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The National Coalition for Gay and Lesbian Equality v. The Minister of Justice: A New Era in South African Sexual Orientation Protection

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Cover Page Footnote

International Law; Commercial Law; Law

The National Coalition for Gay and Lesbian Equality v. The Minister of Justice: A New Era in South African Sexual Orientation Protection

I. Introduction

For decades South Africa has lagged behind the world in the civil rights realm. During apartheid¹ blacks were not considered citizens of South Africa; they were forbidden from living in prosperous urban areas and were often victims of police brutality.² However, with the demise of apartheid and adoption of a new constitution,³ “South Africa’s constitution is one of the most progressive human rights instruments in the world.”⁴ The Constitution

constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. . . . The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality.⁵

Although the South African government has attempted to enact

¹ Apartheid is defined as “racial segregation; *specif*: a policy of segregation and political and economic discrimination against non-European groups in the Republic of South Africa.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 94 (9th ed. 1991).

² See Julie King & Paul Lansing, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT’L & COMP. L. 753, 756 (1998). “Black people were prevented from becoming owners of property or even residing in areas classified as ‘white,’ which constituted nearly 90% of the landmass of South Africa.” Brink v. Kitshoff NO, 1996 (4) SALR 197, para. 40 (CC).

³ See S. AFR. CONST. (Act 108 of 1996).

⁴ Voris Johnson, Comment, *Making Words on a Page Become Everyday Life: A Strategy to Help Gay Men and Lesbians Achieve Full Equality Under South Africa’s Constitution*, 11 EMORY INT’L L. REV. 583, 585 (1997).

⁵ National Coalition for Gay and Lesbian Equal. v. Minister of Justice, No. 97/023677, 1998 SACLR LEXIS 6, at *39 (High Court, Witwatersrand Local Division, Aug. 5, 1998), 1998 (6) BCLR 726 (W) [hereinafter *National Coalition I*] (quoting Shabalala v. Attorney-General of the Transvaal, 1996 (1) SALR 725, para. 26, at (CC)).

programs to heal the deep scars of racism,⁶ protecting homosexuals from discrimination has not come about as quickly.⁷

Internationally, a recent resurgence in equal protection jurisprudence has led many nations to declare anti-sodomy laws unconstitutional.⁸ In 1993, for example, Ireland decriminalized its sodomy laws after the European Court of Human Rights held that the prohibition violated the guarantee of privacy under the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ It is this innovation in constitutional jurisprudence that the Constitutional Court of South Africa utilized in *National Coalition for Gay and Lesbian Equality v. Minister of Justice (National Coalition II)*.¹⁰

In *National Coalition II*, the Constitutional Court of the Republic of South Africa held that certain statutory and common-law offenses penalizing homosexual sex were unconstitutional because they violated the equal protection, dignity, and privacy clauses of the Constitution.¹¹ The Court's decision reflected its attempt to recognize "that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside

⁶ In 1995 the Parliament adopted the Promotion of National Unity and Reconciliation Act, which established the Truth and Reconciliation Commission. See King & Lansing, *supra* note 2, at 760. The purpose of the Commission is to promote "national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past." *Id.* at 760-61; see § 2 of Promotion of National Unity and Reconciliation Act 34 of 1995.

⁷ See Michael Thomas, *Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection*, 17 B.C. THIRD WORLD L.J. 365, 380-83 (1997).

⁸ See *infra* note 44 and accompanying text.

⁹ See John Quinn, *The Lost Language of the Irish Gay Male: Textualization in Ireland's Law and Literature*, 26 COLUM. HUM. RTS. L. REV. 553, 557-59 (1995); §§ 2-4 of Criminal Law (Sexual Offenses) Act No. 20 of 1993; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221 (stating that "[e]veryone has the right to respect for his private and family life, his home and his correspondence").

¹⁰ Case CCT 11/98 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>> [hereinafter *National Coalition II*].

¹¹ See *id.* para. 57.

community.”¹²

Part II of this Note examines the facts of the *National Coalition I* and *II* decisions and discusses the rationale behind both opinions.¹³ Part III clarifies the jurisdictional aspects of the South African Judicial System¹⁴ and discusses the development of South African civil rights jurisprudence.¹⁵ Part IV considers the effect of the *National Coalition II* decision and contrasts the activist position of the South African courts to the conservative approach of the U.S. Supreme Court.¹⁶ Finally, Part V concludes by addressing the possible effects of the decision on homosexual rights in South Africa.¹⁷

II. Statement of the Case

A. *The Facts*

The applicants¹⁸ initially brought suit against the respondents¹⁹ in the High Court of the Witwatersrand Local Division to invalidate the common law and statutory offenses of sodomy, as

¹² *Id.* para. 32.

¹³ *See infra* notes 18-51 and accompanying text.

¹⁴ *See infra* notes 52-76 and accompanying text.

¹⁵ *See infra* notes 89-164 and accompanying text.

¹⁶ *See infra* notes 165-208 and accompanying text.

¹⁷ *See infra* notes 209-11 and accompanying text.

¹⁸ The first applicant, the National Coalition for Gay and Lesbian Equality, is a “voluntary association of gay, lesbian, bi-sexual and transgendered persons comprising seventy organizations and associations.” *National Coalition I*, No. 97/023677, 1998 SACLX LEXIS 6, at *22-*23 (High Court, Witwatersrand Local Division, Aug. 5, 1998). The second applicant, the South African Human Rights Commission, was established by section 184 of the Constitution Act of 1996 to “promote the protection, development and attainment of human rights.” *Id.* at *23 (quoting section 7(1)(e) of the Human Rights Commission Act 54 of 1994). The Commission serves as a watchdog to ensure equality and reports on infringements of fundamental rights. *See Thomas, supra* note 7, at 379.

¹⁹ The respondents, the Minister of Justice and the Minister of Safety and Security, are “responsible for the administration and enforcement of the Criminal Procedure Act, the Sexual Offences Act and the Security Officers Act.” *National Coalition I*, 1998 SACLX LEXIS, at *24. The third respondent, the Attorney-General of Witwatersrand, controls prosecutions for violations of the challenged laws. *See id.*

well as the indirect statutory prohibitions on homosexual sex.²⁰ The applicants argued that “the statutory and common law offences which criminalise [sic] sexual acts engaged in between male persons, and statutes which discriminate on the basis of convictions for those acts” were unconstitutional because the laws applied different standards to individuals based on their sexual orientation.²¹ The applicants based their constitutional argument on the guarantee of equality in the Constitution.²² They specifically challenged the constitutionality of the common law offense of sodomy,²³ section 20A of the Sexual Offences Act,²⁴ the common law offense of commission of an unnatural sexual act between men,²⁵ and the inclusion of sodomy as an item in schedule 1 to both the Criminal Procedure Act²⁶ and the Security Officers Act.²⁷

After hearing the applicants’ arguments,²⁸ the High Court concluded that the challenged offenses were unconstitutional.²⁹ Following the High Court’s decision, the case was automatically referred to the Constitutional Court for confirmation review.³⁰

²⁰ *See id.*

²¹ *Id.*

²² *See id.* at *36-*38; *see also* S. AFR. CONST. § 9(1) (stating that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”).

