believed sexual orientation was a matter of choice therefore it was not subject to the same principles of discrimination as race or gender.

As mentioned prior,<sup>176</sup> apartheid relied on conspiracy theories and this reliance continued in the ‘New’ South Africa by the ACDP as well as the NCGLE. The ACDP said there was a conspiracy among those who took a ‘politically correct’ position on issues such as homosexuality, abortion, pornography, and prostitution<sup>177</sup> and that the NCGLE had coerced African lesbians and gay men, the ANC, the ACC, universities, and the media into supporting it.<sup>178</sup>

At the first round of constitutional debates the ACDP was at odds with the other political parties. In response to the ACDP’s anti-gay stance the ANC asked why religion should be protected in the Constitution, if it was also a choice.<sup>179</sup> The ACDP avoided the question and retaliated that the American Psychiatric Association had only removed homosexuality from its list of mental disorders because lifestyle activists had stormed the convention. The ACDP advocated that these activists had ridden on the back of the civil rights movements in America, and the same was happening in South Africa. The NP responded: did the ACDP agree with gay people being denied employment because they were gay, or the police invading a gay man’s privacy?<sup>180</sup> The ACDP said one evil,

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Geskiedenis, University of the OFS, Micro-Fiche RAU), n.p.

<sup>174</sup> The Secretary-General of the AMP, Rafeek Hassen, in ‘Petition Drive by AMP Against ‘Immoral’ Laws’, The Leader, (26 Aug. 1994, Publication No: 0400, Date: 940826238, Subject No: 272, Document No: 12973, Instituut vir Eietydse Geskiedenis, University of the OFS, Micro-Fiche RAU), n.p.

<sup>175</sup> R. Hartle, ‘Promise to Protect Christian Morals’, Herald, (9 March 1994, Publication No: 0094, Date: 40309068, Subject No: 337, Document No: 1193, Instituut vir Eietydse Geskiedenis, University of the OFS, Micro-Fiche RAU), n.p.

<sup>176</sup> See p 69.

<sup>177</sup> Stychin, A Nation by Rights, p 82.

<sup>178</sup> Ibid and Stychin, ‘Constituting Sexuality’, p 476.

<sup>179</sup> Achmat, Editorial, Equality, p 1.

<sup>180</sup> Ibid.

apartheid, must not be replaced by another, homosexuality. The ACDP was asked if we should then go back to the days of the Immorality Act? The ACDP conceded that the state must not interfere in private lives.<sup>181</sup> However, this did not mean it condoned homosexuality or sexual orientation in the equality clause.

Because the ACDP was so vehement in its opposition to gay protection in the Constitution, initially “the Constitutional Committee agreed that they would need to look again at the ACDP’s objections despite the fact that the other parties in the Assembly raised no objection to retaining sexual orientation.”<sup>182</sup> However, it does not seem that this ever materialised and the ACDP seems to have quietened in its opinion when faced with mounting opposition, specifically from the ANC. No other parties saw support for sexual orientation in conflict with their religious beliefs “confirming that the ACDP is motivated by bigotry rather than religious conviction.”<sup>183</sup>

Stychin holds the opinion that the ACDP was finally silenced during constitutional negotiations by the successes of the lesbian and gay insider strategy with its moderate approach, as well as the changing political climate. Once sexual orientation was accepted in the Interim Constitution the ACDP was put in the indefensible position of advocating that rights be taken away, juxtaposing the newly developed sense of the giving of rights with the apartheid notions of oppression and the taking away or not giving of rights.<sup>184</sup>

Apart from religion, the other argument used against the inclusion of sexual orientation in the Constitution was that homosexuality was Euro-centric and thus un-African, and in conflict with the African Renaissance.<sup>185</sup> The Pan Africanist Congress (PAC) advocated this view but also vacillated during the 1990s in its attitude to gay rights. In 1991 it said

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<sup>181</sup> Ibid.

<sup>182</sup> To the Board of Members, Equality Foundation, from Steven Markovitz, Big World Cinema, (n.d. Kevan Botha Collection, GALA.), n.p.

<sup>183</sup> Achmat, Editorial, *Equality*, p 1.

<sup>184</sup> Stychin, ‘Constituting Sexuality’, p 476.

