Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection

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TEETERING ON THE BRINK OF EQUALITY: SEXUAL ORIENTATION AND INTERNATIONAL CONSTITUTIONAL PROTECTION

MICHAEL THOMAS*

The equitable rule of law is the heart of an orderly society. The collapse of the rule of law for gays shows that society is willing to perpetrate the worst possible injustices against them.1

—Richard D. Mohr

As we move into the 21st century, the concept of equal protection under the law and how it extends to eliminating discrimination on the basis of sexual orientation has sparked debate in most countries.2 Currently, most United Nations declarations, domestic constitutions, and local statutes fail to guarantee equal protection and non-discrimination for sexual minorities.3 However, change may be imminent. In a recent United Nations Human Rights Committee decision, the Board noted that, in its view, the references to “sex” in the International Convention on Civil and Political Rights (ICCPR) should be taken to include sexual orientation.4 Including sexual orientation in the language of the ICCPR is a positive step in recognizing sexual orientation

* Editor-in-Chief, BOSTON COLLEGE THIRD WORLD LAW JOURNAL. This article is dedicated to my loving family, in particular my mother. Her sacrifices and struggles for others have taught me to love, and her unyielding dedication to her family has taught me to live with compassion. Human rights embraces a loving and compassionate vision of humanity. It is my hope that this work will assist in shifting this vision from international human rights law to the reality of domestic law.

2 See generally Art Hendriks et al., The Third Pink Book: A Global View of Lesbian and Gay Liberation and Oppression 16–18 (1993). The country-by-country survey in the Pink Book reveals that the social, political, and legal situation for sexual minorities is most grave in Africa. See id. at 250–51. Africa has the smallest gay movement of all continents surveyed. See id.
3 See generally James D. Wilet, International Human Rights Law and Sexual Orientation, 18 Hastings Int’l & Comp. L. Rev. 1, 4 (1994) [hereinafter Wilet, Sexual Orientation]. The term “sexual minorities” includes any group that has been marginalized by society because of sexual orientation, inclination, behavior, or gender identity. See id. at 3.
in governing documents. However, individual nations must further this international human rights progression by protecting sexual orientation in domestic constitutions.5

Recognizing equal rights and non-discrimination for sexual minorities presents individual nations with an interesting choice: whether to extend international human rights protections to sexual minorities or limit those protections to other minority groups. This debate provides the greatest opportunity to vindicate the rights of sexual minorities in Africa, where commentators suggest there is little tolerance towards sexual minorities.6 Thus, if change can be made in Africa, global momentum will be generated to recognize sexual orientation worldwide.7 The polarized decisions of two neighboring countries, South Africa and Zimbabwe, have set the stage for the debate. Whether these countries embrace or reject the integration of sexual orientation, race, and culture in African law will predict the future of the sexual minority movement around the globe.8

This Note will analyze the United Nations Human Rights Committee's advancement of rights for sexual minorities and show how constitutional incorporation of sexual orientation furthers this movement. Part I will define sexual orientation and the legal concept of non-discrimination and will examine extending the international human rights guarantees of equal protection and non-discrimination to include sexual orientation. Part II will examine how two countries, South Africa and Zimbabwe, have responded to the evolution of those rights. Part III will analyze whether, in countries that do not provide constitutional protection for sexual orientation, protection similar to that provided by the South African Constitution should be established. Finally, part IV will conclude that constitutional protection is a necessary mechanism to guarantee equal protection and non-discrimination for all.

I. INTERNATIONAL HUMAN RIGHTS & SEXUAL ORIENTATION

Before one can begin to apply international human rights law to sexual orientation, one must set forth a definition of sexual orientation and analyze non-discrimination and equal protection under interna-

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5 See Wilet, Sexual Orientation, supra note 3, at 52, 53. According to Wilet, international human rights instruments specifically include sexual orientation among their enumerated groups. See id.
6 See Hendriks, supra note 2, at 250-51.
7 See id.
8 See id.
tional human rights law. With this general background, one can then analyze international human rights law and sexual orientation.

A. Defining Sexual Orientation

It is necessary to define sexual orientation to understand why it should be constitutionally protected. Sexual orientation is generally defined by the gender of the people to whom one is sexually attracted or oriented. While many commonly equate sexual orientation with homosexuality, its definition is broader than an erotic disposition toward members of the same sex. In addition to physical involvement, sexual orientation is a part of one’s self-perception, affiliation with a group (whether inside or outside the cultural mainstream), and a means by which one is identified by others. These characteristics are associations that are a part of one’s self and daily life. Sexual orientation encompasses more than the mere choice of a sexual partner; it is a fundamental part of one’s identity.

Although sexual orientation includes heterosexuality, this Note will focus on sexual minorities. Defining sexual minorities begins with an understanding of sexual relationships, which are a very intimate and private aspect of life. The dominant model for sexual relationships is the heterosexual model. The heterosexual model of sexual orientation focuses on bonds formed between individuals born biologically male and biologically female. The functional purpose of this model is procreation and child rearing. In the world today, the heterosexual model is dominant in all cultures.

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12 See Mohr, supra note 1, at 30, 31. The human rights recognition of sexual orientation should encompass not only the right to love another of one’s choice, but also the right to have one’s sexual orientation displayed in the public realm without becoming a target for discrimination. See id.
13 See Zamansky, supra note 10, at 11.
14 See id.
15 See Heinze, supra note 9, at viii.
16 See id. at 36.
17 See id.
18 See id.
19 See id.
In contrast, sexual minorities include any group whose members' sexual affiliations are not limited to persons of the opposite sex or any group that is marginalized by society because of sexual orientation, inclination, behavior, or gender identity. The term sexual minorities includes bisexuals, gay men, lesbians, transvestites, and transgender individuals.

Homosexuality refers to a sexual orientation towards persons of the same sex. Bisexuality refers to a sexual orientation towards persons of both sexes. Transvestite, transgender, and transsexual individuals refer to those who are born one sex but who identify with the opposite sex. Transsexual also refers to those with unusual or abnormal chromosomal or sexual characteristics. Because all the groups fall outside the heterosexual model, they are referred to as sexual minorities.

B. Non-Discrimination and Equal Protection Under International Human Rights Law

International treaties, conventions, declarations, and domestic case law comprise the body of international human rights law. After World War I, the newly formed United Nations and the international community developed mechanisms to ensure the protection of international human rights. These mechanisms replaced the piecemeal legislation of the League of Nations. The United Nations developed conventions and treaties which have persuasive and binding authority. U.N. declarations are one of the many documents that define the scope of international human rights law. The two U.N. declarations that specifically address discrimination and equal protection are Arti-
cles 2 and 7 of the Universal Declaration of Human Rights (Universal Declaration), and Article 2(1) of the ICCPR.\(^{32}\) Although several subsidiary rights impact sexual orientation, the core demand of sexual minorities is the guarantee of equal protection and non-discrimination.\(^{35}\) Currently, few international human rights protections guard against anti-gay legislation and few mechanisms assist the victims of this type of legislation.\(^{34}\)

The Universal Declaration prohibits state and private discrimination against individuals based on specific arbitrary criteria.\(^{35}\) In its definition of non-discrimination, Article 2 of the Universal Declaration promises that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\(^{36}\) Thus, the Universal Declaration prohibits both public and private discrimination.\(^{37}\)

Article 7 of the Universal Declaration contains the principle of equal protection and reads, “All are equal before the law and are entitled without any discrimination to protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”\(^{38}\) Therefore, Article 7 requires that the laws of a specific jurisdiction be applied to all people in the same manner as they are applied to similarly situated individuals.\(^{39}\) Together, Articles 2 and 7 create guarantees of civil protection.\(^{40}\) They provide that the similarly situated groups defined in Article 2 are entitled to the equal application of the laws, as provided by Article 7.\(^{41}\)

Similar to the Universal Declaration, Article 2(1) and Article 26 of the ICCPR address non-discrimination and equal protection. Article 2(1) of the ICCPR addresses non-discrimination and reads:


\(^{35}\) See Wilet, Sexual Orientation, supra note 3, at 49.


