NEPAL'S NEW CONSTITUTION AND FUNDAMENTAL RIGHTS OF MINORITIES — LESSONS OF THE SOUTH AFRICAN EXPERIENCE*

I INTRODUCTION

It is a great pleasure and an honour to be with you on this occasion. I am honoured to have been invited to take part in your discussions at this critical stage of your constitutional deliberations in Nepal. I come with a message of hope and encouragement from South Africa, though in bringing it I do not intend to prescribe to you about what might be appropriate for Nepal — or to lecture you on what you should or shouldn’t do in making your constitution.

In 1994, South Africa became the first country in the world whose Constitution expressly mentioned the words ‘sexual orientation’.1 The Constitution promised equality as well as protection from unfair discrimination on the ground of sexual orientation.2 This was twelve long years ago,3 when most of the world was still hostile to notions of diversity in gender identity and averse to protection on the ground of sexual orientation. In the United States, the Supreme Court still permitted states to criminalise what consenting adult same-sex couples did in private.4 No state in Europe gave gays and lesbians expressly equal status. And in Africa, in particular, the myth that same-sex attraction was perverse, alien and unAfrican was still widespread.

* This paper was delivered in Kathmandu, Monday 8 January 2007 at a civil society constitutional drafting seminar in preparation for the drafting task of the Nepalese constituent assembly. The constituent assembly will be elected in June 2007. See ‘Nepal Agrees Interim Constitution’ Financial Times 18 December 2006.

1 How sexual orientation came to be included in South Africa’s constitution is narrated and explained in various texts, eg LM du Plessis & HM Corder Understanding South Africa’s Transitional Bill of Rights (1994) 139-144; Carl F Stychin A Nation by Rights (1998) 52-88; Richard Spitz & Matthew Chaskalson The Politics of Transition A Hidden History of South Africa’s Negotiated Settlement (2000) 301-312.

2 Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution), s 8(2): ‘No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, 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.’

3 The interim Constitution was superseded on 4 February 1997 by a permanent Constitution (Constitution of the Republic of South Africa, 1996), which expanded the interim Constitution’s equality protections. Section 9(3) provides that ‘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, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’ Section 9(4): ‘No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.’ Section 9(5): ‘Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

So including the words ‘sexual orientation’ in the equality clause of South Africa’s first democratic Constitution was an extraordinary and dramatic event. It has inspired constitution-writers and reformers all over the world, and it may be that in Nepal you could also find it an appropriate basis for reflection in your constitution-making.

In the nearly thirteen years since South Africa became a constitutional democracy, both Parliament and the courts have done much to fulfil the promise of equality and non-discrimination on the basis of sexual orientation:

- Criminal penalties against consensual sexual conduct between adults in private have been prohibited. The Constitutional Court based its decision outlawing criminal prohibitions on such conduct not only on the fact that sexual orientation is specifically listed in the Bill of Rights, but on wider grounds of dignity and privacy.\(^5\) This showed that even if the constitution did not specifically mention sexual orientation, the court would still have found the criminal prohibitions unconstitutional.
- Same-sex partners are entitled to benefit equally from statutory health insurance schemes.\(^6\)
- Where legislation provides benefits for spouses, permanent same-sex partners are entitled to equal benefits.\(^7\)
- Same-sex couples can adopt children jointly on the same basis as heterosexual couples.\(^8\)
- A same-sex partner is entitled to become the legitimate parent of a child his or her partner conceives by artificial insemination.\(^9\)
- All the benefits that married persons enjoy with regard to beneficial immigrant status have been extended to same-sex partners.\(^10\)
- And the courts developed the common law by extending the spouse’s action for loss of support where a partner is unlawfully killed or injured to partners in permanent same-sex life relationships.\(^11\)

The pinnacle of this progression was reached on 30 November 2006, when the Deputy President of South Africa signed into law a statute that

---

\(^5\) National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) paras 28-32, per Ackermann J for the Court; paras 108-129, per Sachs J (with whose sentiments Ackermann J associated himself) para 78.

\(^6\) Langenaat v Minister of Safety and Security 1998 (3) SA 312 (T), per Roux J.