²³ *See infra* notes 77-80 and accompanying text.

²⁴ *See infra* notes 84-88 and accompanying text (discussing Sexual Offences Act 23 of 1957).

²⁵ *See infra* notes 81-83 and accompanying text.

²⁶ *See* Criminal Procedure Act 51 of 1977. This Act provides that the police expand search and arrest powers against anyone suspected of committing a crime contained in the schedule to the Act. *See National Coalition I*, 1998 SACLX LEXIS, at *30-*32.

²⁷ *See* Security Officers Act 92 of 1987. This Act prohibits anyone convicted of sodomy from becoming or continuing to be a security officer. *See National Coalition I*, 1998 SACLX LEXIS, at *32.

²⁸ The respondents did not present a written argument at either the High Court or the Constitutional Court hearing. *See National Coalition II*, Case CCT 11/98, para. 6 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

²⁹ *See National Coalition I*, 1998 SACLX LEXIS, at *89.

³⁰ *See National Coalition II*, Case CCT 11/98 para. 1. Pursuant to President Mandela’s orders, at the confirmation hearing, the respondent State Attorney made no

Upon review of the High Court ruling, the Constitutional Court confirmed the unconstitutionality of anti-sodomy laws and further expanded the protection afforded to homosexuals.³¹

B. The High Court's Decision

The High Court structured its opinion by (1) outlining the history of and policy reasons for the challenged offenses;³² (2) discussing the history of the Constitution and recent South African and international cases dealing with equal protection jurisprudence;³³ and (3) applying equal protection analysis to determine the constitutionality of the challenged laws.³⁴ Throughout its analysis the court focused on the principle of equality and the great importance it must be given in face of the country's segregated past.³⁵

The High Court analyzed the constitutionality of anti-sodomy laws by utilizing progressive equal protection jurisprudence. South Africa was the first nation to explicitly protect sexual orientation within the equal protection clause of its Constitution.³⁶ The drafters, furthermore, considered the country's long history of oppression of minorities, and the Constitution greatly emphasized the importance of equality in an open and democratic society.³⁷

written argument and was present only to answer questions of the Court. *See id.* para. 6. The Court permitted the Centre for Applied Legal Studies to present an oral argument as *amicus curiae*. *See id.*

³¹ *See id.* para. 32.

³² *See National Coalition I*, 1998 SACL R LEXIS, at *25-*36.

³³ *See id.* at *36-*63. The court performed a thorough review of equal protection jurisprudence in the United States and Canada. *See id.* at *50-*53.

³⁴ *See id.* at *63-*88.

³⁵ *See id.* at *56-*61. During apartheid the government placed different racial and ethnic groups in specific geographic regions. *See Group Areas Act 41 of 1950*. All races were required to carry passes identifying the geographic areas where they were allowed to live. *See King & Lansing, supra* note 2, at 756. These passes allowed the police to prevent blacks from migrating to urban areas unless they had government-approved jobs. *See id.*; *see also Abolition of Passes and Coordination of Documents Act of 1952* (consolidating pass laws and new identification requirements for blacks).

³⁶ *See Johnson, supra* note 4, at 584; S. AFR. CONST. ch. 2, § 9(3).

³⁷ *See S. AFR. CONST.* pmb. "We, the people of South Africa . . . adopt this Constitution as the supreme law of the Republic so as to . . . [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." *Id.*

In light of this heavy historical burden, the court evaluated each challenged law and deemed them all to be unconstitutional.³⁸ The court also reviewed the justifications proposed in analogous U.S. cases³⁹ for limiting homosexual rights. Rejecting these, the Court characterized the U.S. rationales as “historical antipathy, personal revulsion, religious conviction, the prevailing opinion in society, and the protection of the morals of the people.”⁴⁰ In light of the new fundamental rights guaranteed in the South African Constitution, the court found U.S. justifications insufficient to limit necessary personal freedoms.⁴¹

C. *The Constitutional Court's Decision*

After reviewing the High Court's ruling, the Constitutional Court analyzed the constitutionality of the common law anti-sodomy laws under the doctrines of equality, dignity, and privacy.⁴² The Court concluded that anti-sodomy legislation essentially reduced gay men to “unapprehended felons.”⁴³ In lieu of the recent trend toward decriminalizing sodomy in western democracies, the Court found no justification in the “jurisprudence of other open and democratic societies based on human dignity, equality and freedom to continue the prohibition on sodomy.”⁴⁴

³⁸ See *National Coalition I*, 1998 SACLX LEXIS, at *89.

³⁹ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the right of homosexuals to engage in consensual sodomy could not be a fundamental right because the history and tradition of the United States has been to criminalize sodomy).

⁴⁰ *National Coalition I*, 1998 SACLX LEXIS, at *65.

⁴¹ See *id.* at *65-66. “Attitudes emanating from religious belief (a personal and not a State concern in South Africa) and popular opinion cannot constitute a justification for the continued operation of the crime of sodomy in a face of the explicit constitutional guarantees.” *Id.* at *66.

⁴² See *National Coalition II*, Case CCT 11/98, paras. 15, 28-29 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

⁴³ Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 455 (1993). “[G]ay men are at the risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.” *National Coalition II*, Case CCT 11/98 para. 28.

⁴⁴ *National Coalition II*, Case CCT 11/98 para 39. Sodomy between consenting males in private was decriminalized in England and Wales in 1967 and in Scotland in 1980. In 1994 the German government repealed its anti-sodomy laws. See *id.* para. 44.

After finding the common law prohibition of sodomy to be unconstitutional, the Court necessarily found its inclusion on schedule 1 of the Criminal Procedure Act and the Security Officers Act to be unconstitutional.⁴⁵

The Court also discussed the constitutionality of Section 20A of the Sexual Offences Act of 1957.⁴⁶ Because the provision failed to criminalize similar acts between women, the Court concluded the discrimination infringed on the constitutionally protected arena of sexual orientation.⁴⁷ Therefore, like the common law offense of sodomy, the Court concluded that the statutory offense amounted to unfair discrimination.⁴⁸

Finally, the Court addressed its ability to make a retrospective order of invalidity for all the offenses.⁴⁹ Section 172(1)(b)(i) of the Constitution gives the Court the authority to "make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity."⁵⁰ The Court concluded that, in the interest of good government, the just and equitable remedy would be to order all the challenged offenses inconsistent with the Constitution.⁵¹

Thirty-two of the member states of the Council of Europe had decriminalized sodomy by 1995. *See id.* para. 45. Additionally, Australia, New Zealand, and Canada have held anti-sodomy laws to be unconstitutional. *See id.* paras. 46-51.

⁴⁵ *See id.* para. 77.

⁴⁶ *See id.* para. 76; *see also* Sexual Offences Act 23 of 1957 (S. Afr.).

⁴⁷ *See National Coalition II*, Case CCT 11/98 para. 76.