\(^{36}\) See Wilet, Sexual Orientation, supra note 3, at 49.

\(^{38}\) See id.; see also Note, supra note 32, at 127.

\(^{40}\) See Wilet, Sexual Orientation, supra note 3, at 48.

\(^{37}\) See Brownlie, supra note 32, at 127.

\(^{38}\) See Wilet, Sexual Orientation, supra note 3, at 48.

\(^{39}\) See Brownlie, supra note 32, at 128.

\(^{40}\) See id.

\(^{41}\) See id.
Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.42

Article 26 of the ICCPR addresses equal protection and states that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”43 Read together, Articles 2(1) and 26 of the ICCPR prohibit discrimination and guarantee equal protection to all persons regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”44

Clearly, sexual orientation is not mentioned specifically in the wording of the Universal Declaration or ICCPR.45 Neither, however, does the language specifically exclude extending civil protection against discrimination based on sexual orientation.46 In fact, some argue that because both declarations were intended to pertain to all individuals, the language should be interpreted broadly.47 Since both declarations are silent as to sexual orientation, it is necessary to analyze how international human rights law has been applied to sexual orientation.

C. Applying International Human Rights Law to Sexual Orientation

Commentators suggest three strategies for guaranteeing international human rights in domestic courts: 1) challenging legally sanctioned mistreatment in a domestic court based on principles of international law; 2) lobbying to change domestic laws or their application; and 3) appealing a country’s law to an international human rights enforcement body.48 While the first two methods of international human rights law enforcement may provide sufficient protection to sexual minorities, international courts have only recognized sexual orientation on appeal.49 Accordingly, appealing to an international human rights enforcement body is a viable strategy to challenge domestic laws that discriminate based on sexual orientation.

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42 Id.
43 BROWNLIE, supra note 32, at 126.
44 See id.
45 See id. at 134.
46 See id.
47 See id.
48 See BROWNLIE, supra note 32, at 50; see also Wilet, Sexual Orientation, supra note 3, at 24.
49 See HARRIS, supra note 4, at 97. The Toonen decision marked the first time that a domestic court in New Zealand overturned a conviction based on statutory grounds that criminalized consensual homosexual activity.
rights enforcement body may be the only avenue for redress and is the only method covered in this Note.50

The principle body that adjudicates complaints of domestic human rights violations is the International Human Rights Committee (Committee).51 The Committee hears complaints brought under the ICCPR,52 which, as an international treaty, is legally binding on all nations party to the agreement.53 As of December 31, 1994, 128 countries had ratified the document.54

On December 25, 1991, Nicholas Toonen, a gay resident of Tasmania, submitted a complaint to the Committee.55 In his complaint, he alleged that the Tasmanian law criminalizing homosexual relations violated his rights to privacy and equal protection under the ICCPR.56 In a unanimous decision in Nicholas Toonen v. State of Tasmania,57 the Committee adopted a more liberal view of the ICCPR’s protected classes when it expanded the definition of the term “sex” to include sexual orientation.58 On April 4, 1995, the Committee decided in favor of Mr. Toonen, basing its ruling on violations of ICCPR Articles 2(1) and 17(1), and ordered repeal of the Tasmanian law.59

The Toonen case marked the first time an international court ruled on the basis of equal protection that a state law specifically targeting sexual minorities violated international law.60 Nonetheless, despite the

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50 See Wilet, Sexual Orientation, supra note 3, at 19.
52 See id.
53 See id.; see also Brownlie, supra note 32, at 137.
54 See id.
56 See Robert Wintemute, Sexual Orientation and Human Rights 5 (1995). But see Laurence R. Helfer et. al., Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 61 HARV. HUM. RTS. J. 78, 78–79 (1996). Although not the topic of this Note, the ICCPR is arguably not self-executing. See Helfer, supra, at 78–79. A treaty that is self-executing creates rights and obligations that a court may enforce without the assistance of the legislature. See id. In contrast, if a legislature must execute the contract by legislative enactment before it can become law, the treaty is not self-executing. See id.; see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
57 See Toonen, supra note 4; HARRIS, supra note 4, at 105.
58 See Toonen, supra note 4; HARRIS, supra note 4, at 105.
59 See Toonen, supra note 4; HARRIS, supra note 4, at 9.
60 See Toonen, supra note 4; HARRIS, supra note 4, at 9; see also Wilet, Sexual Orientation,
all-inclusive wording of Articles 2 and 7 of the Universal Declaration, the inclusiveness of Article 26 of the ICCPR, and the recognition of sexual orientation in Article 2(1) of the ICCPR, most countries fail to take appropriate measures to ensure equality and non-discrimination to sexual minorities.61

While enforceability of the Toonen decision is subject to the limitations of the ICCPR, the ruling makes clear that momentum is growing in both international and domestic law for the recognition of the right of sexual minorities to equal protection and non-discrimination.62 In fact, many commentators suggest that international law now provides highly persuasive authority to vindicate the equal protection claims of sexual minorities worldwide.63

In response to the international human right recognition of sexual orientation as a human right, two neighboring countries, South Africa and Zimbabwe, have taken polarized approaches to the rights of sexual minorities.64 If international human rights law can prevail in

supra note 3, at 50. Nicholas Toonen challenged various aspects of Tasmanian criminal law which criminalized sexual contact between men, including consensual sexual contact. See Toonen, supra note 4; Harris, supra note 4, at 97. Because the committee found violations of Mr. Toonen's rights under Articles 2(1) and 17(1), it found it unnecessary to discuss whether there was a violation of Article 26 of the Covenant. See Toonen, supra note 4; Harris, supra note 4, at 106.

61 See Harris, supra note 4, at 97; see also Wilet, Sexual Orientation, supra note 3, at 51.

62 See Wilet, Sexual Orientation, supra note 3, at 57.

63 See Hendriks, supra note 2, at 252. The Pink Book reveals the efforts of 202 countries to provide equal protection to sexual minorities and to promote non-discrimination. See id. at 250. Of the 202 nations, six countries provide legal protection against discrimination for sexual minorities. See id. In 98 countries "homosexual behavior is not illegal . . . but there is no protection against discrimination on the basis of sexual orientation." Id. In 74 countries homosexual behavior is illegal, mostly between men, but the situation for women is not much better. See id. In 24 nations no information is available. See id. at 250, 251.