\(^7\) Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC), per Madala J for the Court.

\(^8\) Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 (CC), per Skweyiya AJ for the Court.

\(^9\) J v Director General: Department of Home Affairs 2003 (5) SA 621 (CC), per Goldstone J for the Court.

\(^10\) National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC), per Ackermann J for the Court.

\(^11\) Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA), per Cloete JA for the Court.
legalised same-sex unions as full marriages.\textsuperscript{12} This legislation was passed in response to court decisions requiring equality for same-sex partners in marriage.\textsuperscript{13}

In acting on the constitutional promise of equality for gays and lesbians, the South African courts have enunciated the following principles:

(a) Gays and lesbians are a permanent minority in society who in the past have suffered from patterns of disadvantage. Because they are a minority unable on their own to use political power to secure legislative advantages, they are exclusively reliant on the Bill of Rights for their protection.\textsuperscript{14}

(b) The impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels.\textsuperscript{15}

(c) ‘The sting of past and continuing discrimination against both gays and lesbians’ lies in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships’. This ‘denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity’, namely that ‘all persons have the same inherent worth and dignity’, whatever their other differences may be.\textsuperscript{16}

(d) Continuing discrimination against gays and lesbians forms a particular focus in relation to marriage. That discrimination must be assessed on the basis that marriage and the family are vital social institutions. The legal obligations arising from them perform important social functions.\textsuperscript{17} These obligations provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children.\textsuperscript{18}

(e) Family life as contemplated by the Constitution can be constituted in different ways — and legal conceptions of the family and what

\textsuperscript{12} Civil Union Act 17 of 2006, which enables couples without regard to sexual orientation to join in a civil union or marriage.

\textsuperscript{13} \textit{Fourie v Minister of Home Affairs} 2005 (3) SA 429 (SCA); \textit{Minister of Home Affairs v Fourie} 2006 (1) SA 524 (CC).

\textsuperscript{14} \textit{National Coalition for Gay and Lesbian Equality v Minister of Justice} 1999 (1) SA 6 (CC) para 25.

\textsuperscript{15} Ibid para 26(a).

\textsuperscript{16} \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs} 2000 (2) SA 1 (CC) para 42, per Ackermann J.

\textsuperscript{17} \textit{Dawood v Minister of Home Affairs} 2000 (3) SA 936 (CC) para 31, per O’Regan J for the Court, applied in \textit{Satchwell v President of the Republic of South Africa} 2002 (6) SA 1 (CC) para 13.

\textsuperscript{18} \textit{Du Toit v Minister of Welfare and Population Development} 2003 (2) SA 198 (CC) para 19.
constitutes family life should change as social practices and traditions change.19

(f) Permanent same-sex life partners are entitled to found their relationships in a manner that accords with their sexual orientation: such relationships should not be subject to unfair discrimination.20

(g) The Constitutional Court eloquently affirmed that gays and lesbians in same-sex life partnerships are ‘as capable as heterosexual spouses of expressing and sharing love in its manifold forms’. They are likewise ‘as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household’. They ‘are individually able to adopt children and in the case of lesbians to bear them’. They have in short ‘the same ability to establish a consortium omnis vitae’. Finally, they are ‘capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life’ in a way that is ‘not distinguishable in any significant respect from that of heterosexual spouses’.21

(h) The decisions of the courts regarding gays and lesbians should be seen as part of the growing acceptance of difference in an increasingly open and pluralistic society.22

(i) Significantly for those who falsely claim that same-sex relationships are alien to Africa, the Constitutional Court has affirmed that same-sex marriage is not unknown to certain African traditional societies.23

So much for what has been achieved in terms of the Constitution and the law. What is perhaps of more significance to the constitutional thinkers and constitution-writers in Nepal is not the what, but the why? Why did South Africa, so improbably and surprisingly and dramatically, choose to give full equality to all persons on the basis of sexual orientation?

In trying to throw light on this question, I would like to suggest three reasons, each of which might or might not be relevant to your present constitutional deliberations.