⁴⁸ *See id.* "The impact intended and caused by the provision is flagrant, intense, demeaning and destructive of self-realisation [sic], sexual expression and sexual orientation." *Id.*

⁴⁹ *See id.* para. 83. When additional provisions are made to the constitution, a pre-existing law that is later determined to be unconstitutional based on these changes was unconstitutional at the moment of inception of the new constitutional provisions. *See id.* para. 84. Therefore, under a retrospective order, any conviction of a violation of the pre-existing law must be set aside. *See id.* paras. 95-96.

⁵⁰ S. AFR. CONST. ch. 8, § 172(1)(b)(i).

⁵¹ *See National Coalition II*, Case CCT 11/98 para. 106. In order to give the ruling effect, anyone convicted of a challenged offense must appeal his conviction through the courts to get it overturned. *See id.* para. 97. The Court limited the order to cover only consensual sodomy so that convictions for male rape could not be overturned. *See id.* paras. 98, 106.

III. Background

In deciding *National Coalition II*, the Court used a constitution drafted with the intent to repair a country ravaged by racism and bitterness.⁵² As the High Court noted, “[T]he Constitution was intended to be a ‘ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.’”⁵³ While the Constitutional Court could not rely on a long history of equal protection jurisprudence, the Court was able to gain guidance from a few Constitutional Court cases that interpreted the scope of rights under the Bill of Rights.⁵⁴

A. *The Jurisdiction of the South African Courts*

While there are some similarities between the U.S. and the South African judicial systems, there are also significant differences. Under the South African Constitution, the judiciary is separated into five court systems: (1) the Constitutional Court; (2) the Supreme Court of Appeal; (3) The High Courts; (4) the Magistrates’ Court; and (5) any other court established or recognized by an Act of Parliament.⁵⁵

Each court system has its own jurisdictional limitations.⁵⁶ The Constitution confers three types of jurisdiction on the High Courts.⁵⁷ The High Courts have jurisdiction over any “constitutional matter” not explicitly in the exclusive jurisdiction of the Constitutional Court.⁵⁸ “Constitutional matters” are defined as “issue[s] involving the interpretation, protection or enforcement of the Constitution.”⁵⁹ In addition, the High Courts have

⁵² See *National Coalition I*, No. 97/023677, 1998 SACLR LEXIS 6, at *38-*40 (High Court, Witwatersrand Local Division, Aug. 5, 1998).

⁵³ *Id.* at *41 (quoting *S v. Mhlunga*, 1995 (3) SALR 867, para. 8, at 873-74 (CC)).

⁵⁴ See *id.* at *41-*45.

⁵⁵ See S. AFR. CONST. ch. 8, § 167.

⁵⁶ See Iain Currie, *Jurisdiction and Procedures in Bill of Rights Litigation*, in JOHAN DE WAAL ET AL., *THE BILL OF RIGHTS HANDBOOK* ch. 5, § 5.1 (2d ed. 1999) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/court/constjuris.pdf>>.

⁵⁷ See *id.* § 5.2(b)(iii).

⁵⁸ See *id.*

⁵⁹ S. AFR. CONST. ch. 8, § 167(7).

jurisdiction over any matters conferred on them by national legislation.⁶⁰ The final realm of jurisdiction is residual or inherent jurisdiction conferred by section 173 of the Constitution.⁶¹ Pursuant to section 173, “[t]he Constitutional Court, Supreme Court of Appeal, and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”⁶² These jurisdictional grants give a High Court the power to hear any matter in its geographic region, unless specifically excluded from jurisdiction by the Constitution or legislation.⁶³

Analogous to the U.S. Supreme Court, the Constitutional Court is the final interpreter of the Constitution.⁶⁴ However, the Constitutional Court jurisdictional grant is distinguishable from the U.S. Supreme Court because it is divided into concurrent and exclusive jurisdiction.⁶⁵ “The Constitutional Court has exclusive jurisdiction only over constitutional disputes between organs or state [sic] at national or provincial levels of government; disputes over the constitutionality of provincial or Parliamentary Bills; determination whether Parliament or the President has failed to comply with a constitutional duty and the certification of provincial constitutions.”⁶⁶ When acting within its exclusive jurisdiction, the Court acts as a court of first instance.⁶⁷ Because of the narrow jurisdictional grant, private individuals will seldom have direct access to the court.⁶⁸

Consequently, the majority of cases reach the Constitutional Court through its concurrent jurisdiction.⁶⁹ The Court has

⁶⁰ *See id.* § 171.

⁶¹ *See id.* § 173; *see also* Currie, *supra* note 56, § 5.2(b)(iii).

⁶² S. AFR. CONST. ch. 8, § 173.

⁶³ *See* Currie, *supra* note 56, § 5.2(b)(iii). Normally the High Court is the first court in which a constitutional dispute is heard. *See id.* § 5.2(b)(i).

⁶⁴ *See* S. AFR. CONST. ch. 8, § 167(3)(a).

⁶⁵ *See* Currie, *supra* note 56, § 5.2(b)(i).

⁶⁶ *Id.* (citing S. AFR. CONST. ch. 8, § 167(4)).

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.* The Constitutional Court has concurrent jurisdiction with the High Court and the Supreme Court of Appeal. *See id.*

concurrent jurisdiction to hear disputes over the constitutionality of an Act of Parliament, provincial legislation, or delegated legislation.⁷⁰ A constitutional challenge to an act of Parliament is first heard in the local High Court and then can be appealed to either the Supreme Court of Appeal or the Constitutional Court.⁷¹ Regardless of whether the High Court or the Supreme Court invalidates an act of Parliament, a provincial act, or any conduct of the president, the order is unenforceable until confirmed by the Constitutional Court.⁷² As such, "the Constitutional Court is primarily an appellate court and not a court of first instance."⁷³

While the Constitutional Court reviewed the constitutionality of both statutory and common law offenses relating to sodomy in *National Coalition II*,⁷⁴ the Constitution only gives the Court the explicit jurisdiction to review acts of Parliament.⁷⁵ The Court, however, concluded it had the inherent jurisdiction to decide the constitutionality of the common law offense of sodomy in order to review the constitutionality of the inclusion of sodomy on the schedules to the two Parliament Acts.⁷⁶

B. *The Challenged Laws*

The applicants challenged three laws that directly criminalized homosexuality.⁷⁷ The main challenge was to the common law

⁷⁰ See *id.* The interim Constitution granted the Constitutional Court the exclusive jurisdiction to review the constitutionality of acts of Parliament. See S. AFR. CONST. (Act 200 of 1993) §§ 98(2)(c), 101(3) [hereinafter 1993 CONST.]. The new Constitution, however, eliminated this authority. See S. AFR. CONST.; Currie, *supra* note 56, § 5.2(b)(i). Therefore, human rights practitioners can no longer gain direct access to the Court when challenging an Act of Parliament. See Currie, *supra* note 56, § 5.2(b)(i).

⁷¹ See Currie, *supra* note 56, § 5.2(b)(ii).

⁷² See S. AFR. CONST. ch. 8, § 167(5).

⁷³ Currie, *supra* note 56, § 5.2(b)(i).

⁷⁴ See *National Coalition II*, Case CCT 11/98, para. 9 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

⁷⁵ See S. AFR. CONST. ch. 8, § 167(4).