64 See Wilet, Sexual Orientation, supra note 3, at 59. This momentum has been accelerated by several domestic acts and regional conventions. See id. at 57-59. In 1981, the Parliamentary Assembly of the Council of Europe adopted Recommendations 924 and 756, which condemn discrimination against homosexuals. See id. In 1994, the Committee on Civil Liberties and Internal Affairs of the European Parliament of the European Union issued their Report on Equal Rights of Homosexuals and Lesbians in the E.C. See id. at 58. The report called for the recognition of same-sex couples and the elimination of discrimination with respect to freedom of movement and other areas of civil life. See id. During the debates leading up to the issuance of the report, the Norwegian delegates declared that Norway has taken affirmative steps to secure equal rights for persons of different sexual orientations. See id. The Norwegian delegates urged other states to take "similar steps." See id. In accordance, the Secretary-General of the International Lesbian and Gay Association stated, "Our organization is pleased to note that these delegations share our opinion that both the spirit and the letter of several CSCE documents classify discrimination based on sexual orientation as a human rights violation." Id. The participating states recognized "the right of any person to live in accordance with her or his sexual orientation as a fundamental human right and [pledged] to take measures to eliminate and to prevent discrimination against
Africa, then legal protection for sexual minorities will be advanced globally.\textsuperscript{65} The outcome of the competing approaches taken by South Africa and Zimbabwe with respect to securing the human rights for sexual minorities may well predict the outcome of the debate worldwide for the Twenty-First Century.

II. SEXUAL ORIENTATION IN SOUTH AFRICA AND ZIMBABWE

Like most continents, Africa has its own human rights charter.\textsuperscript{66} To understand how individual African nations have incorporated human rights into governing documents, it is important to first have a general knowledge of the African charter and its history.\textsuperscript{67} With this background, one can analyze South Africa's use of human rights to protect sexual orientation in the Bill of Rights. Zimbabwe's rejection of sexual orientation as a human right can also be analyzed under this framework.

A. Sexual Orientation Under the African Charter on Human Rights

Unlike most other legal rights, human rights are broadly defined and involve a certain degree of abstraction.\textsuperscript{68} Interpretation of human rights law, therefore, becomes critical to determining the outcome of complaints based on legalized assaults on human dignity.\textsuperscript{59} In interpreting the Universal Declaration and ICCPR, continents have devised regional human rights accords that define the scope of international human rights law.\textsuperscript{70} The continents of Africa, Europe, North America, and South America all have adopted human rights resolutions.\textsuperscript{71}


\textsuperscript{65} See generally Wilet, \textit{U.N. Human Rights, supra note 51, at 59.}
\textsuperscript{67} See id.
\textsuperscript{68} See Bennett, \textit{supra note 66, at 1.}
\textsuperscript{69} See id.
\textsuperscript{70} See id.; see also Wilet, Sexual Orientation, \textit{supra note 3, at 15–17.}
\textsuperscript{71} See Wilet, Sexual Orientation, \textit{supra note 3, at 15–17.} Regional human rights instruments
Although regional resolutions are separate from U.N. declarations, they often incorporate similar concepts.\(^{72}\) For example, the provisions in the Universal Declaration and the ICCPR that address non-discrimination and equal protection are incorporated in Article 28 of the African Charter.\(^{73}\) Article 28 states, "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."\(^{74}\)

Not all aspects of the Universal Declaration and the ICCPR, however, are incorporated in the African Charter.\(^{75}\) Specifically, the African Charter has not incorporated the ICCPR's expansive definition of "sex" to include sexual orientation.\(^{76}\) Selective incorporation has enabled many African countries to criminalize homosexuality.\(^{77}\)

Failure of the African Charter to provide protection against discrimination based on sexual orientation has prompted sexual minorities to organize against discriminatory laws.\(^{78}\) In Zimbabwe, the Gays and Lesbians of Zimbabwe (GALZ) continue to protest the "Sexual Offense Act."\(^{79}\) The Gentlemen's Alliance, a group of Nigerian gay men, lobby against laws that make homosexuality punishable with up to fourteen years in prison.\(^{80}\) In Ghana, the Afro-Lesbian and Gay Club

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\(^{72}\) See id. at 25.

\(^{73}\) See Brownlie, supra note 32, at 558. Drafted by Africans, the African Charter concentrates on the types of rights which African countries want to protect. See Wilet, Sexual Orientation, supra note 3, at 15, 25. African countries are free to sign this document to show their commitment to protecting the rights contained within. See id.

\(^{74}\) Wilet, Sexual Orientation, supra note 3, at 15, 25. Similar to the African Charter incorporating the language of the ICCPR, the American and European declarations reflect parallel language. See id. at 16, 52.

\(^{75}\) See id. at 15, 25. Following the Toonen decision, the reference to sex in Article 2 of the ICCPR includes sexual orientation. See Harris, supra note 4, at 102. However, neither the African Charter, the American Convention, nor the European Convention has followed suit. See Wilet, Sexual Orientation, supra note 3, at 51–52.

\(^{76}\) See Wilet, Sexual Orientation, supra note 3, at 51–52.

\(^{77}\) See Kevin Fox, Speaking Of: Being Gay and Lesbian, L.A. Times, Dec. 1, 1992, at 6. In a country-by-country survey conducted on the treatment of sexual minorities, Africa was found to have the worst legal situation for sexual minorities. See id. As of 1992, only two nations, Burkina Faso and Egypt, had legalized homosexuality. See id. In all of the remaining African nations which responded to the survey, homosexual acts are illegal. See id. Some nations did not specify a response or had no available information. See id.; see also Hendriks, supra note 2, at 250–51.

\(^{78}\) See Breaking the Silence, supra note 64, at 38.

\(^{79}\) See id.

\(^{80}\) See id.
combat laws that ban "unnatural carnal sex."81 Similarly, in South Africa, sexual minorities work to ensure that constitutional protection for sexual orientation remains a part of the constitution.82

B. A Historical Glance at Africa and Human Rights

The history of Africa and human rights is complicated by issues of race, sexual orientation, and colonialism. As a result, the evolving human rights struggle must take all those complications into account.83 International human rights, therefore, involve cultural as well as legal issues.84

During de-colonization, African governments were reluctant to incorporate international human rights law into their domestic legal structures85 because of the association of imperialism with international human rights law.86 Although advocates of international human rights claim that human rights law possesses a culturally neutral value system,87 human rights law actually has its origin in western legal thought.88 Because of its western roots, African leaders feared that international human rights law would contribute to a process of acculturation and result in the westernization of Africa.89 As a result, human rights law was suspect because it raised cultural issues and because of its association with white colonial powers.90

International human rights law provides a mechanism for protecting rights considered universal,91 among them the right of sexual orientation.92 Equal protection and non-discrimination of sexual orientation is achieved through freedom of sexual development.93 Sexual

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81 See id.
82 See id.
83 See generally BENNETT, supra note 66, at 1–2.
84 See id.
85 See id. at 40.
86 See id.
87 See id. at 1.
88 See BENNETT, supra note 66, at 1.
89 See id.
90 See id. at 1. African values and western values are in stark contrast. See id. The main difference lies in their respective views of change and progress. See id. The western world views change as progress; the African world believes that tradition is paramount and views change as a disruption of the status quo. See id.
92 See Helfer, supra note 56, at 87.
93 See id. at 87–88.
development is a recognition of each person’s desire to pursue one’s sexual orientation.94 As noted earlier, sexual orientation is a part of one’s self perception and identity.95 Thus, the core component of ensuring equal protection and non-discrimination for sexual minorities is the right to develop one’s personality and dignity.96 While culture and gender often affect how nations view sexual orientation, the right to sexual development is one that should transcend culture.97 Regardless of a person’s sexual orientation, international human rights law should provide a mechanism for preserving universal principles, such as a person’s right to determine his or her own sexual orientation.98

C. South Africa and Sexual Orientation

Commentators such as Robert Wintemute and Eric Heinze suggest that sexual minorities seek to establish a general principle of human rights law that discrimination based on a person’s sexual orientation is prima facie wrong.99 On December 4, 1996, International Human Rights Day, South Africa did as the commentaries suggest.100 South Africa became the first country to specifically provide constitutional protection from discrimination based on sexual orientation by both the government and individuals.101 The operative language is found in

94 See id. at 87.
95 See Zamansky, supra note 10, at 11.
96 See generally Heller, supra note 56, at 87.
97 See id.
98 See id.
99 See WINTEMUTE, supra note 56, at 1; see also HEINZE, supra note 9, at 60–61.