<sup>185</sup> M. Pillay, ‘Gay and Lesbian Academics are Everywhere’, *Agenda*, issue 28, 1996, p 99. The African Renaissance was an ideological movement proposed by Thabo Mbeki whereby the African Union (AU) would transform the African continent from third world to first world status. African countries were encouraged to develop their resources, and empower the African people, thereby reaffirming that Africans should be proud to be African, working as one continent.

gay men should not be persecuted; their rights must be fully respected.<sup>186</sup> The PAC's Stanley Mogoba submitted a letter on behalf of the Methodist Church supporting the equality clause<sup>187</sup> and during constitutional lobbying he took a stand against the ACDP, supporting gay and lesbian rights.<sup>188</sup>

According to Kevan Botha the argument that homosexuality was un-African had been justified by the fact that pre-colonial South Africa had no proof of the criminalisation of homosexuality.<sup>189</sup> Therefore, by deduction, there was no black homosexuality in South Africa prior to colonisation by white Europeans. However, Botha explains, the sangomas had recognised and tolerated homosexuality and *that* was the reason why black homosexuality was not obvious or criminalised. Thus it was the criminalisation of homosexual conduct that was Euro-centric and un-African, not homosexuality.<sup>190</sup> Once South Africa was colonised; anti-homosexual legislation came into play. White missionaries censured black homosexuality. Therefore "there is irony to the fact that latter-day Africanists have assimilated this Judeo-Christian biblical propaganda and reconstructed it as pre-colonial African purity."<sup>191</sup> Vasu Reddy says homosexuality in Africa is not a western import but is part of Africa's culture and history. He says this is evident by black, gay people taking leadership in government and the corporate world<sup>192</sup> (although he gives no examples).

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<sup>186</sup> The PAC's national publicity secretary, Mr Barney Desai in S. Ntshakala, 'Gay Rights a Sensitive Issue in the Politics of a New SA', The Natal Mercury, (26 Oct. 1991), (Publication No: 0132, Date: 911026299, Subject No: 272, Document No: 4044), n.p.

<sup>187</sup> Dunton and Palmberg (no initials given) in Steyn, 'From Closet to Constitution', p 104.

<sup>188</sup> Reddy, 'Institutionalizing Sexuality', p 164. But in 1998 the PAC said homosexuality was the result of the capitalist system and black homosexuality was bred in prisons and compounded by the labour system imposed on black people by white people. (S. Ntuli, 'Homosexuality is Against the 'Afro-Renaissance'', Mail and Guardian, (13 Nov. 1998), B. Alexander in Gevisser, 'A Different Fight for Freedom', p 71, and Steyn, 'From Closet to Constitution', p 103. The PAC felt the African Renaissance was a good cure for homosexuality because it would act as a magnet to pull black, gay men back to their centre, their manhood, and away from everything that was European, including homosexuality. Ntuli, ('Homosexuality is Against the 'Afro-Renaissance''). By the build-up to the 1999 elections Mogoba said gay men and lesbians were social deviants. (Tregrove-Jones, 'Fiction and the Law', p 117). He also said homosexuality was un-African but then stated he had been misquoted.

<sup>189</sup> Telefax from Kevan Botha, The Equality Foundation to Ian McKellen, (17 Jan. 1995), (Kevan Botha Collection, GALA).

<sup>190</sup> Ibid.

<sup>191</sup> Gevisser, 'A Different Fight for Freedom', p 73.

<sup>192</sup> Reddy, 'Institutionalizing Sexuality', p 170.

Other sectors of society did not necessarily oppose gay rights, but neither did they lend their support in the 1990s. Many trade unions did not support the recognition of gay relationships where employment benefits were concerned, even though three new acts clearly prohibited this.<sup>193</sup> The 1995 Labour Relations Act outlaws discrimination on the basis of sexual orientation and marital status,<sup>194</sup> the 1998 Employment Equity Act prohibits discrimination on the grounds of sexual orientation,<sup>195</sup> and the Basic Conditions of Employment Act of 1999 deals with family responsibility leave and defines the immediate family as “the employee’s spouse or any other person who cohabits with the employee.”<sup>196</sup>

The Transport and General Workers Union (TGWU), a COSATU affiliate, was the only union that referred to homosexuality in its constitution (1995). COSATU itself made no effort to rally around the subject of gay and lesbian issues. Within the National Union of Mineworkers (NUM) gay miners formed their own support groups but NUM officially did nothing. All fifty-five affiliates of FEDUSA,<sup>197</sup> NACTU, ESKOM, and the SAPS did not recognise gay relationships.<sup>198</sup> If a gay man had taken one of these unions to court he would have won. For many of these trade unions gay rights or gay equality was inconsequential. The majority of their members were thought to be heterosexual and gay rights were therefore not a concern. There was also the consideration that gay rights were secondary, if anything, to workers’ rights. This, I believe, is another reason why the trade unions made little effort to recognise the discrimination some of the gay workers were subjected to. The majority within these trade unions, and their rights and protection thereof, were of greater importance.

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<sup>193</sup> See M. Jara, ‘A Dismal Record’, in South African Labour Bulletin, vol. 22, issue 2, 1998, p 83-84 and M. Jara, ‘Gay and Lesbian Rights’, in South African Labour Bulletin, vol. 21, issue 6, 1997, p 30-31.