21 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (note 16 above) para 53(iv)-(viii), per Ackermann J.
22 National Coalition for Gay and Lesbian Equality v Minister of Justice (note 16 above) Ibid para 138 and para 107, per Sachs J.
23 Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC) para 12, per Madala J.
II FIRST LESSON: THE DEEPER THE PAST INJUSTICE, THE MORE AMPLE AND INCLUSIVE THE COMMITMENT TO FUTURE FREEDOM AND EQUALITY

South Africa's new constitution was extraordinarily detailed and broad. One can only understand its breadth if one understands how severe South Africa's history of discrimination and injustice was. For over 300 years, black South Africans were excluded and humiliated on the ground of their race. Because they were not white, black women and men were subjected to multiple systematic indignities and exclusions. These included being denied voting rights and citizenship.

What was unique about apartheid was not that it involved racial humiliation and disadvantage — for Europe and other continents have recently afforded much more bloody and murderous examples of racism — but the fact that its iniquities were enshrined in law. More than anywhere else, apartheid enacted racism through detailed, systematised legal regulation. As a result, the dogma of race infected every part of South Africa's national life and its legal culture.

Yet despite this history of legal oppression, the constitutional negotiators decided to regulate contesting social claims through law. Even though apartheid used legal means to exclude and humiliate the majority, the law would in future provide the basis for fulfilling all national aspirations.

In expressing this vision, the constitutional negotiators committed themselves to a conception of civic identity that was both very wide and very inclusive.

In this lay a further paradox: for the very extent of past legal exclusion and denigration now determined the generosity of the protection that the constitution offered. It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they were determined that the future role of the law would be different for all. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans.

These paradoxes explain the significance of the South Africa's commitment to equality on the ground of sexual orientation. For though oppression on the ground of sexual orientation was not paramount amongst historical injustices, it was part of that history, and the negotiators deliberately committed the country to rejecting all forms of legalised oppression and injustice.

Instead of selectively remedying repression and dishonour, all criteria of unfair discrimination were renounced. The national project of liberation would not be mean-spirited and narrow but would encompass every source of unjust denigration. Non-discrimination on the ground of
sexual orientation was to be an integral part of a greater project of racial reconciliation and gender and social justice through law.

The fact that homosexuality was in 1994 and still is a controversial issue in Africa, as elsewhere in the world, did not diminish this commitment. The equality clause went further than elsewhere in Africa: but this was because the legal subordination imposed by colonialism and apartheid went further than anywhere else in Africa.

Nepal has had to walk a painful and fraught path to come to this point in negotiating its own constitutional future. That pain, and the depth of its struggle, may have a meaning. They may signal a lesson about how inclusive Nepal’s future commitment to justice and equality could be.

II SECOND LESSON: GENEROSITY OF SPIRIT

The second lesson is perhaps even more instructive than the first. This was that the dominant party in South Africa’s negotiations, the African National Congress, was determined not to claim victory on narrow partisan grounds. The transition in South Africa was not to be a vindication of black power over white power. It was not to replace one form of narrow nationalism with another. Transition was to aspire to something higher and better — a form of civic inclusiveness that transcended the past and improved on it.

For a time during the negotiations, South Africa’s constitutional negotiators pondered whether to have a broad but abstract equality clause — one that would simply prohibit unfair discrimination, without expressly mentioning any prohibited categories.

A further alternative, which the negotiators carefully considered, was that only the main grounds of prohibited discrimination should be expressly mentioned — race and gender.

Both these alternatives were rejected. Instead, South Africa’s Constitution has an extremely long and inclusive equality clause — one that now mentions no fewer than seventeen conditions that are expressly protected from unfair discrimination.

The reason for this was that the main negotiating party saw itself not merely a vehicle for vindicating partisan aspirations — nor was it a forum for narrow nationalism. It was the steward of a broader nationhood, which would include all South Africans, and outlaw all forms of injustice, not only injustice against the formerly oppressed majority.

To follow this path — the path of broad, generous and affirming inclusiveness — requires constitutional negotiators to see themselves as guardians of something bigger than merely sectional interests. It requires them to regard themselves as fiduciaries of a bigger trust — the interests of a whole nation.