We, the people of South Africa, [r]ecognize the injustices of our past; [h]onour those who suffered for justice and freedom in our land; [r]espect those who have worked to build and develop our country; and [b]elieve that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, 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; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people.

101 See Drogin, supra note 100, at A5.
Chapter 3, Section 8, entitled “Fundamental Rights,” stating: “Every person shall have the right to equality before the law and to equal protection of the law.” The protection guaranteed in this section is made even more explicit in other language found in the constitution. Section 8(2) states, “No person shall be unfairly discriminated against, directly or indirectly . . . on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.” The broad protections of the constitution are furthered by Section (3)(a) which states, “This section shall not preclude measures designed to achieve the adequate protection and advancement of person or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.” While the language of the new constitution reflects a strong recognition of human rights law, how South Africa interprets the constitution will be the true test of its commitment.

D. Interpretation of Equal Protection in South Africa’s Bill of Rights

A bill of rights, which lists the rights a country deems fundamental, protects its citizens and is binding on all courts and government institutions that make and execute laws. In addition, the bill of rights affects relationships between private individuals and organizations. South Africa’s Bill of Rights applies to all law enforcement agencies and to laws made after ratification.

South Africa’s courts have not yet interpreted provisions of its new constitution. The constitution, however, does provide guidance for interpretation. Chapter 3, Section 35(1) entitled “Interpretation” states:

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102 See McGee, supra note 100, at ch. 3.
103 See id.
104 See id.
105 See I.M. RAUTEHNBACH ET AL., WHAT DOES THE CONSTITUTION SAY? 8 (1994). Professors Rautehnbach and Mahlerbe provide explanations of sections 4 and 98 of the interim constitution which binds courts and government institutions. See id.
106 See id. at 8–9. Since the South African constitution contains a clause prohibiting security services from obeying a clearly illegal order, a police officer or soldier may refuse to carry out an apparently illegal order. See id. In addition, the working draft of the constitution provides for civilian control, thus giving citizens an important role in determining law and policy. See id. Civilian control holds police, army and intelligence services accountable to South Africans. See id. The working draft also suggests that security services will have to abide by international norms and conventions; thus, there is a strong emphasis on international law. See id.
107 See RAUTEHNBACH, supra note 105, at 8.
108 See id.
In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.\textsuperscript{109}

Commentators further suggest that discrimination based on any of the grounds specifically listed (including sexual orientation) creates prima facie proof of discriminatory treatment.\textsuperscript{110} Based on the broad language and the desire to provide an open and democratic society, the South African Constitution arguably provides both equal protection and non-discrimination for sexual minorities.\textsuperscript{111}

The constitution also contains guidance on the enforcement of its provisions.\textsuperscript{112} When the rights of a sexual minority are threatened or infringed, the bill of rights guarantees them access to the courts for a claim of relief.\textsuperscript{113} The constitution broadly defines those who may claim relief.\textsuperscript{114} This list includes a person in his or her own interest, or on behalf of someone else not able to seek such relief; or an association acting on behalf of its members all have standing to bring suit.\textsuperscript{115}

In addition to the incorporation of international human rights law into the language of the bill of rights, South Africa has also incorporated human rights law in the enforcement of these rights.\textsuperscript{116} Two bodies interpret the bill of rights in South Africa: the Constitutional Court, and the Human Rights Commission.\textsuperscript{117} The Constitutional Court is the highest court for the enforcement of the bill of rights.\textsuperscript{118} The Human Rights Commission serves a different purpose.\textsuperscript{119}

\textsuperscript{109} Id.
\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{112} See Rautehnbach, supra note 105, at 8.
\textsuperscript{113} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See Rautehnbach, supra note 105, at 9–11.
\textsuperscript{117} See id. at 9.
\textsuperscript{118} See id. at 9–11.
\textsuperscript{119} See id. The new constitution also developed a Commission on Gender Equality which affects sexual orientation. See McGee, supra note 100, at ch. 8. Similar to the duty of the Human Rights Commission, the Commission on Gender Equality is to "promote Gender Equality and to advise and to make recommendations to Parliament of any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women." Id. The Commission’s focus on gender, equality, and the status of women reflects an intent of the Constitutional Committee to protect all issues connected to gender, including sexual orientation.
Comprised of eleven members of the South African community, one of the Human Rights Commission’s duties is to investigate complaints of legislation that violate international human rights law. "If the Commission is of the opinion that any proposed legislation might be contrary to . . . norms of international human rights law which form part of South Africa law or to other relevant norms of international law, it shall immediately report to the relevant legislature." Thus, the Human Rights Commission serves as a watchdog to ensure equality, non-discrimination, and to report infringements of fundamental rights, including those based upon sexual orientation.

It is still unclear whether the Constitutional Court may limit equality for sexual minorities. There is a possible safeguard, however, because South Africa’s constitution incorporates international human rights law. The fundamental rights enumerated in the bill of rights are not absolute. In order to limit a right, four requirements must be met. Among the requirements, the third mandates that “[t]he limitations have to be justifiable in an open and democratic society based on freedom and equality.” Decision makers will apply international human rights law and foreign case law to determine whether the state has met its burden. Thus, international human rights law serves to limit a state’s ability to infringe upon individual rights.

See id. This interpretation is reflected in Chapter 8, section 120 which states “section 119 shall provide for the composition, powers, functions and functioning of the Commission on Gender Issues and for all other matters in connection therewith.” See id.

120 See McGee, supra note 100, at ch. 8.
121 See id.
122 Id.
123 See id. Chapter 3, section 115(3) states:
The commission shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.

Id.
124 See RAUHTENBACH, supra note 105, at 10–11.
125 See id.
126 See id. Rights may only be limited if the following four requirements are met: (1) the right is limited by law and law of general application; (2) the limitation is reasonable; (3) the limitation is justifiable in an open and democratic society based on freedom and equality; and (4) the essential content of a right is not negated. See id.
127 Id.
128 See id.
129 See id.
The Toonen case heralds a trend in international human rights law: to ensure equal protection and non-discrimination under the law to sexual minorities.\(^{130}\) The current South African National Director stated, "We need to understand that we are in the 90s. If African countries have a serious commitment to human rights the right to sexual preference should be a part of that."\(^{131}\)

Two years in the making, South Africa’s highest court ratified the constitution 11–0, and on December 4, 1996, Nelson Mandela signed the new constitution into law.\(^{132}\) The constitution will take full effect in 1999, but until then, South Africa’s interim constitution will govern.\(^{133}\) While the new South African constitution evidences a country committed to human rights, this achievement was not easily acquired.