⁷⁶ See *National Coalition II*, Case CCT 11/98 para. 9.

⁷⁷ See *id.* para. 1. In addition, the applicants charged that two laws that penalized persons previously convicted of homosexual behavior were unconstitutional. See *supra* notes 26-27 and accompanying text.

offense of sodomy.⁷⁸ South African law defines sodomy as “unlawful and intentional sexual relations per anum between human males.”⁷⁹ Therefore, by definition, the law criminalized male homosexual conduct, even if between consenting adults.⁸⁰

While the common law offense of an unnatural sexual act attempted to criminalize certain conduct, it did not clearly define those prohibited acts.⁸¹ An unnatural sexual offense is circularly defined as “the unlawful and intentional commission of an unnatural sexual act by one person with another.”⁸² Under this definition, the common law had criminalized various consensual sex acts between men, including mutual masturbation, inter-femoral (thigh) sex, and oral sex.⁸³

In addition to challenging common law offenses, the applicants also argued that the statutory offense criminalizing homosexual sex under section 20A of the Sexual Offences Act of 1957 was unconstitutional.⁸⁴ This statute criminalized “[a]cts committed between men at a party and which are calculated to stimulate sexual passion or to give sexual gratification.”⁸⁵ The statute further defined “party” as any instance where more than two people are present.⁸⁶ The Court did not attempt to determine a rationale for the law but instead simply noted the vagueness of the law.⁸⁷ In effect, the law could criminalize any openly male

⁷⁸ See *National Coalition II*, Case CCT 11/98 paras. 4, 9.

⁷⁹ *National Coalition I*; No. 97/023677, 1998 SACLX LEXIS 6, at *25 (High Court, Witwatersrand Local Division, Aug. 5, 1998) (citing P.M.A. HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE (J.R.L. Milton ed., 3d ed. 1996)).

⁸⁰ The applicants only sought constitutional review of consensual, non-commercial homosexual sex between males taking place in private. See *National Coalition II*, Case CCT 11/98 para. 67. Neither anal nor oral sex between a male and female, nor between two females, was punishable under South African law. See *id.* para. 14.

⁸¹ See *National Coalition I*, 1998 SACLX LEXIS, at *26-*27.

⁸² *Id.* at *26 (citing HUNT, *supra* note 79).

⁸³ See *id.* at *27.

⁸⁴ See *National Coalition II*, Case CCT 11/98 para. 1.

⁸⁵ § 20A(1) of Sexual Offences Act 23 of 1957.

⁸⁶ See *id.* § 20A(2).

⁸⁷ See *National Coalition II*, Case CCT 11/98 para. 75. While reviewing several theories for the rationale of this law, however, the High Court concluded that the statute was designed “to discourage orgiastic practices to which homosexuality seems often to

homosexual act, including kissing.⁸⁸

C. *The South African Bill of Rights*

The South African Constitution is similar to the U.S. Constitution in that the Bill of Rights⁸⁹ is the foundation for the rights of the people.⁹⁰ As the introduction to the Bill of Rights states, "[T]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."⁹¹ Unlike the U.S. Constitution, however, the South Africa Constitution imposes an additional affirmative obligation on the government: "[T]he State must respect, protect, promote and fulfill the rights in the Bill of Rights."⁹² Therefore, it becomes the responsibility of the Constitutional Courts to determine whether the State is violating the Bill of Rights and to affirmatively attempt to ensure that the law provides full protection for the citizens.⁹³

Additionally, the Constitution provides the Court with the authority to eliminate or modify any particular law or the common law to ensure that the Bill of Rights is applied equally to all citizens.⁹⁴ "In applying the provisions of the Bill of Rights to natural and juristic persons . . . a court in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common law to the extent that legislation does not give effect to

fall prey." *National Coalition I*, 1998 SACL R LEXIS, at *29.

⁸⁸ See *National Coalition II*, Case CCT 11/98 para. 75.

⁸⁹ See S. AFR. CONST. ch. 2.

⁹⁰ See *National Coalition I*, 1998 SACL R LEXIS, at *36.

⁹¹ S. AFR. CONST. ch. 2, § 7(1).

⁹² *Id.* § 7(2). "The Constitution creates an ethos of accountability. The State and its officials, where appropriate, must be called to answer for their actions and must be subject to critical scrutiny." *National Coalition I*, 1998 SACL R LEXIS, at *38 (relying on *S v. Makwanyane*, 1995 (3) SALR 391, at 431 (CC)).

⁹³ See *National Coalition I*, 1998 SACL R LEXIS, at *37. "A court in order to give effect to a right in the Bill, must apply, or where necessary, develop the common law to the extent that legislation does not give effect to that right." S. AFR. CONST. ch. 2, § 8(3)(a).

⁹⁴ See S. AFR. CONST. ch. 2, § 8.

that right.”⁹⁵ These constitutional provisions provide the Constitutional Court with a wide array of power and authority to develop and administer the law.⁹⁶

However, under some circumstances, the State is allowed to limit the protection of the Bill of Rights.⁹⁷ Pursuant to section 36 of the Constitution (the Limitations Clause):

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.⁹⁸

Therefore, the Bill of Rights analysis is a two-prong test: (1) whether the State has violated a guaranteed right; and, if so, (2) whether the violation is justified under the Limitations Clause.⁹⁹

To facilitate their analysis, the Constitutional Court has adopted certain principles of constitutional interpretation to help determine the full implications of the Bill of Rights. These same principles guide the Court in determining when the State is satisfying the protections mandated by the Constitution.¹⁰⁰ The Constitution itself is the starting point for Bill of Rights interpretation:

⁹⁵ *Id.* § 8(3).

⁹⁶ *Cf.* U.S. CONST. arts. I-III (dividing the power to develop, administer, and review the law between the legislative, executive, and judicial branches).

⁹⁷ *See* S. AFR. CONST. ch. 2, § 36.

⁹⁸ *Id.* § 36(1).

⁹⁹ A court reviewing a Bill of Rights matter must conduct a balancing test to determine whether it is justified to limit the right. *See National Coalition II*, Case CCT 11/98, para. 33 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>. The application of the limitations clause involves a process of “weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests.” *Id.*

¹⁰⁰ *See id.* para. 34.

1) When interpreting the Bill of Rights, a court, tribunal or forum

a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b) must consider international law; and

c) may consider foreign law.¹⁰¹

Using section 39(1) as a foundation, the Constitutional Court concentrated on equal protection analysis developed in prior South African cases and under foreign law.¹⁰²

D. Equality under the Bill of Rights

One essential right in the Bill of Rights is equality. Throughout the Constitution there are various references to the importance and centrality of equality and fairness in the "New South Africa."¹⁰³ Interpreting the scope of equal protection is crucial, therefore, in determining the degree of equality in the country.¹⁰⁴ The equal protection clause provides in part:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour [sic], sexual orientation,¹⁰⁵ age, disability, religion, conscience, belief, culture, language and birth

¹⁰¹ S. AFR. CONST. ch. 2, § 39(1).