In South Africa, we were fortunate that the majority party and its leaders, principal amongst them Nelson Mandela, had this vision of themselves. They were trustees of the whole nation, and not only a part of
it. They were generous-spirited in a way that continues to characterise our democracy, despite the many and deep problems — including poverty, dispossession, continuing injustice, and AIDS — that continue to beset it.

For Nepal, the question is whether the constitutional negotiations will be directed to a generously inclusive nationhood, or whether a barer and smaller conception of civic status is to prevail. In case of doubt, generosity of spirit and largeness of vision are good impulses, and the figure of reconciliation and human affirmation that Nelson Mandela provided to the world could serve as an inspiration.

III THIRD LESSON: COMMITMENT TO JUSTICE AND EQUALITY IS MEASURED NOT BY EASY CASES, BUT BY HARD CASES

You could concede the first two lessons from South Africa — that constitution-making should be broad and generously inclusive — and yet still wonder why there should be a commitment to protecting sexual orientation and gender identity. It is the third lesson from South Africa that gives the answer. For a commitment to justice and equality is not measured by easy cases, but by hard cases.

It is easy to profess that there shall be justice for women and minority cultural, religious and ethnic groups. No self-respecting constitution-maker anywhere would put these in dispute. What is more difficult is to fulfil that commitment in the case of unfashionable, unpopular and socially reviled groups. These include gays and lesbians, transsexuals, transvestites, inter-sexed and transgendered persons.

For homosexuality and other non-abusive forms of sexual variance test the fundamental core of human rights philosophy. A society that aspires to respect human rights cannot disrespect people because of sexual orientation. It is easy to endorse rights like free speech and dignity and socio-economic benefits in the abstract: more difficult is to actualise equality and dignity by according marginalised groups like gays and lesbians the full protection and benefit of the law. And if a society fails that test, it fails the test of elementary human rights protection.

Sexual orientation equality constitutes a critical test for the protection of human dignity for a number of connected reasons: the fact that gays and lesbians are a minority in society; that the defining criterion of their status is sexuality, which is still fraught with complexity for many humans; and that gay and lesbian rights seem to conflict with many religious principles and tenets.

(a) MINORITIES, DIVERSITY AND DEMOCRACY

Sexual orientation equality tests the principle of minority protection in a diverse democracy. Unavoidably, gays and lesbians are a minority in society. (They must be, since they depend on heterosexual majority
procreation for their own existence.) In the collectivity, this is perilous, for gays and lesbians can never hope to vindicate their elementary civic rights by their votes alone. So if they cannot persuade the majority to endorse their cause, they must rely on counter-majoritarian principles for their protection. The South African Constitutional Court recognised this in expanding its protection for gays and lesbians.

In this sexual orientation is not unique. It is true also for many other minority groups. In South Africa, no single linguistic, ethnic or cultural group commands a majority. The same is true of Europe; and indeed of most countries. Our societies are aggregates of minorities: and the question this raises is whether our commitment to constitutional value and principle can afford us a means of brokering our differing interests.

Our common future depends on the capacity of majoritarian politics to accommodate minorities; and gays and lesbians bring this acutely to the fore. They constitute no more than 3-5 per cent of any society, and yet the progress of their cause is invariably bitterly contested. Hence, how society deals with their rights and interests is likely to indicate how it will deal with other minorities. It is no surprise that many societies that cruelly oppress gays and lesbians also subject other minority ethnic and cultural groupings to persecution and injustice.

(b) Distaste, repugnance and democracy

Unlike many other minorities, gays and lesbians test the distaste of the majority. Are we willing to afford equal rights to those we dislike or fear, or whose lifestyles we feel are repugnant?

The reason is that sexual orientation is defined by reference not to physiological characteristics like skin colour or gender. It is defined by reference to erotic attraction and affiliation.

When we think of gays and lesbians we therefore cannot avoid thinking of how they have sex — and for many in the majority this remains a painful challenge. For many societies, sexuality remains a fraught issue. The difficulties we have had in Africa in managing the effects of the AIDS epidemic attest to this. The disease is enormously stigmatised, and shrouded in silence — with an agonising cost in life and suffering — largely because it is sexually transmitted. But across the world, not only in Africa, blame, condemnation, moralism and heavy-handed prescription still predominate in attitudes to private consensual adult sexual expression.