### E. How Sexual Orientation Became a Part of the South African Constitution

The road to constitutional inclusion in South Africa was not an easy one for sexual minorities to travel. Sexual orientation combines issues of race, culture, and sex. Opposition to the inclusion of sexual minorities as a protected class came from many sources, including the black consciousness movement.\(^{134}\) Several political, religious, and social organizations identified gay rights as a white or European issue.\(^{135}\)

\(^{130}\) See Wilet, Sexual Orientation, supra note 3, at 26. While South Africa’s constitution is the only one in the world which prohibits discrimination against sexual minorities and explicitly guarantees their rights, other countries have taken similar steps. See id. Ireland is currently considering protecting sexual orientation under its constitution. See id. In Germany, the Brandenburg Constitution protects sexual orientation. See id. Similarly, Poland is following South Africa in its attempt to include sexual orientation in its bill of rights. See id. Wilet also discusses a Court of Appeals decision in Ontario, Canada, in which the court interpreted the Canadian constitution as protecting sexual orientation. See id.


\(^{134}\) See Drusilla Menaker, Gay Rights Called Vulnerable as South Africa Plans to Rewrite Constitution, DALLAS MORNING NEWS, Mar. 17, 1995, available in 1995 WL 7471165 [hereinafter Menaker, Gay Rights]. Since apartheid, South Africa has been under increasing internal pressure to be more black and less European. See id. The identification of homosexuality strikes at this existing pressure and threatens to create turmoil if sexual orientation is included. See id.

\(^{135}\) See id. Removing sexual orientation from the constitution was sought vigorously by several black consciousness groups, such as the African Christian Democratic Party. See Drusilla Menaker,
The belief that homosexuality is European and un-African comes primarily from two sources which are intertwined with the issues of race and sexual orientation.\textsuperscript{136} The first source dates back to the pre-colonial period.\textsuperscript{137} Before colonialism, South Africa was a subsistence-based society.\textsuperscript{138} Large families were necessary for toiling the fields, so procreation became extremely important.\textsuperscript{139} With white colonialism, European culture prevailed and the labor structure changed.\textsuperscript{140} Some members of the black consciousness movement contend that Europeans caused the disease of homosexuality.\textsuperscript{141} The other source that identifies homosexuality as a European construct is the history of the gay rights movement in South Africa.\textsuperscript{142} Both the past and present gay rights movement in South Africa was organized and led by whites.\textsuperscript{143} During apartheid, black homosexuals were oppressed by two groups.\textsuperscript{144} Initial oppression came from abuse by whites for being black and homosexual in apartheid South Africa.\textsuperscript{145}

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\textsuperscript{136} See Menaker, \textit{Gay Rights}, supra note 134.
\textsuperscript{137} See id.
\textsuperscript{138} See id.
\textsuperscript{139} See id.
\textsuperscript{140} See id.
\textsuperscript{141} See Menaker, \textit{Gay Rights}, supra note 134. Members of the black consciousness movement contend that black and white culture have been intertwined for more than 300 years and that during this time homosexuality was introduced into black culture. See id. This history is illustrated by the labor structure of the gold mines in South Africa. See id. There, black males were absent from women for extensive periods. See id. This deprivation often led black males to take "tink-onkana" or boy wives. See id. Boy wives would fetch water, cook, wash dishes, and serve their "husbands" in bed. See id. Thus, it has been suggested that homosexual behavior in blacks resulted from European colonial structures. See id. In the Archives at the University of the Witwatersrand there are taped interviews with miners that reveal that homosexuality was prevalent in the gold mines of this century. See Fred Bridgland, \textit{Homosexual Blacks Out of Africa's Closet}, \textit{Sunday Telegraph}, Dec. 15, 1991, at 13.
\textsuperscript{142} See Menaker, \textit{Gay Rights}, supra note 134.
\textsuperscript{143} See id.
\textsuperscript{144} See Menaker, \textit{Gays Struggle}, supra note 135 (revealing that black homosexuals in South Africa were stigmatized by whites for being black and by blacks for being homosexual).
\textsuperscript{145} See id. For example, white gays could drive to meetings, but blacks had no safe way to return home after dark. See id. In addition, counseling hotlines did not help because many blacks did not have phones. See id.
The second form of oppression came from abuse by blacks for being homosexual.\textsuperscript{146} Despite this tragedy, the only organization for black sexual minorities was the Gay and Lesbian Organization of the Witwatersrand (GLOW).\textsuperscript{147} Inaugurated in 1988, GLOW was formed because most blacks could not survive the dual oppression, but needed support.\textsuperscript{148} In fact, many black sexual minorities ruined their lives with drugs and/or alcohol, and many committed suicide.\textsuperscript{149} As a result, until recently there was no black sexual minority movement and very little support for them.\textsuperscript{150}

Furthermore, the gay movement in South Africa was not fighting against apartheid.\textsuperscript{151} The failure to challenge the racism of apartheid furthered the contention that homosexuality is Eurocentric and un-African.\textsuperscript{152} Therefore, many people contend sexual orientation should not be afforded protection in the bill of rights in a black, African society.\textsuperscript{153}

Strong support for the inclusion of sexual orientation, however, has come from those who support South Africa’s post-apartheid commitment to human rights for all.\textsuperscript{154} To human rights advocates, the inclusion of sexual orientation is another step in this commitment.\textsuperscript{155} Support also comes from gay rights lobbyists who feel the only way to ensure sexual minorities equal protection and non-discrimination un-

\textsuperscript{146} See id. The difficulty that young African homosexuals face is reflected in the story of Simon Nkoli, a prominent African National Congress activist. See id. According to Mr. Nkoli:

I announced it (my homosexuality) on my 18th birthday after I had passed my matriculation examinations. My mother just sat there and cried. My other relatives were disgusted. My mother, who is a Catholic, took me to a witch doctor who tried to cast out my “evil spirit.” I told him he was wasting his time, there was no evil spirit: I was what I am.

Id.

\textsuperscript{147} See Bridgland, supra note 141, at 1. GLOW, which is 70\% black, was formed in 1988. See id.

\textsuperscript{148} See id.

\textsuperscript{149} See id.

\textsuperscript{150} See id.

\textsuperscript{151} See Menaker, Gays Struggle, supra note 135. “To the extent that gays were organized socially or politically in South Africa, they were in white-led groups. They were seen as apolitical, isolated from the anti-apartheid fight.” Id.

\textsuperscript{152} See id.

\textsuperscript{153} See id.

\textsuperscript{154} See Menaker, Gays Struggle, supra note 135.

\textsuperscript{155} See generally S.A. Assembly, supra note 114. According to the Constitutional Assembly, human rights are rights, values, and freedoms about which it is agreed that everyone should possess, simply because they are human beings. See id. The inclusion of sexual orientation provides human rights protection for human beings and is therefore a furtherance of South Africa’s commitment to human rights. See id.
der the law is to give sexual orientation constitutional protection. The upper ranks of the African National Congress (ANC) also supported constitutional inclusion.