¹⁰² See *National Coalition II*, Case CCT 11/98 para. 17.

¹⁰³ "We, the people of South Africa, . . . [l]ay the foundations for a democratic and open society in which . . . every citizen is *equally* protected by law." S. AFR. CONST. pmbl. (emphasis added). "The Republic of South Africa is one sovereign democratic state founded on the following values: (a) Human dignity, the achievement of *equality* and advancement of human rights and freedoms." *Id.* ch. 2, § 1(a) (emphasis added). "[The Bill of Rights] enshrines the rights of all people in our country and affirms the democratic values of human dignity, *equality* and freedom." *Id.* § 7(1) (emphasis added).

¹⁰⁴ See *National Coalition II*, Case CCT 11/98 para. 16.

¹⁰⁵ The Court gave a broad definition to the concept of sexual orientation to include bisexuals, transsexuals, and persons who were erotically attracted to a member of their own sex on a single occasion. See *id.* para. 20.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.¹⁰⁶

Accordingly, to determine whether a law impairs equality, courts analyze the constitutionality of a challenged law based on the unfairness of that law on a certain group.¹⁰⁷

The Constitutional Court attempted to clarify the policy behind the equality clause in *Brink v. Kitshoff NO*.¹⁰⁸ In *Brink* the applicants argued that section 44 of the Insurance Act¹⁰⁹ violated the Bill of Rights because it discriminated against married women.¹¹⁰ After reviewing equal protection analysis in the United States, India, and Canada, the Court concluded that the definition of true equality is necessarily the product of that particular nation's history.¹¹¹ Thus, the Court focused on the role apartheid had played to disenfranchise black South Africans and to keep them from playing an equal role in the development of the country.¹¹²

Although the Court concluded that the elimination of systematic racial discrimination was the primary rationale for the

¹⁰⁶ S. AFR. CONST. ch. 2, § 9(1)-(5) (emphasis added). Under the 1993 Constitution, the equal protection provisions were found in § 8(1)-(5). See 1993 CONST. Therefore, certain Constitutional Court cases interpreting the equal protection clause cite section 8 instead of the current section 9. See, e.g., *Prinsloo v. Van Der Linde*, 1997 (3) SALR 1012 (CC). While there are minor differences in wording between the statute, the courts interpret the clauses similarly. See *National Coalition II*, Case CCT 11/98 para. 15. Compare 1993 CONST. with S. AFR. CONST.

¹⁰⁷ See *National Coalition II*, Case CCT 11/98 para. 17. "The drafters realised [sic] that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination." *Id.*

¹⁰⁸ 1996 (4) SALR 197 (CC).

¹⁰⁹ § 44 of Insurance Act 27 of 1943.

¹¹⁰ See *Brink*, 1996 (4) SALR para. 19. The applicants alleged that in certain circumstances the Insurance Act deprived women of the benefits of life insurance policies ceded to them by their husbands. See *id.*

¹¹¹ See *id.* paras. 35-39. "Our history is of particular relevance to the concept of equality." *Id.* para. 40.

¹¹² See *id.* para. 40. "The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted." *Id.*

equality clause,¹¹³ it also concluded that the theory of equality should apply with equal force to all groups:

In drafting section 8, the drafters recognised [sic] that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured [sic] groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society.¹¹⁴

Instead of adjusting the level of scrutiny in accordance with the history or severity of discrimination, the Court concluded it should apply equal scrutiny to any policy that served directly or indirectly to discriminate based on a protected ground.¹¹⁵ Therefore, although gender discrimination was not as widely condemned as racial discrimination, the Constitutional Court did not lower its degree of scrutiny when analyzing whether the equality clause had been violated.¹¹⁶

The judiciary further attempted to outline the significance of equality in the Bill of Rights by defining the term "unfair discrimination."¹¹⁷ In *Harksen v. Lane NO*,¹¹⁸ the applicant challenged the constitutionality of the Insolvency Act.¹¹⁹ This Act required that upon the death of an insolvent spouse, the entire estate of that spouse would be sequestered to the control of a state trustee.¹²⁰ The effect of the sequestration was to vest the property of the surviving solvent spouse to the state as if it was the property

¹¹³ *See id.*

¹¹⁴ *Id.* paras. 41-42.

¹¹⁵ *See id.* para. 44; *cf.* *Virginia Military Institute v. United States*, 508 U.S. 946, 116 S. Ct. 2264 (1996) (holding that intermediate scrutiny rather than strict scrutiny should apply to cases involving discrimination based on gender).

¹¹⁶ *See Brink*, 1996 (4) SALR para. 44.

¹¹⁷ *National Coalition II*, Case CCT 11/98, para. 17 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

¹¹⁸ 1998 (1) SALR 300 (CC).

¹¹⁹ *See id.*; Insolvency Act 24 of 1936.

¹²⁰ *See* Insolvency Act 24 § 20(1).

of the sequestered estate.¹²¹ The applicants alleged that the “vesting provision constitute[d] unequal treatment of solvent spouses and discriminate[d] unfairly against them.”¹²²

The Court began its analysis by laying the ground work “to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility.”¹²³ Instead of applying sweeping interpretations of equality or adopting foreign interpretations, the Court decided that the equality doctrine should develop incrementally.¹²⁴ The Court divided treatment of classes by the government into “mere differentiation” and “unfair discrimination.”¹²⁵ Mere differentiation is the differentiation that is impossible for the government to eliminate.¹²⁶ “In regard to mere differentiation the constitutional state is expected to act in a rational manner.”¹²⁷ Thus, mere differentiation violates the constitutional requirement of equality only when no rational relationship exists between the different treatment and the government purpose for the differentiation.¹²⁸

The Court then attempted to distinguish mere differentiation from discrimination.¹²⁹ When the government differentiates against a class specifically protected in section 9(3), discrimination is established.¹³⁰ However, the law may still be constitutional if

¹²¹ See *id.* § 21(1).

¹²² *Harksen*, 1998 (1) SALR para. 40.

¹²³ *Id.* para. 44 (quoting *Prinsloo v. Van Der Linde*, 1997 (3) SALR 1012, para. 17 (CC)).

¹²⁴ See *id.* para. 42. “While our country, unfortunately, has great experience in constitutionalising [sic] inequality, it is a newcomer when it comes to ensuring constitutional respect for equality.” *Prinsloo v. Van Der Linde*, 1997 (3) SALR 1012, para. 20 (CC) (reviewing various considerations in determining whether a law amounted to mere differentiation or constituted unfair discrimination).

¹²⁵ *Harksen*, 1998 (1) SALR para. 44 (relying on *Prinsloo v. Van Der Linde*, 1997 (3) SALR 1012, paras. 17, 23, 24-26 (CC)).

¹²⁶ See *id.*

¹²⁷ *Id.* The rational requirement prevents governments from acting in an arbitrary manner manifesting “naked preferences.” *Id.*

¹²⁸ See *id.* para. 44.

¹²⁹ See *id.* paras. 44-45.