For gays and lesbians this has an often devastating effect. They are the only significant social interest group defined by reference to sexual functioning. This brings taboos, inhibitions, anxieties, repressions, jealousies and even envy to the fore.

Yet our responses to sex are emblematic of our other visceral reactions. And so the plight of gays and lesbians in this respect only accentuates an issue that manifests in many other ways too: do people wearing
yarmulkes, or headscarves, or yashmaks, excite our distaste or fear or disapproval?

Sexual orientation is a test for rationality and humaneness over visceral disfavour. For if society disqualifies gays and lesbians because of discomfort or fear, few other minority groups will be able to rest safe. Gay and lesbian equality therefore tests our capacity to commit ourselves to rational and humane principles of co-existence as human beings.

(c) Religious intolerance, secularism and democracy

Lastly, sexual orientation protection brings to the fore perhaps our civilization’s largest challenge: that of secularism. This raises the question whether the world’s devout religious believers are willing to co-exist in society with those who do not subscribe to their faith or to the tenets of their beliefs.

This is not only a question for sexual orientation protection — but for the religions themselves, and for their coexistence with one another. But gay and lesbian equality brings the issue acutely to the fore because orthodox interpretations of three of the world’s most prominent religions — Judaism, Christianity and Islam — have same-sex conduct particularly in their focus. Conservatives say these religions condemn and even outlaw homosexual conduct. Indeed, religious believers are often the most virulent opponents of dignity and legal protection for gays and lesbians. If orthodox religious beliefs do indeed proscribe same-sex conduct, the question is not whether gays and lesbians are willing to live peacefully with orthodox religious adherents — for they undoubtedly are — but whether orthodox adherents are willing to live peacefully with gays and lesbians. The question is whether adherents of these religions are willing to reciprocate the tolerance and good will that gays and lesbians are willing to extend to them — and the challenge to those faiths is whether they can manifest humane tolerance along with devout belief.

For society itself, gay and lesbian equality offers a profound test of our commitment to building and living in secular community, without subordinating ourselves to the particular religious tenets of any faith. This is a question that is as acute for Baptists in the southern USA as it is for some devout Catholics and for the Muslim world.

Religiously inspired intolerance is today one of the world’s most frightening problems. It offers a sure means of halting progress and of stoking all-obliterating hatred and violence. The gay and lesbian question offers the profoundest test of whether we can commit ourselves to better: for if gay and lesbian equality can be accepted, a broader commitment to rationality and humane principles of secularism will follow.

The same unfortunately applies to politically inspired intolerance — like the reported statements by some Maoist groups in Nepal that homosexuality is a product of capitalism.
IV CONCLUSION: THREE LESSONS FROM SOUTH AFRICA — DEPTH OF COMMITMENT, GENEROSITY OF PROTECTION, AND PROTECTION OF THE DISFAVOURLED

The present constitutional negotiations offer the Nepalese people a truly wonderful opportunity to inspire the world. The world waits to see whether an inclusive, generous and ample-minded approach will be taken to constitution-making.

Those negotiating on behalf of the Nepalese people occupy a position of high trust. Their decisions will shape the future of a society that has paid a high price for its freedom. If they err on the side of mean-spiritedness and small-mindedness, future generations could suffer. On the other hand, if they put their trust in generosity of spirit and humane openness, they could shape a society that could grow larger with its constitution.

In South Africa, as in many parts of Nepalese society, we experienced very grave prejudice and fear about sexual orientation and gender identity. Even recently, in the public debate about extending marriage equality to same-sex partners, many deeply prejudiced and unfeeling statements were made. But the greatest lesson from South Africa is that our Constitution has gained respect and strength and acceptance from being wide, inclusive and encompassing.

A constitution is a nation’s blueprint for its own future. It expresses a people’s aspirations and ambitions. It articulates its best vision for itself. An opportunity to embody humankind’s best impulses — openness, inclusiveness and acceptance — may prove a rich and rewarding investment.

EDWIN CAMERON
Judge of the Supreme Court of Appeal of South Africa
Honorary Professor of Law, University of the Witwatersrand,
Johannesburg