The groups in tension with each other over the issue of sexual orientation had to work together in order to end apartheid. When the issue switched from race to sexual orientation, the same groups that were horrified by discrimination based on race accepted it when applied to sexual minorities. Bishop Desmond Tutu underscored the importance of broad protection when he signed the new constitution, and stated, “Freedom is indivisible... the whites in this land will not be free until all sections of our community are genuinely free. We need one another.”

This desire for equality and human rights for all prompted South Africa to include sexual orientation in its constitution and the Constitutional Court to uphold that constitution. As stated by Constitutional Affairs Minister Mohammed Vale Moos, this constitution “is a document that will no doubt serve as a beacon in constitutionalism not only here, but internationally...”

F. Zimbabwe's Treatment of Sexual Orientation

Similar to the South African experience, sexual orientation in Zimbabwe is intertwined with both homophobia and racial dynamics, and stems from colonial laws. Zimbabwe's “Sexual Offense Act” criminalizes homosexuality. The Act is based on legal, social, and...
Like South Africa, Zimbabwe’s social structure is patriarchal. In a patriarchal society, where agricultural productivity is directly correlated to group survival, status is based on procreativity. This societal structure leads to the belief that homosexuality is counter to patriarchy and, therefore, destructive to Zimbabwean life and tradition. Furthermore, Christianity is a prevalent religious influence. According to Christian teachings, homosexuality is immoral—a view readily acceptable by religious Zimbabweans.

G. Zimbabwe and International Human Rights Law

Unlike the Human Rights Association in South Africa, Zimbabwe’s Human Rights Association has not formally recognized the constitutional importance of recognizing the status of sexual orientation. The administration is currently divided, with some members supporting the rights of homosexuals. Furthermore, some members of the Human Rights Association have strong ties with the Catholic Church and, therefore, support maintaining the illegality of homosexuality.

In Zimbabwe, the pendulum of international human rights law seems to be swinging away from recognizing sexual orientation as a legally protected status. Recent statements from three political or-
ganizations regarding homosexuality and human rights illustrate this movement.\textsuperscript{175}

The first statement was made by President Robert Mugabe in August of 1995. Referring to the Gay and Lesbians of Zimbabwe, he stated:

If we accept homosexuality as a right, as is being argued by the Association of Sodomist and Sexual Perverts, what moral fiber shall our society ever have to deny organized drug addicts, or even to deny organized bestiality, the right they might claim and allege they possess under the rubrics of individual freedom and human rights?\textsuperscript{176}

The second statement came from a representative of Zimbabweans’ Women’s League of the ruling ZANU-PF, who in 1995 stated, “As mothers and custodians of our heritage, we stand solidly behind our president and leader on his unflinching stand against homosexuality. . . . Human rights should not be allowed to dehumanize us.”\textsuperscript{177}

Finally, a third statement came from the Foundation for Democratic Process. In 1995, a bishop from this organization stated, “As far as the church is concerned, there is no compromise on the matter. Homosexuality is a sin which must not be allowed to take root in the name of human rights.”\textsuperscript{178} Evidently, there is support for continued institutionalized discrimination from political, social and religious groups, despite a more liberal trend evolving in international human rights law.\textsuperscript{179}

\textsuperscript{175} See id.
\textsuperscript{176} Id. This statement was made by President Mugabe at the opening of Zimbabwe’s International Book Fair. See id. A protest by human rights and sexual minority organizations against Mugabe followed. See id. After the fair, Mugabe stated,

I find such immoral and repulsive organizations, like those of homosexuals who offend both the law of nature and the morals or religious beliefs espoused by our society, outrageous and repugnant to my human conscience. . . . Homosexuality is prevalent in jails where there are mad people and criminals. But outside, we shall never accept it. Where it happens, it’s against the law and it will be treated as such.

Id.

\textsuperscript{177} Id. This comment was articulated by the women of the leading political party in support of President Mugabe’s stance on homosexuality. See id. The women also stated, “Neither sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor the greedy nor drunkards will inherit the kingdom of God.” Id.

\textsuperscript{178} No Fun Being Gay, supra note 131.
\textsuperscript{179} See id.
H. Impact of the Sexual Offense Act on Sexual Minorities in Zimbabwe

Because of this very vocal and public stance against sexual minorities, Zimbabwe, unlike most countries, has virtually no gay public presence. With one exception, there are no social, educational, or lobbyist groups. The only gay presence is the Gay and Lesbians of Zimbabwe (GALZ), whose power is greatly constrained by laws that criminalize homosexuality. As a result of this homophobic atmosphere, most sexual minorities in Zimbabwe live in constant fear. An example of this fear is evidenced by Herber Mondhlanzi, who stated, “Today, there is racial equality in Zimbabwe. But today there is another apartheid in Zimbabwe. This is the apartheid of gay oppression. As a gay man in Zimbabwe, I have no place, I have no voice, I have no status simply because of my sexual orientation.” While sexual orientation is embraced in South Africa, the future of constitutional recognition of sexual orientation across the border in Zimbabwe is virtually non-existent.

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181 See id.
182 See id.
183 See id. GALZ is the only collective presence for sexual minorities. See id. As a result of the recent tension created in Zimbabwe, the four-year-old organization with about 180 members is split “between those who believe they should remain hidden and those who favor openly advancing their cause.” See id. An example of the constraints placed on GALZ is their treatment at Zimbabwe’s 1995 International Book Fair. See id. Ironically, the theme of the book fair, which was scheduled from July 28th to August 5th, was “human rights and justice.” See id. When GALZ attempted to set up an exhibit, however, the government barred them from the exhibition. See id. At the same fair in 1996, GALZ was allowed to have an exhibit because the organizers of the exhibit claimed that “[g]ay rights are human rights.” See id.
184 See Gumisai Mutume, Zimbabwe: Gays Protest Against Discrimination, HARERE, Feb. 16, 1993, at 1. Sheila Tungware, an engineer in Zimbabwe, was representative of much of Zimbabwean society when she stated, “Homos must go.” See id. She continued by saying that the predominant belief among Zimbabweans is that justifying homosexuality only encourages it to become more widespread. See id.
185 JAMES HORMEL ET AL., THE INTERNATIONAL TRIBUNAL ON HUMAN RIGHTS VIOLATIONS AGAINST MINORITIES 4 (1995); see also Duke, Public Enemies, supra note 165, at A19. Other examples include the case of Wallace Zimunya, a 24-year-old gay rights activist who is very outspoken. See Duke, supra, at A19. Mr. Zimunya fears for his job and has received a threat from a civil servant to stay out of the press. See id. In addition, Polyana, a 29-year-old black lesbian, was forced to leave the family home when she received a letter with the GALZ logo. See id. She was thrown out once her family discovered that the logo came from a homosexual organization. See id.
186 This assessment is based on incidents that followed President Mugabe’s statements after the 1995 book fair. See Machipisa, supra note 174, at 1. In response to the statements made by President Mugabe, 70 members of the United States Congress wrote letters attacking Mugabe on human rights grounds. See id. These letters stated in pertinent part: “attacking decent individuals who are fully respectful of the rights of others, who are productive and responsible [citizens] but who happen to be gay or lesbian is wrong.” Id. In response, Mugabe, in front of 500 ruling party
III. The Need to Protect Sexual Orientation

South Africa and Zimbabwe present two polarized responses to the current development of international human rights law. While most nations fall somewhere between these two positions, current international human rights law propels nations to make a firm commitment to guaranteeing non-discrimination and equal protection to sexual minorities. The arguments for and against constitutional inclusion reveal the importance of using constitutional protection to ensure sexual minorities equality.