¹³⁰ See *id.* Differentiation against a § 9(3) protected class is presumed to constitute

the government can show either that the discrimination is fair or that it is justified under the Limitations Clause.¹³¹

Even if the differentiation is not based on the specified grounds, it can still constitute discrimination if it distinguishes between people based on grounds analogous to the protected grounds found in section 9(3).¹³² In determining what factors to consider when deciding if a class is similar to the protected classes, the Court focused on South Africa's history of the racial discrimination.¹³³ During apartheid the government discriminated against minorities based on their characteristics and attributes.¹³⁴ Consequently, the Court defined discrimination as "treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."¹³⁵

Finally, the Court addressed when discrimination becomes unfair discrimination.¹³⁶ If the law discriminates on a specified ground, the unfairness is presumed.¹³⁷ If, however, the

unfair discrimination. *See id.* para. 46.

¹³¹ *See id.*; *see also supra* notes 97-99 and accompanying text (discussing the limitations clause and its application).

¹³² *Harksen*, 1998 (1) SALR para. 47. "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise [sic] and often oppress persons who have had, or who have been associated with, these attributes or characteristics." *Id.* para. 50.

¹³³ *See id.* para. 47. The Court reasoned that since apartheid had denied blacks recognition of their humanity and inherent dignity, the Constitution's drafters wanted to protect against similar discrimination. *See id.* "Section [9(3)] seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history." *Id.* para. 50.

¹³⁴ *See id.* para. 47. The Court failed to outline what characteristics and attributes placed individuals in a section 9(3) analogous class. *See id.*

¹³⁵ *Id.* Unlike the U.S. Supreme Court, the Court refused to limit protection to discrimination based upon immutable characteristics. "The temptation to force [the unspecified grounds] into neatly self-contained categories should be resisted." *Id.* para. 50; *cf.* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (holding that requiring a special use permit based on an immutable characteristic, mental retardation, violated the equal protection clause in absence of any rational basis in the record for believing that a group home would pose any special threat).

¹³⁶ *See Harksen*, 1998 (1) SALR paras. 47, 51-54.

¹³⁷ *See id.* para. 47. Section 9(5) creates the presumption of unfairness. "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." S. AFR. CONST. ch. 2, § 9(5).

discrimination is not based on a specified ground, the Court looks to see whether the impact of the law was unfair.¹³⁸ The Court outlined various factors to consider when determining whether the impact of a law is unfair towards a certain person or group.¹³⁹ The factors include; (1) “the position of the complainants in society;”¹⁴⁰ (2) the history of past discrimination against the complainants; (3) the nature of the law and its purpose;¹⁴¹ and (4) any other relevant factors that show the law impaired the complainant’s fundamental human dignity.¹⁴²

Since the applicants in *National Coalition II* challenged a law that specifically targeted homosexuals, unfair discrimination was presumed.¹⁴³ Additionally, the respondents failed to offer any rationale as to why the discrimination was justified under the limitation clause.¹⁴⁴ Nonetheless, the Court reviewed both the unfairness of the law to homosexuals and possible reasons why the law might be justified.¹⁴⁵

¹³⁸ See *Harksen*, 1998 (1) SALR para. 51. The court concluded:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of a disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new Constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of [sic] particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

Id. (quoting *President of the Republic of South Africa v. Hugo*, 1997 (4) SALR 1 (CC)).

¹³⁹ See *id.* para. 52.

¹⁴⁰ *Id.*

¹⁴¹ If the purpose for the law is not directly aimed at discriminating against the complainants but instead at “achieving a worthy and important societal goal, such as . . . the furthering of equality for all” then the Court is free to consider the law to have, in fact, fairly impacted on the complainants. *Id.*

¹⁴² See *id.*

¹⁴³ See *National Coalition II*, Case CCT 11/98, paras. 26-27 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

¹⁴⁴ See *id.* para. 37. The onus of justifying a Bill of Rights limitation is on the party seeking to uphold the limitation. See *National Coalition I*, No. 97/023677, 1998 SACLR LEXIS 6, at *47 (High Court, Witwatersrand Local Division, Aug. 5, 1998).

¹⁴⁵ See *National Coalition II*, Case CCT 11/98 paras. 22-25, 33-57. The Constitutional Court never specifically revealed why this analysis was necessary. See

E. The Right to Dignity

The right to dignity is closely related to the right of equality.¹⁴⁶ Section 10 of the Constitution, the dignity provision, states: "Everyone has inherent dignity and the right to have their dignity respected and protected."¹⁴⁷ While there is no one definition of dignity,¹⁴⁸ courts usually define the term based on the specific circumstances. In *State v. Makwanyane*,¹⁴⁹ the Court considered the right to dignity in relation to the death penalty.¹⁵⁰ Relying on U.S. constitutional law, the Court concluded: "The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded."¹⁵¹

The *National Coalition II* Court analogized the concept of human dignity as used in *Makwanyane* to the present case.¹⁵² In order to protect the value of human dignity, at a minimum the Constitution requires the government to "acknowledge the value and worth of all individuals as members of our society."¹⁵³ Therefore, if a law attacks and degrades a person in the society simply for who he is and what he represents, the law would violate the concept of the right of dignity.¹⁵⁴

id. However, the High Court reasoned:

A court faced with the matter of great public interest and importance in which many potentially interested groups (such as the Churches) have received no notice of the application, should do its best to place itself in the position of the legislature and the law-enforcing arms of the State in order to determine, as best it can, what there is to be said in favour of the legislation.

National Coalition I, 1998 SACL R LEXIS, at *47.

¹⁴⁶ See *National Coalition II*, Case CCT 11/98 para. 30.

¹⁴⁷ S. AFR. CONST. ch. 2, § 10.

¹⁴⁸ See *National Coalition II*, Case CCT 11/98 para. 28.

¹⁴⁹ 1995 (3) SALR 391 (CC).

¹⁵⁰ See *id.* paras. 57-62.

¹⁵¹ *Id.* para. 57 (quoting *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting)).

¹⁵² See *National Coalition II*, Case CCT 11/98 paras. 33-35.

¹⁵³ *Id.*

¹⁵⁴ See *id.*

F. Right to Privacy

The right to privacy is enshrined in section 14 of the Constitution.¹⁵⁵ The privacy clause provides: “Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.”¹⁵⁶

Although interrelated with the rights of equality and dignity, the protection afforded to privacy is not as great as that of the other rights.¹⁵⁷

In *Bernstein v. Bester*,¹⁵⁸ the applicants argued that sections 417 and 418 of the Companies Act 61 of 1973,¹⁵⁹ requiring the disclosure of private, personal financial information, were an invasion of privacy and, therefore, unconstitutional.¹⁶⁰ In addressing this right to privacy claim, the Court limited the scope of its analysis to the features necessary for an individual to have personal autonomy.¹⁶¹ The right to privacy must also be viewed in relation to the larger community.¹⁶² Thus, as an individual “moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”¹⁶³ Consequently, if a law invades a person’s sphere of private intimacy and autonomy, it breaches his right to privacy.¹⁶⁴

¹⁵⁵ See S. AFR. CONST. ch. 2, § 14.