<sup>194</sup> See Jara, ‘Workplace Rights: a Gay and Lesbian Issue’ in South African Labour Bulletin, vol. 20, Issue 6, Dec. 1996, ’ G. van der Walt, ‘Gay Rights and Medical Aid Scheme Membership’, in Obiter, vol. 19, Issue 1, 1998, p 198, and Jara, ‘Gay and Lesbian Rights’, p 30.

<sup>195</sup> See R. Louw, ‘Gay and Lesbian Partner Immigration and the Redefining of Family’, in South African Journal on Human Rights, vol. 16, Issue 2, 2000, p 319, Jara, ‘Gay and Lesbian Rights’, and Steyn, ‘From Closet to Constitution’, p 108.

<sup>196</sup> Jara, ‘Gay and Lesbian Rights’, p 31.

<sup>197</sup> Gay and lesbian issues were discussed in a forum but no policy decisions were taken.

<sup>198</sup> The NCGLE took up the issue and was before the Labour Court in 1997 fighting to get same-sex

## **Conclusion.**

The ANC did not rush to the aid of the gay liberation movement in the late 1980s. It was suspicious of GASA and the essentialism that plagued the movement. The ANC was forced to face the issue of gay rights in 1987 but there was still little real commitment until individual ANC members supported gay rights as civil rights. Thereafter most political parties fell in line and gay rights became one in a number of minority rights that were to be protected in the Constitution. The NP, DP, and IFP all accepted that the equality clause would inevitably include sexual orientation and did not fight it. The ACDP did, however, but was to lose this battle.

Gay rights were established and secured in the Constitution but it was not due to the gay liberation movement, which proves its failure. Individual gay rights activists and the overseas, anti-apartheid movement, coupled with the international, gay liberation movement, were more responsible for sexual orientation in the equality clause. It was individual, civil rights activists from the ANC who had been in exile overseas who proved to be the most successful, achieving success for the gay movement in South Africa.

The NCGLE too, played its part. OLGA was one of its affiliates, and courted Albie Sachs and his influence in order to gain insight into how the ANC would respond to sexual orientation in the equality clause of the Constitution. It was also Kevan Botha who skilfully represented the gay cause to the politicians at CODESA and in so doing ensured gay people were protected in the equality clause of the Constitution.

Masculinities are “institutional practices located in structures of power”<sup>199</sup> and controlling the meaning of masculinity was central in the struggle for power.<sup>200</sup> If the ANC wanted to redefine hegemony and the hegemonic masculinity it had to control the meanings of masculinities. It therefore had to decide whether or not this included the gay masculinity, which was previously not the case with the NP government. The ANC

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partners recognised by medical aid schemes.  
<sup>199</sup> J. Hearn, ‘Is Masculinity Dead?’, p 206.

opted for inclusion rather than exclusion,<sup>201</sup> thereby exercising its power over the meaning of masculinity and initiating the inclusion of sexual orientation in the Constitution.

But there is a concern with the equality clause. Liz Walker asserts that manhood and masculine identity represented in the Constitution derive from, but also break with the past.<sup>202</sup> The traditional hegemonic definition of masculinity supported by patriarchy changed.<sup>203</sup> The Constitution's understanding of sexuality is based on a liberal model of manhood, as liberal as the Constitution itself is and is unrecognizable to men who subscribed to the definitions constructed by the apartheid regime, be they black or white men, authoritarian or submissive masculinities. This 'Constitutional sexuality' has allowed for the creation of spaces and opportunities for men to construct new masculinities, one of which was gay masculinity. Consequently "older versions of masculinity are at odds with newer ones with very unsettling results"<sup>204</sup> in the sense that straight men do not recognize who they are and what their role is. The male sense of selfhood has been destabilized.<sup>205</sup> This change in definition of masculinity from NP to ANC-defined has "triggered a crisis of masculinity"<sup>206</sup> and some men's reactions to this shift in gendered power relations have been violent.<sup>207</sup> The new definitions of masculinities are non-violent, monogamous, responsible, and respectful which is the antithesis of the traditional hegemonic definition of masculinity.<sup>208</sup> This confusion and uncertainty about masculinity, the expectation of men, and male sexuality has created a crisis, but it is also creating space for new notions of manhood.<sup>209</sup>

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<sup>200</sup> Edley, Wetherall, 'Masculinity, Power and Identity', p 106.

<sup>201</sup> Hayward, 'History of the Equality Clause', p 2.

<sup>202</sup> L. Walker, 'Men Behaving Differently: South African Men Since 1994', (IASSCS Sex and Secrecy Conference 2003), p 2.

<sup>203</sup> Ibid, p 3.

<sup>204</sup> Ibid, p 19.

<sup>205</sup> Ibid, p 24.

<sup>206</sup> Ibid, p 2.

<sup>207</sup> Ibid, p 6.

<sup>208</sup> Ibid, p 19.

<sup>209</sup> Ibid, p 24. Also see K. Ratele, 'Contradictions in Construction of African Masculinity', in Nordic Africa Institute, 1996-2002.