Following the logic of the Toonen decision, a state law that specifically targets sexual minorities is in violation of international human rights law. As a result, aggrieved parties could appeal Zimbabwe's "Sexual Offense Act" to the International Human Rights Committee and, arguably, the act could be struck down. Such a holding would contravene President Mugabe, who opposes civil protection against discrimination based on sexual orientation on moral, historical, and religious grounds.

Mugabe's view, however, is contrary to the views espoused by the United Nations, which purports that human beings have a right to be free from persecution based on sexual orientation. In fact, since the United Nations has recognized sexual orientation, several countries have repealed anti-gay legislation.
Mugabe’s view that homosexuality is a European import also contradicts historical facts. Although there is little written history prior to colonialization, black gays point to African history to find sources of homosexuality. Historically there existed Xhosas, traditional African female healers who lived apart from men. In addition, male Zulu warriors were forbidden to have sex with women. Both Xhosas and Zulu warriors are strong evidence of the likelihood of same sex relations prior to colonialism. There is also history of gay taverns in black townships. Similarly, some older Zimbabweans contend that there have always been homosexuals in Zimbabwe; however, they were just forced to live outside the villages with people they called witches. Furthermore, in Shona, the language spoken by eighty percent of Zimbabwe’s population, the word ngochani means gay and pre-dates colonial times. Finally, according to Professor Rudo Gaidzanwa from the University of Zimbabwe, homosexual acts existed in African warrior societies.

Religious justifications are also used to maintain anti-gay laws. The religious argument stems from two interpretations of the Bible: 1) the belief that homosexuality is directly condemned by God, and 2) the suggestion that homosexuality is inconsistent with God’s master plan of nature.

Both arguments are flawed because they are based on selective interpretation of the Bible. Recent discoveries have called into question whether the Bible condemns homosexuality. Furthermore, Chris...
tian prosecution of homosexuality is questionable because "[m]any prominent and respected Christians—some canonized—were involved in relationships which would almost certainly be considered homosexual in cultures hostile to same-sex eroticism." Thus, condemnation of homosexuality in the Bible is questionable.

In spite of the traditional biblical prohibition on homosexuality relied on by President Mugabe, the religious argument is incompatible with the African Charter's commitment to human rights. For example, the African Charter makes it evident that Africa is strongly committed to creating an atmosphere of equality in which people will not be discriminated against or persecuted for their differences. The failure to affirm this human rights commitment on religious, social, and historical grounds is inconsistent with a universal commitment to human rights.

Another frequently stated argument against constitutional protection for sexual minorities is that constitutional protections are far too important to apply to marginal issues like discrimination based upon sexual orientation. Marginalization, however, is precisely why sexual orientation should receive constitutional protection. The argument assumes that the constitution is the highest and most authoritative legal document in the land. Incorporating sexual orientation in such a document would require courts, local officials, and most importantly, domestic citizens to acknowledge the presence and the rights of sexual minorities. The international oppression of sexual minorities makes it painfully obvious that sexual orientation can no longer be viewed as

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Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century ch. 4 (1980). In fact, recent interpreters of the story of Lot at Sodom discovered that the story was meant to show God condemning inhospitality rather than homosexuality. See Mohr, supra note 1, at 33. Also, it is believed that the references to homosexuality in the New Testament are meant to taint, not condemn, some of the Israelite's opponents who accepted homosexuality. See id. In addition, in all of Christ's preachings, he never mentioned homosexuality, let alone condemned it. See id.

204 See Boswell, supra note 203, at 243.
205 See id.
206 See Dukaczewski, supra note 191, at 18; Brownlie, supra note 32, at 51–52; see also Wilet, Sexual Orientation, supra note 3, at 52. Nonetheless, many African countries still criminalize sexual orientation. See Hendriks, supra note 2, at 250–51. This persecution is not based on anything sexual minorities have done, but instead is based on their differences. See id. As a result, anti-gay legislation based on religion is in direct conflict with the African commitment to create an atmosphere free from persecution based on differences. See Dukaczewski, supra note 191, at 18.
207 See Dukaczewski, supra note 191, at 18.
208 See id.
209 See id.
210 See generally Mohr, supra note 1, at 26–27.
“marginal.” Access to courts and the recognition of rights is exactly what sexual minorities need in order to protect their rights. Constitutional inclusion will assist sexual minorities in achieving equality. Furthermore, international human rights law demands that this goal be achieved.

Some argue that constitutional protection is unnecessary because sexual minorities already have legal access to courts. While this may be true in some areas where they are given special protection, without constitutional protection sexual minorities are still subject to the whim of legislators who may change laws without contravening constitutional principles. Furthermore, great difficulty arises when a non-visual minority group, such as sexual minorities, complains of discrimination. In order to file a complaint, a member of a sexual minority must reveal his or her sexual orientation. Since the topic of sexual orientation is still considered taboo in most countries, registering a complaint socially stigmatizes the individual. Without any specific protection against further discrimination, registering a complaint acts as an invitation for additional discrimination. Therefore, limited protection of sexual orientation fails to sufficiently assist sexual minorities in achieving justice.

211 See generally Hormel, supra note 185, at 35. During the International Gay & Lesbian Human Rights Commission forum on human rights violations, judges from various countries heard the testimonies of sexual minorities from around the world. See id. In recognition that the plight of sexual minorities is not marginal, the judges called for a worldwide commitment to fighting discrimination by stating, "We call on the international community—governments, nongovernmental organizations, civic and religious groups, individual citizens, as well as international and intergovernmental organizations, to work together towards a world [in] which those who do suffer such abuses (based on sexual orientation) are able to speak, without fear of further persecution." Id.

212 See id.

213 See Wilet, Sexual Orientation, supra note 3, at 29.

214 See Dukaczewski, supra note 191, at 18.

215 See id. at 27.

216 See id.

217 See id.

218 See id.

219 See id.

220 See Dukaczewski, supra note 191, at 27. According to a Gay and Lesbian Task Force report in 1984, over 90 percent of gays and lesbians had been victimized in some form on the basis of their sexual orientation. Greater than one in five gay men and nearly one in ten lesbians had been punched, hit, or kicked; a quarter of all gays had objects thrown at them; a third had been chased; a third had been sexually harassed and 14 percent had been spit on—all just for being perceived to be gay.


221 See National Gay and Lesbian Task Force, supra note 219; Dukaczewski, supra note 191, at 27.
Another argument against constitutional protection is that homosexuality is not a form of sexual orientation, but is a social construct. This argument is the product of philosopher Michel Foucault, who professes that all human situations are products of history. In applying this theory to sexual minorities, Foucault contends that historical forces created homosexuality. Foucault argues that the nineteenth century’s “relentless categorization of sexual perversions” was an attempt to repress sexuality. However, the opposite occurred and these social controls had an encouraging effect. Labelling sexual minorities as a social construct has led people to believe that sexual orientation can be deconstructed, and is therefore a marginal issue not requiring constitutional protection.

Many disagree with this conclusion and contend that homosexuality is not limited to time or culture. Both science and psychology suggest that homosexuality exists around the world and throughout history. For example, homosexuality is referenced in Plato’s Symposium, and is referred to in the ancient Arabic tale, A Thousand and One Nights.