¹⁵⁶ *Id.*

¹⁵⁷ See *National Coalition II*, Case CCT 11/98 para. 32; *cf.* *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (holding anti-sodomy laws in Georgia unconstitutional as a violation of the state constitution’s right to privacy).

¹⁵⁸ 1996 (2) SALR 751 (CC).

¹⁵⁹ Companies Act 61 of 1973.

¹⁶⁰ See *Bernstein*, 1996 (2) SALR para. 56, at 784-85. These sections provide for the summoning and examination of persons during the winding-up of a company. See § 417(1) of Companies Act.

¹⁶¹ See *Bernstein*, 1996 (2) SALR para. 67, at 788. The right of privacy shields “only the inner sanctum of a person, such as his/her family life, sexual preference and home environment.” *Id.*

¹⁶² See *id.* para. 67, at 788-89.

¹⁶³ *Id.*

¹⁶⁴ See *National Coalition II*, Case CCT 11/98, para. 32 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>.

IV. Significance of the Case

Why was South Africa, a country ripe with human rights abuses, so easily able to outlaw anti-homosexuality laws while the U.S. Supreme Court has been slow to react?¹⁶⁵ The reason appears to be two-fold: (1) sexual orientation is specifically protected in the South African Constitution;¹⁶⁶ and (2) the South African government has a desire to wash itself clean of its past human rights atrocities and history of vile discrimination.¹⁶⁷

A. *Specific Protection v. Equal Protection*

The Fourteenth Amendment of the U.S. Constitution contains only general equal protection and due process clauses.¹⁶⁸ It therefore provides no specific protection to any class, including race or gender.¹⁶⁹ To provide substance to this amendment, the U.S. Supreme Court chose to enforce equal protection by providing varying degrees of protection from discriminatory laws to different classes, depending on the characteristics of the classes themselves.¹⁷⁰ When a law is neutral as to a "discrete and insular minority,"¹⁷¹ the Court uses rational basis scrutiny to determine its constitutionality.¹⁷² If a law contains a gender bias, the Court often

¹⁶⁵ See *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986) (holding that anti-sodomy laws are constitutional because homosexuality was against the morals of the majority of the country and the history and tradition of the country was to punish homosexual acts). However, following the *National Coalition II* decision, the Georgia Supreme Court held its laws prohibiting consensual, non-commercial acts of sexual intimacy between adults to be unconstitutional under the state constitution's right of privacy provisions. See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998). "We cannot think of any other activity that reasonable persons would rank as more private and deserving of protection from governmental interference than unforced, private, adult sexual activity." *Id.* at 24.

¹⁶⁶ See S. Afr. Const. ch. 2, § 9(3).

¹⁶⁷ See *id.* pmb. (recognizing past injustices and adapting the new constitution to provide equal protection under the law for all citizens).

¹⁶⁸ See U.S. CONST. amend. XIV.

¹⁶⁹ See *id.*

¹⁷⁰ See generally *United States v. Carolene Products*, 304 U.S. 144, 148-51 (1938) (reviewing when a law of general applicability would violate the Fifth Amendment guarantee of equal protection).

¹⁷¹ *Id.* at 153 n.4.

¹⁷² See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-48 (1976). Under rational

applies a form of intermediate scrutiny.¹⁷³ The highest form of scrutiny, strict scrutiny, applies when a law expressly targets racial minorities.¹⁷⁴ Additionally, under the due process clause, if a law impinges on a right rooted in history and tradition, the Court will strictly scrutinize any restrictions on that right.¹⁷⁵

Under this rubric of analysis, the Supreme Court has been able to deny homosexuals any level of protection higher than rational basis scrutiny.¹⁷⁶ Citing the history of discrimination against gays and lesbians in the United States, the Supreme Court reasoned that homosexuality acts were not "deeply rooted in this Nation's history and tradition."¹⁷⁷ Accordingly, the Court refused to invalidate the anti-sodomy laws using a strict scrutiny analysis.¹⁷⁸ Instead, the Court concluded that morality was a rational basis under which the government could justify the discriminatory

basis scrutiny, a law is presumed constitutional if it is rationally related to a legitimate government interest. *See also* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 592 n.39 (1979) (stating that "legislative classifications are valid unless they bear no rational relationship to the State's objectives").

¹⁷³ *See, e.g.*, United States v. Virginia, 518 U.S. 515, 530-34 (1996) (invalidating the continuation of single-sex education at Virginia Military Institute). A law which differentiates based on gender survives scrutiny if the state offers an "exceedingly persuasive" justification for the law. *Id.* at 532-33. Some commentators, however, have argued that this "exceedingly persuasive" language elevates gender-based equal protection analysis from intermediate scrutiny to strict scrutiny. *Id.* at 570-71 (Scalia, J., dissenting).

¹⁷⁴ *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"). The U.S. Supreme Court has always been more protective of racial discrimination. Many commentators see the prevention of racial discrimination as the original rationale behind the fourteenth amendment. *See* Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 332-33 (1996); Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 41 (1993). The law with a racial classification can only survive if the government has a compelling reason and the law is narrowly tailored to satisfy this reason. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting); *cf.* S. AFR. CONST. ch. 2, § 36.

¹⁷⁵ *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1986) (holding that under strict scrutiny a Connecticut statute forbidding the use of contraception violated the marital right to privacy).

¹⁷⁶ *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 195.

law.¹⁷⁹

In contrast, the South African Constitution not only has a general Equal Protection Clause but also provides specific protection for various classes, including sexual orientation.¹⁸⁰ Accordingly, the South African judiciary has not been forced to create an artificial system under which they must apply various levels of scrutiny to legislation.¹⁸¹ Any law that directly or indirectly discriminates on the basis of a protected class is presumed unconstitutional.¹⁸² The only way the law survives is if it is justified under the Limitations Clause.¹⁸³

Consequently, homosexuals in South Africa have had a much easier time getting anti-sodomy laws declared unconstitutional than their counterparts in the United States. In South Africa homosexuals were not forced to prove that they were a class worthy of constitutional protection, an issue replete with moral controversy. Instead, the South African government had the burden to justify why an openly discriminatory law could exist in "an open and democratic society based on freedom and equality."¹⁸⁴ It is a daunting task for any court or government to justify such intrusive discrimination when the justification must be the "least restrictive means."¹⁸⁵ Consequently, the Constitutional Court held the anti-sodomy laws unconstitutional.¹⁸⁶

¹⁷⁹ See *id.* at 196. "[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.*

¹⁸⁰ See S. AFR. CONST. ch. 2, § 9(3).

¹⁸¹ See *National Coalition II*, Case CCT 11/98, para. 55 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>. "Our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgment in *Bowers* can really offer us no assistance in the construction and application of our own Constitution." *Id.*

¹⁸² See *id.* (citing sections 10 and 14 of the South African Constitution).

¹⁸³ See *supra* notes 97-99 and accompanying text.

¹⁸⁴ *National Coalition II*, Case CCT 11/98 para. 34.

¹⁸⁵ *Id.* "The criminalisation [sic] of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation." *Id.* para. 36.

¹⁸⁶ See *id.* para. 90.

B. *The Clean Hands Doctrine*

Another rationale behind the South African Court's eagerness to bring an end to homosexual discrimination was the nation's long history of racial discrimination.¹⁸⁷ Apartheid was an institution designed to separate the races as well as to keep the races in a specific hierarchical order.¹⁸⁸ Therefore, any new, post-apartheid government opposed to the premise of apartheid could only survive if the concept of discrimination as desirable was eliminated.¹⁸⁹ In the light of decades of government sanctioned apartheid, the framers of the new Constitution attempted to denounce discrimination and to draft a constitution investing every citizen with a sense of equal stature and worth.¹⁹⁰

Also in light of the framer's commitment to ending discrimination, the Court was unwilling to rationalize unequal treatment for homosexuals, even though most religions and the majority of the nation were prejudiced against them.¹⁹¹ The Court declined to follow the lead of the U.S. Supreme Court¹⁹² and instead dismissed South Africa's history of homosexual discrimination as prejudice and moral bigotry.¹⁹³ Rather, the Constitutional Court decided its task was to protect unpopular minorities from discrimination.¹⁹⁴ Relying on a Canadian Supreme Court decision, the Court reasoned:

It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who

¹⁸⁷ See Johnson, *supra* note 4, at 589.

¹⁸⁸ See *id.* at 591.

¹⁸⁹ See *id.* at 589. "The atrocities of past discrimination that characterized apartheid-era South Africa instilled in the constitution's framers a commitment to end all future discrimination." *Id.*

¹⁹⁰ See *id.*

¹⁹¹ See *National Coalition II*, Case CCT 11/98 para. 37. The Court concluded that while religious perversion to homosexuality was well documented, "however honestly and sincerely held, [it] cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation." *Id.* para. 38.

¹⁹² See *id.* paras. 53-55; *supra* notes 176-79 and accompanying text.

¹⁹³ See *National Coalition II*, Case CCT 11/98 para. 37. "The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose." *Id.*

¹⁹⁴ See *id.* para. 25.

are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned.¹⁹⁵

The Court refused to continue to rely on the majority's history of intolerance and instead chose to secure equality for all.¹⁹⁶

C. A Break From the Past

One of the most significant aspects of the *National Coalition* decisions is South Africa's decisive break from a culture that supported homosexual discrimination.¹⁹⁷ Since European colonization in the early eighteenth century, many black South Africans have viewed homosexuality as an European concept.¹⁹⁸ Therefore, it is somewhat surprising that in post-apartheid South Africa, where blacks have vast political autonomy, human rights advocates were able to garner broad-based support for inclusion of sexual orientation as a protected class.¹⁹⁹

In *National Coalition I*, the High Court noted that a "softening in attitudes"²⁰⁰ in the South African government toward homosexuals occurred when the government recognized that "the dignity and innate worth of every member of society [was] not a matter of reluctant concession but [was] one of easy acceptance."²⁰¹

¹⁹⁵ *Id.* para. 22 (quoting *Vriend v. Alberta*, [1998] 156 D.L.R. 4th 385, 417 (Can.)).

¹⁹⁶ *See id.* para. 37. The Dutch colonists began criminalizing sodomy in the seventeenth century based on their moral interpretations of the Bible. *See Johnson, supra* note 4, at 591-92.

¹⁹⁷ *See Thomas, supra* note 7, at 380 (noting the difficulties African gays and lesbians have faced in their attempts to gain constitutional protection for homosexuality).

¹⁹⁸ *See id.* at 381. Before colonialism black South Africans needed large traditional families to increase agricultural production and efficiency. *See id.* When Europeans changed the agrarian labor structure, the need for the traditional family was no longer as prevalent. *See id.*

¹⁹⁹ *See Johnson, supra* note 4, at 605. "On the floor of the constitutional debates . . . there was very little discussion of the issue. Basically, only a small number of speakers opposed including protection for gays and lesbians in the constitution." *Id.*

²⁰⁰ *National Coalition I*, No. 97/023677, 1998 SACLX LEXIS 6, at *33 (High Court, Witwatersrand Local Division, Aug. 5, 1998).

²⁰¹ *Id.* at *35.

The court concluded that this realization only occurs when people accept three premises: (1) despite divergent moral views, consensual homosexual conduct should not evoke social censure; (2) homosexual orientation is not evidence of depravity; and (3) homosexual orientation should not be a factor in the distribution of social goods.²⁰²

Both the High Court and the Constitutional Court recognized the reality that many citizens had not yet adopted these premises and did not support homosexual equality.²⁰³ Nevertheless, the courts decided that the Constitution did not permit personal bias to dictate which groups deserved equal protection:²⁰⁴ “This court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.”²⁰⁵

Although both courts willingly eliminated laws in a counter-majoritarian manner, they understood the possible limited effects its decision would have on the public.²⁰⁶ The High Court noted that while private biases exist and “may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect.”²⁰⁷ The courts remained steadfast in their contention that prejudice should not have “any role to play in constitutional adjudication.”²⁰⁸

²⁰² See *id.* at *34-35.

²⁰³ See *id.* at *35, *66; *National Coalition II*, Case CCT 11/98, para. 37 (CC 1998) (visited Apr. 7, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>>. “Public opinion may have some relevance to the enquiry, but, in itself, is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour [sic].” *National Coalition I*, 1998 SACLX LEXIS, at *66.

²⁰⁴ See *National Coalition I*, 1998 SACLX LEXIS, at *66-67; *National Coalition II*, Case CCT 11/98 para. 37.

²⁰⁵ *National Coalition I*, 1998 SACLX LEXIS, at *67. The Constitutional Court’s unwillingness to abide by public opinion is not a new phenomenon. In 1995 the Court refused to uphold the death penalty as constitution in the face of a large amount of public pressure and support for its retention. See *State v. Makwanyane*, 1995 (3) SALR 391 (CC).

²⁰⁶ See *National Coalition I*, 1998 SACLX LEXIS, at *69-71; *National Coalition II*, Case CCT 11/98 para. 37.

²⁰⁷ *National Coalition I*, 1998 SACLX LEXIS, at *70-71.

²⁰⁸ *Id.* at *70; see *National Coalition II*, Case CCT 11/98 para. 38.

V. Conclusion

While the South African judiciary might be sympathetic to gay and lesbian equality, only time can tell whether its fellow citizens will share its view.²⁰⁹ Several of South Africa's geographic neighbors continue to ban and criminalize homosexual sex.²¹⁰ Therefore, before there is true homosexual equality, more cases like *National Coalition II* must spark and capture public debate to inculcate the public with respect for homosexuals. The challenge for legal advocates is then to bring the South African citizenry to the same level of tolerance as the South African judiciary. Only then will the citizens of South Africa provide homosexuals the same protection from unconstitutional discrimination that the Constitutional Court was so willing to give.²¹¹

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²⁰⁹ See Johnson, *supra* note 4, at 585.

²¹⁰ See James Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 66 (1994). Sodomy laws still exist in Namibia, Mozambique, Tanzania, Kenya, Uganda, and 13 other African nations. See *id.*

²¹¹ See Johnson, *supra* note 4, at 585.