Similarly, the history of homosexuality exists outside of cultural controls:

There is, in short, a space within any oppressive social structure where human beings can operate from their own will. The autonomy may be born out of pain, or misery, out of the very forces that seek to extinguish it; but its resilience suggests the existence of a human individual separate and independent

221 See Neil Miller, Out of the Past: Gay and Lesbian History from 1869 to the Present 470–72 (1995). According to the philosophy of Michel Foucault, homosexuality is not an immutable characteristic, but the result of historical and social forces. See id.
222 See id. at 471.
223 See id.
224 See id.
225 See id.
226 See generally Miller, supra note 221. This conclusion, which is drawn from the philosophy of Michel Foucault, is incorrect. See id. In arguing for cultural reform, Foucault claims: [I]t is not enough as a part of a more general way of life, or in addition to it, to be permitted to make love with someone of the same sex. The fact of making love with someone of the same sex can very naturally involve a whole series of choices, a whole series of other values and choices for which there are not yet real possibilities.
228 See Sullivan, supra note 227, at 7.
229 See id.
230 See id.
from the culture in which he operates. The space may be no more than a cultural crack, the gesture of a drag queen, the inarticulate embrace snatched from an unseeing friend, the benign silence of an understanding parent. But between the gesture and the space, there is the possibility for human freedom. 231

Thus, contrary to a constructionist view, it is questionable whether homosexuality resulted from cultural repression.232

Many claim that history reveals that the love of another person of the same sex has always operated in the small space called freedom.233 The "love of a man for a man, of a woman for a woman" is a fundamental part of a person's existence and freedom.234 Human lives are drawn around and societies are developed upon love of another.235 As a result, regardless of whom one loves, the freedom to love another is a fundamental part of one's existence and is ultimately free from historical, social, or religious forces created by one's oppressor.236

Currently, South Africa is the only country in the world that guarantees equal protection and prohibits discrimination against sexual orientation with specific language in its constitution.237 In response to the United Nations Human Rights Committee's recognition of sexual orientation as a human right, South Africa developed an all-inclusive constitution that exemplifies the ideals of equal protection under the laws and freedom from discrimination.238 This constitutional protection assures sexual minorities legal recourse.239 The inclusion of sexual orientation assures South Africa's sexual minorities the rights enjoyed by other South Africans.240

231 Id. at 7-8.
232 See MILLER, supra note 221, at 470-472; Sullivan, supra note 227, at 7.
233 See Sullivan, supra note 227, at 8.
234 See id.
235 See id.
236 See id.
237 See Wilet, U.N. Human Rights, supra note 51, at 29 and accompanying text.
238 See Wilet, U.N. Human Rights, supra note 51, at 29. According to Kevin Both, a spokesperson for the Equality Foundation, the gay and lesbian lobbyist group that fought for equal protection in South Africa, the constitution is "based on equality, not special rights. Here we're able to say that as long as a right is enjoyed by the heterosexual person living next door to me, then I must have a similar right." See Neil McMahon, Surprise for Gays—Equal Rights in South Africa, S.F. CHRON., Aug. 2, 1994, at A8.
239 See RAUTEHNBACH, supra note 105, at 8-9.
240 See id.
Globally, sexual minorities are subjected to "[s]take burning, hanging, beating, whipping, and castration."\(^{241}\) While such treatment may sound barbaric, in many countries it is "legally prescribed, and cleri-
cally and theologically endorsed . . . ."\(^{242}\) By not protecting sexual orien-
tation, humanity is deprived of "an important culture of same-sex relationships, including a rich artistic and literary heritage . . . ."\(^{243}\) As stated by Bishop Desmond Tutu when South Africa granted sexual orientation constitutional protection, "Freedom is indivisible . . . the whites in this land (South Africa) will not be free until all sections of
our community are genuinely free. We need one another."\(^{244}\)

V. Conclusion

The recognition of injustice requires doing something to rectify
wrong; the recognition of injustice requires doing something about
the system, and most people, especially the already beleaguered,
simply are not up to the former, let alone the latter.\(^{245}\)

—Richard D. Mohr

As we head into the Twenty-First Century, the question of domestic
treatment of sexual orientation is left unanswered. The International
Human Rights Commission’s inclusion of sexual orientation in the
International Convention on Civil and Political Rights reflects an in-
ternational commitment to human rights and equality for all people
regardless of their differences.\(^{246}\) The examples of South Africa and
Zimbabwe reflect the opposing positions countries may take in re-
sponse to the current movement to incorporate sexual orientation in
international human rights law. While most countries’ laws fall be-
tween these two positions, the demand for rights by sexual minorities
strengthens.\(^{247}\) Likewise, as sexual minorities become more outspoken,
those who oppose legal recognition of sexual minorities have also
become more vocal.

\(^{241}\) See Boswell, supra note 203, at 267–334 (discussing global discriminatory treatment of
sexual minorities); see also Heinze, supra note 9, at 39.

\(^{242}\) See Boswell, supra note 203, at 267–334 (discussing global discriminatory treatment of
sexual minorities); see also Heinze, supra note 9, at 39.

\(^{243}\) See Boswell, supra note 203, at 267–334 (discussing global discriminatory treatment of
sexual minorities); see also Heinze, supra note 9, at 39.

\(^{244}\) See Freedom, supra note 160, at A6.

\(^{245}\) Mohr, supra note 1, at 27.

\(^{246}\) See Harris, supra note 4, at 105. This text contains the Toonen decision and analysis. See id.

\(^{247}\) See Hendriks, supra note 2, at 250–52.
International human rights law provides a forum in which domestic laws may be appealed. The *Toonen* decision provides precedent for individuals to appeal to international authorities on the grounds of unequal protection based on sexual orientation.\(^{248}\) The homophobic domestic laws of Zimbabwe and similarly oppressed countries make these nations highly susceptible to international challenges.\(^{249}\)

Sexual minorities face violence and discrimination world-wide.\(^{250}\) Law enforcement officers fail to pursue crimes against sexual minorities with the same zealousness as other crimes.\(^{251}\) In the work force, sexual minorities face harassment, discrimination, and glass ceilings because of their sexual orientation.\(^{252}\) Countries often deny or encumber access because of sexual orientation.\(^{253}\) Finally, “Young people whose sexual orientation does not conform to social expectations confront censure, harassment, and violence in their communities, schools, and even in their homes.”\(^{254}\)

Nothing short of constitutional protection for sexual orientation will allow sexual minorities to obtain equal protection and non-discrimination.\(^{255}\) To remedy unjust treatment based on sexual orientation, South Africa granted sexual orientation equal protection and non-discrimination in its bill of rights. South Africa holds the torch for the domestic recognition of sexual minority rights. While this torch burns bright in the hearts and souls of South Africans, the possibility of passing the torch to their Zimbabwean neighbors is not unlikely. Nonetheless, we must remain forward looking.

\(^{248}\) See Harris, *supra* note 4, at 105.
\(^{249}\) See *id.*
\(^{250}\) See Boswell, *supra* note 203, at 277.
\(^{251}\) See *id.*
\(^{252}\) See *id.* at 270.
\(^{253}\) See *id.* at 286.
\(^{254}\) *Id.* at 283.
\(^{255}\) See Rautehnbach, *supra* note 105, at 8–9; see also Wilet, *Sexual Orientation, supra* note 3, at 29.